

36438
EB

SERVICE DATE – JULY 14, 2006

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33475

C&NC RAILROAD CORPORATION—LEASE AND OPERATION EXEMPTION—LINES
OF THE NORFOLK AND WESTERN RAILWAY COMPANY AND INDIANA HI RAIL
CORPORATION

STB Finance Docket No. 33476

C&NC, L.L.C.—ACQUISITION EXEMPTION—INDIANA HI-RAIL CORPORATION

Decided: July 13, 2006

RMW Ventures, L.L.C. (RMW), and C&NC Railroad Corporation (CNCR), petitioners, ask that the notices of exemption served in these proceedings on October 31, 1997,¹ be “clarified and corrected.” Specifically, petitioners request that the notices: (1) be clarified to confirm that CNCR and its corporate parent, C&NC, L.L.C. (CNCL),² acquired the common carrier right to serve Cohen Brothers Metals Company (Cohen) (now Integrity Metals, Inc. or Integrity) on a connecting 1.1-mile line owned by Whitewater Valley Railroad, Inc. (WVRI); and (2) be corrected to state that CNCR also acquired incidental trackage rights to serve Cohen.

WVRI filed a reply on November 21, 2005, and petitioners filed a verified statement of facts and argument in rebuttal on December 1, 2005. On December 7, 2005, WVRI filed a motion to strike the rebuttal and, in the alternative, a reply. Petitioners filed a reply in opposition

¹ C&NC Railroad Corporation—Lease and Operation Exemption—Lines of the Norfolk and Western Railway Company and Indiana Hi-Rail Corporation, STB Finance Docket No. 33475 (STB served Oct. 31, 1997) (C&NC Lease) and C&NC, L.L.C.—Acquisition Exemption—Indiana Hi-Rail Corporation, STB Finance Docket No. 33476 (STB served Oct. 31, 1997) (C&NC Acquisition).

² CNCL was merged into RMW on or after March 10, 1998. See RMW Ventures, L.L.C.—Control Exemption—C&NC, L.L.C., Maumee & Western, L.L.C., and Wabash Central, L.L.C., STB Finance Docket No. 33565 (STB served Mar. 10, 1998).

to the motion on December 19, 2005.³ The petition for clarification and correction will be denied.

BACKGROUND

Indiana Hi-Rail Corporation (IHRC) acquired approximately 6.1 miles of a 27-mile rail line known as the Connersville Line in 1981. The 6.1-mile segment (the Beesons Segment) ran between milepost 74.1 at Beesons and milepost 68 at Connersville in southeast Indiana. The Interstate Commerce Commission (ICC) authorized the acquisition.

IHRC acquired the segment pursuant to the “feeder line” provisions of 49 U.S.C. 10907 (formerly codified at 49 U.S.C. 10910). Indiana Hi-Rail Corporation—Feeder Line Acq., 366 I.C.C. 42 (1981). A party that acquires a rail line under the feeder line program may elect to be exempt from any of the provisions of Part A of Subtitle IV of Title 49 of the U.S. Code (except those relating to joint rates). See 49 U.S.C. 10907(g)(1). IHRC elected the broadest possible exemption. See Black v. ICC, 762 F.2d 106, 108-09 (D.C. Cir. 1985).

WVRI is a railroad museum and the operator of a tourist train. WVRI purchased the southernmost 1.1-mile portion (the South End) of the Beesons Segment, between milepost 69.0 and milepost 67.9, from IHRC in December 1989. The South End, which runs through downtown Connersville, connects to an 18-mile section of track between milepost 67.9 at Connersville and milepost 50 at Metamora, IN. WVRI’s tourist train operates to Metamora from a depot on the South End.

WVRI did not seek or obtain ICC approval for its purchase of the South End. WVRI states that it did not seek ICC approval because IHRC represented that the South End was exempt from ICC regulation as a result of the election pursuant to 49 U.S.C. 10907(g)(1). IHRC also represented to WVRI that the new owner need not become a common carrier and instead could operate the South End as a private carrier. WVRI states that it relied on IHRC’s representations, claiming that it neither intended nor desired to operate the South End as a common carrier.

WVRI and IHRC entered into an agreement, termed a switching agreement, in June 1990. That agreement permitted IHRC to use a set-off track WVRI would provide at Connersville to pick up or deliver cars bound to or from any shipper on the South End.⁴ WVRI switched cars

³ In its motion to strike, WVRI contends that petitioners’ rebuttal is a reply to a reply in violation of 49 CFR 1104.13(c). In the interest of a more complete record, we will deny WVRI’s motion to strike and accept petitioners’ rebuttal as well as WVRI’s and petitioners’ replies.

⁴ When WVRI bought the South End, Cohen (now Integrity) was the only shipper on it, and apparently Integrity still is the only shipper on the South End today.

over the South End between Cohen's facility and the set-off track. WVRI terminated the switching agreement in March 1993. In June 1993, WVRI and IHRC entered into an agreement, termed a "trackage rights" agreement,⁵ that permitted IHRC to operate over the South End to serve Cohen directly. That agreement expired on December 31, 1997. Neither the switching agreement nor the trackage rights agreement was submitted to the ICC for approval.

CNCL acquired the northern portion of the Beesons Segment, approximately 5.2 miles between Beesons and Connersville, from R. Franklin Unger, Trustee for IHRC, on October 31, 1997, pursuant to the notice published in C&NC Acquisition. On the same day, CNCR obtained authority to lease and operate the 5.2-mile segment from CNCL pursuant to the notice published in C&NC Lease.⁶ The Trustee assigned IHRC's rights under the 1993 trackage rights agreement, to operate over WVRI's South End, to CNCR in December 1997, just before the agreement expired.

WVRI subsequently refused CNCR's requests to renew the trackage rights agreement. Instead, WVRI's president orally consented to permit CNCR to enter onto the South End to serve Cohen in December 1998 and in January, March, and April 1999. Since then, WVRI has not permitted CNCR to operate over the South End stating that it, WVRI, feared that allowing such operations could subject it to costly Federal Railroad Administration regulations.

Recently, according to petitioners, Integrity asked CNCR to resume freight service. CNCR wishes to serve Integrity but says it cannot do so because WVRI has refused to renew the 1993 trackage rights agreement.

⁵ Pursuant to 49 U.S.C. 11323, the term "trackage rights" refers to the rights one railroad gives to another to permit the latter to operate over the former's track. While we need not decide here whether the rights granted under the 1993 agreement were "trackage rights" within the meaning of section 11323, we will refer to those rights as trackage rights and to the agreement as a trackage rights agreement because that is what the parties call them.

⁶ CNCR also obtained authority to lease and operate the remaining 22.42 miles of the Connersville Line from Norfolk and Western Railway Company pursuant to the notice published in C&NC Lease.

DISCUSSION AND CONCLUSIONS

Petitioners' argument, that CNCR is entitled to operate over the South End to serve Integrity, seems to rest chiefly on the IHRC Trustee's assignment to CNCR of the 1993 trackage rights agreement IHRC had entered into with WVRI; the notice of exemption in C&NC Acquisition, which authorized CNCL to acquire IHRC's rights to the 5.2-mile northern portion of the Beesons Segment; and the notice of exemption in C&NC Lease, which authorized CNCR to lease and operate the 5.2-mile portion of the Beesons Segment.

The Trustee's assignment of the trackage rights agreement to CNCR in December 1997 does not give CNCR the right to operate over the South End now. The trackage rights agreement expired by its terms on December 31, 1997.⁷

When we authorize carriers to enter into trackage rights agreements by exercising our authority under 49 U.S.C. 11323(a)(6), that authorization and the trackage rights granted pursuant to it continue until the Board grants authority to discontinue the rights. There is no outstanding authority to discontinue here. IHRC never sought or obtained authority from this agency with respect to the trackage rights agreement with WVRI. Nor did CNCR seek or obtain authority to accept the assignment of those rights from IHRC. Thus, the trackage rights simply ceased to exist when the underlying agreement expired at the end of 1997.

Petitioners claim that CNCR obtained "incidental trackage rights" in C&NC Acquisition. The term incidental trackage rights derives from the Board's rules at 49 CFR 1150.31, which contain a class exemption from the requirements of 49 U.S.C. 10901 for licensing a noncarrier's acquisition of rail lines. Pursuant to section 1150.31(a)(4), the class exemption extends to the grant of trackage rights by the seller or the assignment of trackage rights to operate over the lines of a third party.

This provision, section 1150.31(a)(4), allows a noncarrier to obtain trackage rights incidental to a line acquired pursuant to a notice filed under section 1150.31, without the need to file a separate notice under 49 CFR 1180.2(d)(7). It does not, however, afford a means of acquiring trackage rights apart from an agreement with a granting carrier. Moreover, neither the notice of exemption in C&NC Acquisition nor the one in C&NC Lease included any request for exemption of, or any reference to, the assignment to CNCR of IHRC's trackage rights over the South End. Thus, even if the rights CNCR claims could be considered trackage rights under 49 U.S.C. 11323, authorization to grant or assign trackage rights was neither sought nor obtained.

⁷ Moreover, section 9 of the agreement required WVRI's consent before IHRC could assign its rights to another party. Petitioners do not claim, nor does the record show, that WVRI's consent was given. But even assuming, arguendo, that the Trustee could assign the trackage rights agreement without WVRI's consent, the expiration of the agreement extinguished those rights.

We have, on occasion, prospectively authorized incidental trackage rights where their omission from the original notice exempting the main transaction to which they were incidental was clearly inadvertent.⁸ This is not possible here, even if the rights CNCR claims could be considered eligible for handling as incidental trackage rights. The record does not indicate that CNCR's acquisition of trackage rights over the South End was intended for inclusion in the notices of exemptions in C&NC Acquisition or C&NC Lease but omitted through mere inadvertence. And, as already noted, the expiration of the trackage rights agreement in 1997 means that there is no present grant of rights for us to authorize.

Citing Sagamore National Corporation—Acquisition and Operation Exemption—Lines of Indiana Hi-Rail Corporation, Finance Docket No. 32523 et al. (ICC served Oct. 28, 1994) (Sagamore National), petitioners argue that in 1994, IHRC “waived” the exemption from regulation it had elected under 49 U.S.C. 10907(g) when it acquired the Connorsville Line. Petitioners construe the ICC's determination that IHRC “remains obligated to continue to provide and fulfill its common carrier obligations,” Sagamore National, slip op. at 1, as meaning that all of IHRC's operations, including its trackage rights operations over the South End, would henceforth be subject to the common carrier obligation. They contend that CNCR assumed that obligation over the South End when it was assigned the South End trackage rights by IHRC's Trustee.

Petitioners misread Sagamore National. The ICC merely held that IHRC remained obligated to fulfill the common carrier obligations that it possessed prior to its unsuccessful effort to sell its entire system to Sagamore National Corporation. The ICC did not hold that IHRC's operations over the Beesons Segment were subject to a common carrier obligation. In any event, petitioners overlook the fact that the South End was sold to WVRI in 1989, well before Sagamore National and IHRC's alleged waiver of the exemption from regulation elected under 49 U.S.C. 10907(g).

Finally, petitioners assert that the only way WVRI could have acquired the South End without authority from the ICC was if IHRC under Indiana law retained an “implied permanent easement” permitting it to provide common carrier service to Cohen. They claim that CNCR acquired the implied permanent easement from IHRC and that it permits CNCR to serve Integrity. This agency does not interpret Indiana law. That is an argument CNCR must make in state court.

⁸ See, e.g., ParkSierra Corporation—Trackage Rights Exemption—North Coast Railroad Authority, Finance Docket No. 34127 (STB served Dec. 26, 2001), where a notice of exemption was filed to replace the originally filed petition for exemption but failed to reference the incidental trackage rights that had originally been requested.

To the extent petitioners imply that authority from the ICC was required for WVRI to purchase the South End from IHRC, they have not shown how this argument, even if correct, affords CNCR any right to serve Integrity. If it wishes to claim that WVRI has a common carrier obligation to provide it with freight service, Integrity may file a petition and make that argument. It has not done so here. Additionally, if CNCR wants to serve Integrity, it can seek to negotiate a mutually acceptable access agreement with WVRI.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. WVRI's motion to strike is denied.
2. Petitioners' rebuttal and the replies filed by WVRI and petitioners are accepted into the record.
3. The petition for clarification and correction is denied.
4. Petitioners are directed to serve a copy of this decision on Integrity and verify to the Board that it has done so within 10 days from the date of service.
5. This decision will be effective on the date of service.

By the Board, Chairman Buttrey and Vice Chairman Mulvey.

Vernon A. Williams
Secretary