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SERVICE DATE – DECEMBER 11, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35022

NEW HAMPSHIRE CENTRAL RAILROAD, INC.—LEASE AND OPERATION
EXEMPTION—LINE OF THE NEW HAMPSHIRE DEPARTMENT OF
TRANSPORTATION

Decided: December 10, 2007

On May 9, 2007, Twin State Railroad Corporation (Twin State) and the State of Vermont Agency of Transportation (VTrans) filed petitions to revoke or reject a verified notice of exemption filed by New Hampshire Central Railroad, Inc. (NHCR) to lease and operate approximately 8.47 miles of rail line between Whitefield, NH, and Lunenburg, VT (the Line). This decision denies the relief sought.

BACKGROUND

The Line is on the Mountain Division corridor, between Engineering Station 5060+25, Valuation Section 17 NH Map 53, in Whitefield, NH, and Station 5503, Valuation Section 18 VT Map 3, in Lunenburg, VT. In 1984, Maine Central Railroad Company (Maine Central), Twin State, and Lamoille Valley Railroad Company signed a lease and operating agreement (the Agreement) that designated Twin State as the operator on the Line, while Maine Central retained an ownership interest and common carrier rights and obligations. In 2002, Maine Central conveyed its fee interest in the Line to the State of New Hampshire Department of Transportation (NHDOT), subject to Twin State's operating rights thereon.¹

On May 2, 2007, NHCR, a Class III rail carrier, filed a verified notice of exemption under 49 CFR 1150.41 to acquire by lease and operate the Line. On May 9, 2007, Twin State

¹ See State of New Hampshire Department of Transportation-Acquisition and Operation Exemption-Certain Assets of Maine Central Railroad Company, STB Finance Docket No. 34307 (STB served Jan. 22, 2003). Twin State alternatively requests here that we void as false and misleading the notice of exemption filed by NHDOT in STB Finance Docket No. 34307 and revoke or reject that exemption. We will not address this argument directly here, as it does not pertain to the present docket. However, for the reasons subsequently discussed, we can discern no basis for a “false or misleading” finding against NHDOT in either docket.

and VTrans² filed the instant petitions for relief, to which NHCR and NHDOT filed separate replies. The Board served and published notice of the exemption in the Federal Register at 72 FR 27361 on May 15, 2007.

On May 25, 2007, Twin State and Trans Rail Holding Company jointly filed a petition to stay the effectiveness of the notice. The Board denied the petition in a decision served on May 31, 2007. The exemption became effective on June 1, 2007.

DISCUSSION AND CONCLUSIONS

Twin State and VTrans ask the Board to revoke or reject NHCR's notice of exemption. No basis for either type of relief has been shown on this record.

Revocation. Under 49 U.S.C. 10502(d), the Board may revoke an exemption in whole or in part if it finds that regulation is necessary to carry out the rail transportation policy set forth in 49 U.S.C. 10101. The party seeking revocation has the burden of proof and petitions to revoke must be based on reasonable, specific concerns. I&M Rail Link LLC—Acquisition and Operation Exemption—Certain Lines of Soo Line Railroad Company d/b/a Canadian Pacific Railway, STB Finance Docket No. 33326 et al. (STB served Apr. 2, 1997), aff'd sub nom. City of Ottumwa v. STB, 153 F.3d 879 (8th Cir. 1998). Here, although both petitioners seek revocation, neither Twin State nor VTrans has presented any evidence that supports revocation, or even refers to the applicable standard for such relief. Consequently, we will summarily deny that portion of their requests.

Rejection. Pursuant to 49 CFR 1150.42(c), if a verified notice contains false or misleading information, the exemption is void ab initio.³ Consequently, it may be rejected after-the-fact on that basis. Neither Twin State's nor VTrans' arguments in support of such Board action satisfy that standard.

Twin State claims that the notice is false and misleading because it makes no reference to any incumbent carrier on the Line and creates the "mistaken impression" that NHDOT had the right to designate a carrier for the Line. Twin State also argues that the notice is inconsistent with NHDOT's representation in STB Finance Docket No. 34307 that it would not seek a new operator, except "subject to the operating rights" of Twin State. This petitioner further asserts that the class exemption procedures were not available to NHCR in these circumstances because

² VTrans, representing the State of Vermont, supports Twin State's claim of an exclusive right to operate on the Line and asserts that only Vermont may designate that operator pursuant to the Agreement.

³ See, e.g., Yolo Shortline Railroad Company—Lease and Operation Exemption—Port of Sacramento, STB Finance Docket No. 34114, slip op. at 2 (STB served Feb. 3, 2003) (Yolo).

the Agreement gives Twin State exclusive rights to operate over the Line and its rights were not extinguished prior to the filing of the notice (or thereafter).⁴

VTrans, in its petition, also argues that the notice is incomplete and misleading, and that it does not comply with the information requirements set forth in 49 CFR 1150, subpart E. VTrans states that the notice does not mention Twin State or VTrans' rights pursuant to the Agreement, nor does it indicate that there is a trackage rights agreement between NHCR and Twin State or that such an agreement will be reached.

In response, NHCR refutes Twin State's arguments and contends that 49 CFR 1150, subpart E, does not require that a notice of exemption include information or references to the rights of other carriers on the Line. NHCR also argues that, because it was not a party to the acquisition of the Line by NHDOT, it was not, and is not, in a position to opine on it, nor is it an appropriate party to respond to any of Twin State's allegations.

NHDOT responds that Twin State does not have an exclusive right to operate over the Line. It adds that, even if the Agreement so provided, Twin State's failure to provide any service since October 1999 despite numerous requests resulted in a breach of the Agreement, thus allowing NHDOT to designate another operator—here NHCR.

Neither petitioner has demonstrated that NHCR provided false and misleading information in its notice or wrongfully invoked the Board's class exemption procedures here. As to the former, the regulations for exempt transactions, at 49 CFR 1150, subpart E, do not require that a notice of exemption refer to any existing operators on a rail line to be acquired.⁵ The regulations, at 49 CFR 1150.43, require that the notice provide the name and address of the applicant, information about its representative, a summary of the proposed transaction, a statement that an agreement has been reached or details about when an agreement will be reached, the name of the operating seeking authority, a map, and revenue information. Here, the notice provided all of the required information and was therefore not false, misleading, or incomplete simply because it did not refer to Twin State as an existing operator on the Line.

We also find no merit in petitioners' argument that NHCR wrongfully invoked the Board's class exemption procedures in this case. That argument is grounded in petitioners' assertion that Twin State has exclusive rights to operate on the Line and, therefore, a prerequisite to NHCR's use of the class exemption here is the prior extinguishment of Twin State's rights. But petitioners have not on this record supported their "exclusivity" argument. Although Twin State asserts that the Agreement gives it exclusive rights to operate the Line, petitioner fails to identify any provision therein supporting that claim. Moreover, as noted in the prior decision

⁴ Twin State cites Section 6.01 of the Agreement in support of this assertion.

⁵ See 49 CFR 1150.41, *et seq.*, Lackawanna County Railroad Authority—Acquisition Exemption—F&L Realty, Inc., STB Finance Docket No. 33905, *et al.* (STB served Oct. 22, 2001) at 5-6; Yolo, slip op. at 3.

at 2-3, “the issue of whether the lease agreement grants such exclusive rights to Twin State lies within the purview of the courts, not with this agency.” Because the Board’s grant of authority to NHCR is permissive in nature, i.e., it confers only the right not the obligation to exercise the authority, it does not prohibit petitioners from seeking enforcement of their contractual rights in state court. In any event, even if the agreement were shown to be exclusive, that by itself would not constitute a basis for us to reject the notice.

Lastly, we would point out, however, that Twin State’s operating rights have not been extinguished, by adverse discontinuance or otherwise.⁶ Consequently, Twin State continues to have Board authority to provide rail service over the Line.

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

It is ordered:

1. The petitions by Twin State and VTrans to revoke or reject NHCR’s notice of exemption are denied.
2. This decision is effective on its date of service.

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary

⁶ In 2003, Maine Central and NHDOT filed a joint petition for waiver of several of the Board’s regulations for an adverse discontinuance of Twin State’s lease and operating rights. The Board acted on the waiver, but no adverse discontinuance application with respect to Twin State’s lease or operating rights was ever filed. See Maine Central Railroad Co., State of New Hampshire—Adverse Discontinuance—Line Between Whitefield, New Hampshire and St. Johnsbury, Vermont, STB Docket No. AB-848 (STB served July 1, 2003).