

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35379

RAILAMERICA, INC., PALM BEACH HOLDING, INC., RAILAMERICA TRANSPORTATION CORP., CENTRAL RAILROAD COMPANY OF INDIANAPOLIS, CHICAGO FT. WAYNE AND EASTERN RAILROAD DIVISION, FORTRESS INVESTMENT GROUP, LLC, AND RR ACQUISITION HOLDING, LLC—CONTROL EXEMPTION—DELPHOS TERMINAL COMPANY, INC.

Decided: August 25, 2010

By petition filed on May 28, 2010, RailAmerica, Inc. (RailAmerica); Palm Beach Holding, Inc. (Palm Beach); RailAmerica Transportation Corp. (RTC); Central Railroad Company of Indianapolis (CERA); Chicago Ft. Wayne and Eastern Railroad Division (CFE); Fortress Investment Group, LLC (Fortress), on behalf of certain private equity funds managed by Fortress and its affiliates; and RR Acquisition Holding, LLC (RR Acquisition) (collectively, petitioners or RailAmerica et al.) seek an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. §§ 11323-25 for CERA to acquire direct control, and for RR Acquisition, RailAmerica, Palm Beach, RTC, and Fortress to acquire indirect control, of Delphos Terminal Company, Inc. (DTC), from Bunge North America (East), LLC (Bunge). The Board will grant the exemption, subject to employee protective conditions.

BACKGROUND

Fortress's noncarrier affiliate, RR Acquisition, currently owns 55% of the publicly traded shares of and controls noncarrier RailAmerica, which directly controls noncarrier Palm Beach, which directly controls noncarrier RTC. In turn, RTC directly controls rail carrier CERA, whose CFE division operates over DTC's rail line. RailAmerica et al. directly or indirectly control 1 Class II¹ and 29 Class III railroads.² In addition, Fortress directly controls noncarrier FECR Rail,

¹ This carrier is: Central Oregon & Pacific Railroad, Inc., operating in California and Oregon.

² These carriers (and, in parentheses, the states in which the carriers operate) are: Alabama & Gulf Coast Railway L.L.C. (Alabama, Florida, and Mississippi); Arizona & California Railroad Company (Arizona and California); Bauxite & Northern Railway Company (Arkansas); California Northern Railroad Company (California); Cascade and Columbia River Railroad Company (Washington); The Central Railroad Company of Indiana (Indiana and Ohio); CERA (Illinois, Indiana, and Ohio); Connecticut and Southern Railroad, Inc. (Connecticut and Massachusetts); Dallas, Garland & Northeastern Railroad, Inc. (Texas); Eastern Alabama

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L.L.C., which directly controls another noncarrier, FEC Rail Corp., which directly controls Florida East Coast Railway, LLC (FEC), a Class II rail carrier operating in Florida.³

CERA intends to enter into an agreement with Bunge, the parent company of DTC and a shipper on DTC's line, to acquire from Bunge all of the issued and outstanding shares of stock of DTC, a Class III rail carrier that owns approximately 3.8 miles of rail line between approximately milepost 73.7 at or near Delphos, Ohio, and approximately milepost 77.5 at or near Landeck, Ohio, together with interchange tracks at or near Delphos (the line). Upon consummation of the stock purchase, CERA will acquire direct control of DTC. The other parties related to RailAmerica, which directly or indirectly control CERA, will acquire indirect control of DTC. Petitioners state that DTC connects to a rail line leased from CSX Transportation, Inc., and operated by CERA, and that this connection is DTC's only link to the national rail system.

In support of their petition, RailAmerica et al. state that, after consummation of the stock purchase, rail service on DTC's line will continue as it does today. Petitioners also state that they do not anticipate that any shipper currently served on the line will experience a reduction in its rail transportation options as a result of their control of DTC. One shipper on the line, Bunge, owns DTC and entered into the stock purchase, and the other, DD Ingredient Distributors, Inc. (DD), submitted a letter in support of the exemption. RailAmerica et al. submit that rail service may in some cases improve because, they claim, upon consummation of the stock purchase,

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Railway, LLC (Alabama); Huron & Eastern Railway Company, Inc. (Michigan); Indiana & Ohio Railway Company (Indiana, Michigan, and Ohio); Indiana Southern Railroad, LLC (Indiana); Kiamichi Railroad Company, L.L.C. (Arkansas, Oklahoma, and Kansas); Kyle Railroad Company (Colorado and Kansas); The Massena Terminal Railroad Company (New York); Mid-Michigan Railroad, Inc. (Michigan); Missouri & Northern Arkansas Railroad Company, Inc. (Arkansas, Kansas, and Missouri); New England Central Railroad, Inc. (Connecticut, Massachusetts, New Hampshire, and Vermont); North Carolina & Virginia Railroad Company, LLC (North Carolina and Virginia); Otter Tail Valley Railroad Company, Inc. (Minnesota and South Dakota); Point Comfort & Northern Railway Company (Texas); Puget Sound & Pacific Railroad (Washington); Rockdale, Sandow & Southern Railroad Company (Texas); San Diego & Imperial Valley Railroad Company, Inc. (California); San Joaquin Valley Railroad Co. (California); South Carolina Central Railroad Company, LLC (South Carolina); Toledo, Peoria & Western Railway Corporation (Illinois and Indiana); and Ventura County Railroad Corp. (California).

³ The Board exempted the transfer of indirect control of FEC from Fortress to RailAmerica, with Fortress retaining indirect control of RailAmerica, in Fortress Inv. Group, LLC et al.—Exemption for Transaction within a Corporate Family, Docket No. FD 35123 (STB served Mar. 19, 2008). According to petitioners, to date, RailAmerica has not exercised the control of FEC.

CERA will realign and connect the east end of DTC's track to CERA's east siding and build a new connection between DTC's track and CERA's track.

DISCUSSION AND CONCLUSIONS

The acquisition of control of a rail carrier by another rail carrier requires prior approval by the Board under 49 U.S.C. § 11323(a)(3), and the acquisition of control of a rail carrier by a person that is not a rail carrier but that controls any number of rail carriers requires prior approval by the Board under 49 U.S.C. § 11323(a)(5). Under 49 U.S.C. § 10502(a), however, the Board must exempt a transaction or service from regulation if it finds that: (1) regulation is not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101; and (2) either (a) the transaction or service is limited in scope; or (b) regulation is not needed to protect shippers from the abuse of market power.

In this case, an exemption from the prior approval requirements of 49 U.S.C. §§ 11323-25 is consistent with the standards of 49 U.S.C. § 10502. Detailed scrutiny of the proposed transaction through an application for review and approval under 49 U.S.C. §§ 11323-25 is not necessary to carry out the RTP. Rather, an exemption will promote that policy by minimizing the need for Federal regulatory control over the proposed transaction and ensuring that a sound rail transportation system will continue to meet the needs of the shipping public. 49 U.S.C. §§ 10101(2) and (4). By allowing RailAmerica et al. to integrate DTC into their existing family of Class II and Class III carriers, with the attendant experience, resources, capital, and administrative support, an exemption will foster sound economic conditions in transportation, ensure effective competition and coordination between rail carriers, and encourage efficient management. 49 U.S.C. §§ 10101(5) and (9). Other aspects of the RTP will not be adversely affected.

Regulation of this transaction is not needed to protect shippers from an abuse of market power. RailAmerica et al. have indicated that there will be no adverse impacts on rail transportation or lessening of rail competition. Petitioners simply will be incorporating DTC into their family of short line carriers without materially changing the operations over DTC's line. As a result, shippers potentially will benefit from greater efficiencies while receiving the same service. No shipper located on the line is expected to lose rail service options as a result of the control transaction. The more likely result would be enhanced rail service, as shippers will benefit from the substantial experience and resources of RailAmerica et al. and from the connection between DTC and the RailAmerica affiliates. Moreover, the connections that CERA intends to realign and build between CERA's track and the line will provide for better coordination between the line and CERA, making service more competitive and efficient. In addition, Bunge, the current owner of DTC and also a shipper on the line, reached an arms-length agreement to sell DTC's stock to CERA. Therefore, Bunge has been able to protect itself from any potential market abuse, and DD has indicated that it supports the transaction. Given our finding regarding the probable effect of the transaction on market power, we need not determine whether the transaction is limited in scope.

Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Because Fortress and RailAmerica each have indirect control of one Class II carrier, as a condition to the use of this exemption, any employees adversely affected by this transaction will be protected by the conditions set forth in New York Dock Railway—Control—Brooklyn District Eastern Terminal, 360 I.C.C. 60 (1979), aff'd sub nom. New York Dock Railway v. United States, 609 F.2d 83 (2d Cir. 1979).

The acquisition of control is exempt from environmental reporting requirements under 49 C.F.R. § 1105.6(c)(2)(i) because it will not result in any significant change in carrier operations. Similarly, the transaction is exempt from the historic reporting requirements under 49 C.F.R. § 1105.8(b)(3) because it will not substantially change the level of maintenance of railroad properties.

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

It is ordered:

1. Under 49 U.S.C. § 10502, the Board exempts from the prior approval requirements of 49 U.S.C. §§ 11323-25 RailAmerica et al.'s control of DTC, subject to the employee protective conditions set out in New York Dock Railway—Control—Brooklyn District Eastern Terminal, 360 I.C.C. 60 (1979), aff'd sub nom. New York Dock Railway v. United States, 609 F.2d 83 (2d Cir. 1979).

2. Notice will be published in the Federal Register on August 31, 2010.

3. This exemption will be effective on September 25, 2010. Petitions for stay must be filed by September 3, 2010. Petitions to reopen must be filed by September 15, 2010.

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