

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35208

WINAMAC SOUTHERN RAILWAY COMPANY—TRACKAGE RIGHTS EXEMPTION—  
A. & R. LINE, INC.

Decided: January 9, 2009

On December 24, 2008, notice was served and published in the Federal Register (73 FR 79223) of a 1995 trackage rights agreement pursuant to which A. & R. Line, Inc. (A&R) had purportedly agreed to grant overhead trackage rights to Winamac Southern Railway Company (WSRY) between milepost 71.5 at or near Van and milepost 74.5 at or near Logansport, a distance of approximately 3.0 miles in Cass County, IN. The exemption was scheduled to become effective on January 10, 2009.

As explained in the notice, the line was acquired by A&R from WSRY in 1995.<sup>1</sup> WSRY states that it entered into a trackage rights agreement with A&R in 1995 (the 1995 Trackage Rights Agreement) pursuant to which WSRY continued to conduct operations over the line. According to WSRY, however, it did not seek approval of the trackage rights from the Board's predecessor, the Interstate Commerce Commission, or from the Board. WSRY states that it filed this notice to remedy that error.

According to WSRY, operations have continued under the 1995 Trackage Rights Agreement for over 13 years, during which time Central Railroad Company of Indianapolis took over WSRY's operations, including the trackage rights, as WSRY's agent, and A&R was taken over by Toledo, Peoria & Western Railway Corporation (TP&W).

On January 2, 2009, TP&W filed a petition to stay the effectiveness of the exemption. TP&W states that it intends to file a petition to reject or revoke WSRY's notice of exemption and asks that the exemption be stayed until the Board acts on that petition. In its stay request, TP&W raises concerns with respect to the notice, WSRY's operations, and the trackage rights agreement. Specifically, TP&W alleges that it has terminated the 1995 Trackage Rights Agreement with WSRY, effective January 5, 2009. Therefore, TP&W asserts, there is no trackage rights agreement for the Board to exempt. TP&W also maintains that, even before it terminated the agreement, the agreement ceased to bind the parties because WSRY had abandoned it under Indiana law. Finally, TP&W asserts that neither WSRY nor its agent has ever operated over the line under the trackage rights agreement.

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<sup>1</sup> See A. & R. Line, Inc.—Acquisition Exemption—Winamac Southern Railway Company, Finance Docket No. 32694 (ICC served July 6, 1995).

On January 2, 2009, the Board also received a stay petition from the Logansport & Eel River Short-Line Co., Inc. (L&ER), although that party did not address the criteria for a stay and its interest in the matter is unclear. On January 7, 2009, WSRY replied in opposition to the stay petitions. Also on that day, U S Rail Corporation (US Rail) filed a pleading joining WSRY in opposing a stay and requesting that the Board allow the trackage rights exemption to become effective as scheduled.<sup>2</sup>

## DISCUSSION AND CONCLUSIONS

In general, the notice of exemption process is an expedited means of obtaining Board authority in certain classes of transactions, defined in the Board's regulations, that ordinarily do not require greater regulatory scrutiny. Thus, notices of exemption are intended to be used for routine and non-controversial cases.<sup>3</sup> In cases where unresolved issues arise, the Board will reject a notice.<sup>4</sup> Here, WSRY has invoked the class exemption under 49 CFR 1180.2(d)(7), which applies to trackage rights that are (i) based on a written agreement, and (ii) not filed or sought in responsive applications in rail consolidation proceedings.

WSRY's notice of exemption will be rejected because the record indicates that this matter is not routine and non-controversial and that use of the trackage rights class exemption is not appropriate in this case. The exemption sought here would belatedly authorize trackage rights under an agreement entered into nearly 14 years ago. Moreover, TP&W, the successor to the original granting party, is actively opposed to the grant of the exemption and asserts that the 1995 Trackage Rights Agreement is no longer in effect. WSRY "disagrees emphatically" with that assertion. This serious contractual dispute raises issues of state law that the Board is not in a position to resolve and calls into question whether a key component of the trackage rights class exemption—that the trackage rights be based on a written agreement—is met. These uncertainties preclude use of the expedited notice of exemption process here.

Finally, the underlying justification for the trackage rights class exemption is not just that the agreement has been reduced to writing, but that the rights are, in fact, volitional on the part of both parties to the transaction—i.e., that the granting carrier does not object. This is underscored by the provision at section 1180.2(d)(7)(ii), which excludes from the class exemption trackage rights that are not based on mutual agreement, but rather are sought in responsive applications in

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<sup>2</sup> In a separate transaction in which it seeks to acquire certain trackage from WSRY, U S Rail also seeks to acquire the trackage rights at issue here. See U S Rail Corporation—Lease and Operation Exemption—Winamac Southern Railway Company and Kokomo Grain Co., Inc., STB Finance Docket No. 35205 (STB served Dec. 31, 2008).

<sup>3</sup> See Northeast Interchange Railway, LLC—Lease and Operation Exemption—Line in Croton-On-Hudson, NY, STB Finance Docket No. 34734 (STB served Nov. 17, 2005); James Riffin d/b/a the Northern Central Railroad—Acquisition and Operation Exemption—In York County, PA, STB Finance Docket No. 34501 (STB served Feb. 23, 2005).

<sup>4</sup> See FPN-USA, Inc.—Operation Exemption—Tijuana-Tecate Shortline, STB Finance Docket No. 35155 (STB served Aug. 8, 2008); Pro-Go Corp.—Operation Exemption—In Suffolk County, NY, STB Finance Docket No. 35120 (STB served Mar. 13, 2008).

rail consolidation proceedings. Thus, even if the 1995 Trackage Rights Agreement is still operative and binding on TP&W, the very fact that TP&W nevertheless now objects suggests that a notice of exemption still would not be the appropriate mechanism for seeking Board authority for those rights. Rather, the more extensive record afforded in an application or petition for exemption proceeding likely would be needed to allow TP&W to air its objection and the Board to fully consider the matter.

For those reasons, the notice will be rejected.

In light of the rejection of the notice in this decision, TP&W's and L&ER's petitions for a stay will be denied as moot.

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

It is ordered:

1. The notice of exemption is rejected.
2. TP&W's and L&ER's petitions for a stay are denied as moot.
3. This decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Anne K. Quinlan  
Acting Secretary