

38382  
EB

SERVICE DATE – SEPTEMBER 28, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35031

FORTRESS INVESTMENT GROUP LLC, ET AL.—CONTROL—FLORIDA EAST COAST  
RAILWAY, LLC

Decision No. 4

Decided: September 27, 2007

By application filed on May 22, 2007, Fortress Investment Group LLC, on behalf of certain private equity funds managed by it and its affiliates (Fortress); Iron Horse Acquisition Holding LLC, a Delaware limited liability company and affiliate of Fortress (Iron Horse); NEWCO, a Delaware limited liability company and affiliate of Fortress; RailAmerica, Inc. (RailAmerica); and Florida East Coast Industries, Inc. (FECI) and its wholly owned subsidiary, Florida East Coast Railway, LLC (FECR) seek Board approval under 49 U.S.C. 11323-26 of the acquisition of control of FECR by NEWCO (and, indirectly, by Fortress). Fortress, Iron Horse, NEWCO, RailAmerica, FECI, and FECR are referred to collectively as applicants. The transaction is classified as a minor transaction. See 49 CFR 1180.2(c) (classification of transactions under 49 U.S.C. 11323).

In Decision No. 2 (served and published in the Federal Register on June 21, 2007, at 72 FR 34349-53), we accepted the application for consideration, and we established a procedural schedule that set July 30, 2007, as the due date for the filing of comments, protests, requests for conditions, and any other evidence and argument in opposition to the application.<sup>1</sup> The International Brotherhood of Electrical Workers (IBEW) and the United Transportation Union (UTU) filed separate requests seeking imposition of employee protective conditions. Applicants replied on August 3, 2007. We are approving the application, subject to standard employee protective conditions.

---

<sup>1</sup> Also on May 22, 2007, applicants submitted a petition for revocation of class exemptions pursuant to 49 U.S.C. 10502(d), asking the Board to revoke the class exemptions set forth in 49 CFR 1180.2(d)(2) and 1180.2(d)(3) with respect to the transaction. In Decision No. 2, the Board revoked the class exemptions as to this transaction to permit the applicants to proceed by seeking Board approval for the transaction through the application process.

## BACKGROUND

Fortress, through its management of certain private equity funds, controls RailAmerica and (indirectly) RailAmerica's rail carrier subsidiaries. Fortress acquired control of RailAmerica in February 2007, pursuant to a Verified Notice of Exemption. See Fortress Investment Group LLC, et al.—Control Exemption—Rail America, Inc., et al., STB Finance Docket No. 34972 (STB served Dec. 22, 2006).

RailAmerica is a short-line and regional rail service provider that currently owns and operates, through its freight railroad subsidiaries, approximately 7,800 miles of rail lines in the United States and Canada. RailAmerica's 30 U.S. freight railroad subsidiaries (referred to collectively herein as the RailAmerica Railroads) operate 41 railroads in the United States. RailAmerica also operates four railroads in Canada through three Canadian subsidiaries. One of the RailAmerica Railroads, the Central Oregon & Pacific Railroad, Inc. (CORP), is a Class II carrier. The other RailAmerica Railroads, all of which are Class III carriers, include Alabama & Gulf Coast Railway L.L.C. (AGR), Arizona & California Railroad Company (ARZC), Bauxite & Northern Railway Company (BXN), California Northern Railroad Company (CFNR), Cascade and Columbia River Railroad Company (CSCD), The Central Railroad Company of Indiana (CIND), Central Railroad Company of Indianapolis (CERA), Connecticut Southern Railroad, Inc. (CSO), Dallas, Garland & Northeastern Railroad, Inc. (DGNO), Eastern Alabama Railway (EARY), Huron & Eastern Railway Company, Inc. (HESR), Indiana & Ohio Railway Company (IORY), Indiana Southern Railroad, Inc. (ISKR), Kiamichi Railroad L.L.C. (KRR), Kyle Railroad Company (KYLE), Massena Terminal Railroad Company (MSTR), Mid-Michigan Railroad, Inc. (MMRR), Missouri & Northern Arkansas Railroad Company, Inc. (MNA), New England Central Railroad, Inc. (NECR), North Carolina & Virginia Railroad Company, Inc. (NCVA), Otter Tail Valley Railroad Company (OTVR), Point Comfort and Northern Railway Company (PCNR), Puget Sound & Pacific Railroad Company (PSAP), Rockdale, Sandow & Southern Railroad Company (RSSR), San Diego & Imperial Valley Railroad Company, Inc. (SDIV), San Joaquin Valley Railroad Company (SJVR), South Carolina Central Railroad Company, Inc. (SCRF), Toledo, Peoria & Western Railway Corporation (TPW), and Ventura County Railroad Company (VCRR). RailAmerica's Canadian freight railroads include Cape Breton & Central Nova Scotia (CBNS), Goderich-Exeter Railway (GEXR), Ottawa Valley Railway (OVR), and Southern Ontario Railway (SOR).

Only one of the RailAmerica Railroads, AGR, owns or operates a rail line in Florida. AGR's line extends south from Kimbrough, AL, to Pensacola, FL. AGR does not serve the east coast of Florida, nor does it serve any point in common with FECR.

Iron Horse is a Delaware limited liability company owned by certain private equity funds controlled by Fortress. Iron Horse controls Iron Horse Acquisition Sub, Inc. (Iron Horse Sub), a Florida corporation created for purposes of the proposed transaction. NEWCO is a Delaware limited liability company owned by certain private equity funds controlled by Fortress.

FECI, a holding company incorporated in 2006, is engaged in the real estate and railroad businesses. FECI's real estate business is conducted through certain affiliated companies known as Flagler Development Group (Flagler). Flagler is engaged in the acquisition, entitlement, development, management, construction, leasing, operation, and sale of real estate in Florida.

FECR, another affiliate of FECI, owns and operates a Class II regional railroad located entirely within Florida. FECR's main line extends for 351 miles between Jacksonville and Miami, FL. In addition to this main line track, FECR owns and operates approximately 268 miles of branch, switching, and other secondary track, and 167 miles of yard track. FECR also operates nine major terminal facilities along its lines, including Bowden Yard in Jacksonville, which also serves as FECR's primary point of interchange with CSX Transportation, Inc. (CSXT) and Norfolk Southern Railway Company (NS). In connection with a haulage agreement with NS, FECR also serves an approximately 100-acre facility owned by NS near Titusville, FL, which is currently used for automobile distribution.

The primary commodities handled by FECR include intermodal trailers and containers, aggregates, vehicles, food, paper, and lumber. Intermodal traffic accounts for approximately 45% of FECR's total revenues, and carload traffic (primarily aggregates) generates approximately 53% of total revenues. In 2006, FECR transported approximately 212,000 carloads and 322,000 intermodal units. FECR's revenues from freight-related operations in 2006 were approximately \$264 million.

Through its interchange connections with both NS and CSXT at Jacksonville, FECR offers its customers interline rail service to points beyond FECR's service territory. FECR has also forged marketing alliances with connecting carriers to offer daily express intermodal service to South Florida from Atlanta, Chicago, New York/New Jersey and Baltimore. In conjunction with its affiliate, FEC Highway Services, Inc. (FECHS), FECR offers drayage services throughout the Southeast via terminals in Atlanta, Jacksonville, Fort Pierce, Fort Lauderdale and Miami.

The transaction for which the applicants seek approval involves the acquisition of FECI (and, as a result, FECR) by Fortress. The transaction would be carried out through a merger of Iron Horse Sub into FECI. Upon consummation of the merger, FECI would become a wholly owned subsidiary of Iron Horse and an affiliate of Fortress. FECI would be a privately held company and its common stock would no longer be publicly traded. Shareholders of FECI would receive cash consideration of \$62.50 for each outstanding share of FECI's common stock, and a special dividend of \$21.50 per share to be paid by FECI prior to the merger. The total value of the transaction, including the refinancing of existing FECI debt and the special dividend, is approximately \$3.5 billion. The closing of the proposed transaction is subject to a number of conditions precedent, including receipt of certain regulatory approvals, an affirmative vote of the holders of a majority of the outstanding shares of FECI, and other customary conditions.

Immediately upon consummation of the merger described in the prior paragraph, all of the limited liability company interests of FECR were to be placed into an independent voting trust pending approval of the proposed transaction by the Board.<sup>2</sup> On or after the effective date of a final order of the Board authorizing the proposed transaction, the voting trust would be terminated, FECR's interests would be transferred to NEWCO, and FECR would become a wholly owned subsidiary of NEWCO (and controlled indirectly by Fortress). The shares of FECHS, which provides drayage and ancillary services in conjunction with FECR rail service, would also be transferred by FECCI to NEWCO, and FECHS would become a wholly owned subsidiary of NEWCO. Applicants may allocate other assets to NEWCO or FECCI to align all of FECCI's current transportation-related activities within NEWCO and real estate business within FECCI following the transaction.

### DISCUSSION AND CONCLUSIONS

Statutory Criteria. Under 49 U.S.C. 11323(a)(5), acquisition of control of a rail carrier (here, FECR) by a person that is not a rail carrier but controls any number of rail carriers (Fortress) requires prior Board approval under criteria set forth in 49 U.S.C. 11324. Because the transaction does not involve the merger or control of two or more Class I railroads, this transaction is governed by section 11324(d), under which we must approve the application unless we find that: (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

In assessing transactions subject to section 11324(d), our primary focus is on the anticipated competitive effects. We must grant the application unless there will be adverse competitive impacts that are both "likely" and "substantial." And, even if there will be likely and substantial anticompetitive impacts, we may not disapprove the transaction unless the anticompetitive impacts outweigh the benefits and cannot be mitigated through conditions. See Canadian National, et al.—Control—Wisconsin Central Transp. Corp., et al., 5 S.T.B. 890, 899 (2001); Kansas City Southern Industries, Inc., KCS Transportation Company, and The Kansas City Southern Railway Company—Control—Gateway Western Railway Company and Gateway Eastern Railway Company, STB Finance Docket No. 33311, slip op. at 4 (STB served May 1, 1997); CSX Corporation and CSX Transportation, Inc.—Control—The Indiana Rail Road Company, STB Finance Docket No. 32892, slip op. at 3-4 (STB served Nov. 7, 1996).

---

<sup>2</sup> Pursuant to 49 CFR 1013.3, applicants submitted their proposed Voting Trust Agreement to the Board's Secretary for his review and informal opinion regarding the efficacy of the voting trust to shield Fortress from violation of the statute that could occur if Fortress were to control FECR prior to receiving the Board's approval. The Secretary issued his letter on July 6, 2007.

Competitive and Public Interest Analysis. The transaction would have no adverse competitive effects. The FECR and RailAmerica Railroads do not compete in the same markets, nor do they serve any common points or rail corridors. No party has filed comments asserting that the merger will lessen competition. Accordingly, we find that the evidence demonstrates that the acquisition will not result in a substantial lessening of competition, the creation of a monopoly, or a restraint of trade in freight surface transportation in any region of the United States.

Applicants contend that the transaction would further the public interest in meeting significant transportation needs, including the ability to obtain capital at a lower cost, the opportunity to enhance the efficiency of both FECR and the RailAmerica Railroads by applying the “best practices” of each in the other railroads’ operations, and the ability to take advantage of Fortress’ purchasing power in acquiring locomotives, rolling stock, track maintenance equipment, vehicles, rail, other materials and supplies, insurance, and fuel. No one has filed any comments, protests or other evidence questioning applicants’ contentions, and the Board has identified nothing to suggest that the parties’ plans are not in the public interest.

Therefore, based on our competition and public interest analysis, we will approve the transaction.

Labor Protection. The Board received letters from IBEW and UTU expressing unspecified concerns about the effects of this transaction on employees. Under 49 U.S.C. 11326(a), we must impose labor protective conditions on our approval of the transaction. The appropriate conditions are those set out in New York Dock Ry.—Control—Brooklyn Eastern District Terminal, 360 I.C.C. 60, aff’d sub nom. New York Dock Ry. v. United States, 309 F.2d 83 (2d Cir. 1979). We believe those conditions are adequate to protect employees affected by the transaction.

Environmental Issues. As noted in Decision No. 2, the Board’s Section of Environmental Analysis (SEA) has concluded, based on the information presented in the application and the related filings, that this proceeding is “categorically excluded” from the need for an environmental review under the National Environmental Policy Act of 1969, see 49 CFR 1105.6(c)(2)(i), and that formal environmental review is not warranted in this case. SEA also agrees with applicants that the proposed transaction does not require historic review under the National Historic Preservation Act of 1966 because further approval would be required to abandon any service, and because applicants have advised the Board that there are no plans to dispose of or alter properties subject to the Board’s jurisdiction that are 50 years old or older. See 49 CFR 1105.8(b)(1). We have not received any comments disputing SEA’s conclusions or expressing environmental concerns. Accordingly, we adopt SEA’s conclusions.

We find:

1. The acquisition of control of FECR by NEWCO (and, indirectly, by Fortress) will not substantially lessen competition, create a monopoly, or restrain trade in freight surface transportation in any region of the United States.
2. This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. In STB Finance Docket No. 35031, the acquisition of control of FECR by NEWCO (and, indirectly, by Fortress) is approved, subject to the conditions for the protection of railroad employees set out in New York Dock Ry.—Control—Brooklyn Eastern District Terminal, 360 I.C.C. 60, aff'd sub nom. New York Dock Ry. v. United States, 309 F.2d 83 (2d Cir. 1979).
2. This decision shall be effective on October 28, 2007.

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

Vernon A. Williams  
Secretary