

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35016

ROCK RIVER RAILROAD, INC.—ACQUISITION AND OPERATION EXEMPTION—
RAIL LINES OF RENEW ENERGY, LLC

Docket No. FD 35017¹

MARK K. SMITH—CONTINUANCE IN CONTROL EXEMPTION—ROCK RIVER
RAILROAD, INC.

Decided: June 24, 2010

By petition filed on March 8, 2010, Rock River Railroad, Inc. (Rock River), Union Pacific Railroad Company (UP), and Valero Renewable Fuels Company, LLC (Valero) (collectively, Petitioners), jointly petitioned the Board to revoke the exemption obtained by Rock River, a noncarrier, to acquire and operate approximately 2,100 feet of private track located within an industrial plant site in Jefferson, Jefferson County, Wisc.² The exemption became effective on May 13, 2007, as did a related exemption for Mark K. Smith to continue in control of Rock River, if Rock River becomes a Class III rail carrier.³ As discussed below, the Board will reopen these proceedings based on substantially changed circumstances and permit Rock River to withdraw its notice of exemption, because Rock River never exercised its exemption to acquire the trackage as a line of railroad, does not intend to do so, and indeed, cannot do so as originally authorized. The Board also will permit Mr. Smith to withdraw his continuance-in-control exemption, because it is moot.

¹ These proceedings are not consolidated but are being considered in the same decision for administrative convenience.

² In its notice of exemption, Rock River describes the private track as spur, industrial, or switching track excepted from regulation under 49 U.S.C. § 10906.

³ By decisions served on April 20, 2007, the original effective date of the exemptions was May 6, 2007, but, after UP sought to stay the exemptions from becoming effective, Rock River and Mr. Smith agreed to postpone the effective date until May 13, 2007, and, by decision served on May 4, 2007, the effective date of the exemptions was postponed until May 13, 2007. By decision served on May 10, 2007, the petition for stay was denied, and the exemptions became effective on May 13, 2007.

According to Petitioners, Rock River reached an agreement in principle to acquire the private track from Renew Energy, LLC (Renew). Pursuant to its exemption, Rock River intended to convert the private track into a rail line and operate over it as a common carrier, transporting ethanol and dried distiller's grain from Renew's plant site. The private track connects with UP at both of its termini.

Subsequent to Rock River filing its verified notice of exemption to acquire the private track, Renew entered Chapter 11 bankruptcy. Petitioners state that Rock River never: (1) completed its agreement in principle with Renew to acquire the private track; (2) acquired any interest in the private track; or (3) provided any rail service. In February 2010, Valero acquired the plant out of bankruptcy, including the private track. Petitioners state that, since then, Valero and UP have been engaged in discussions regarding resumption of rail service into Valero's facility, and are concerned that Rock River's existing acquisition and operation exemption may present an impediment to resumption of private rail service into the facility.⁴ Thus, Petitioners seek revocation of Rock River's exemption so that UP and Valero can pursue other arrangements.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10502(d), the Board may revoke an exemption as applied to a particular transaction if the Board finds that regulation of the transaction is necessary to carry out the rail transportation policy. 49 U.S.C. § 10101. The Board will also revoke a notice that is based on false or misleading information. See 49 C.F.R. § 1150.32(c). Here, there is no claim that the notice was false or misleading, nor are Petitioners seeking additional regulation of the transaction. Rather, they are seeking revocation because Rock River never acquired the property, and, as a result of substantially changed circumstances, cannot exercise the acquisition authority to acquire the property from Renew. The proper remedy, therefore, is for the Board to set aside the previous Board action. 49 U.S.C. § 722. Accordingly the Board will treat petitioners' pleading as a request for Rock River to withdraw its notice of exemption.

The changed circumstances here justify reopening these proceedings and allowing Rock River's and Mr. Smith's notices of exemption to be withdrawn. While a notice of exemption gives the acquiring entity permission to acquire the rail line, it does not mandate the acquisition.⁵ In fact, an exemption to acquire a rail line may not be exercised unless an agreement is ultimately reached between the parties to the transaction.⁶ Here, Petitioners state that Rock River never acquired from Renew any interest in the private track and that Rock River has not operated over the private track. Petitioners also state that Valero purchased the private track out of

⁴ Neither Valero nor UP have authority to acquire or operate the private track as a rail line.

⁵ See, e.g., General Ry., d/b/a Iowa N.W. R.R.—Exemption for Acquis. of R.R. Line—in Osceola and Dickinson Counties, Fla., FD 34867, slip op. at 4 (STB served June 15, 2007).

⁶ See The Chicago, Lake Shore & South Bend Ry.—Acquis. and Operation Exemption—Norfolk S. Ry., FD 34960, slip op. at 4 (STB served Feb. 14, 2008).

bankruptcy and that Rock River no longer intends to acquire the private track. These changed circumstances show that Rock River will not, and indeed cannot, exercise its authority to acquire the line from Renew. Moreover, as noted by Petitioners, were the exemption to remain in effect, it may have the undesirable effect of leaving the status of the track's current and future use uncertain. Accordingly, in order to avoid uncertainty, the Board will permit Rock River to withdraw its notice of exemption.

Correspondingly, the continuance-in-control exemption obtained by Mr. Smith in FD 35017 is moot because it flows from the exercise of Rock River's exemption, which is no longer possible. Accordingly, the Board will permit Mr. Smith to withdraw his notice of exemption in FD 35017, as well. Should Rock River seek to become a rail carrier in the future, then Mr. Smith would again need to file for authority to continue in control of Rock River.

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

It is ordered:

1. These proceedings are reopened.
2. In FD 35016, Rock River's notice of exemption is withdrawn and dismissed without prejudice. The notice served and published in the Federal Register on April 20, 2007, is vacated.
3. In FD 35017, Mr. Smith's notice of exemption is withdrawn and dismissed without prejudice. The notice served and published in the Federal Register on April 20, 2007, is vacated.
3. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.