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SERVICE DATE – JUNE 29, 2011

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35363

R. J. CORMAN RAILROAD PROPERTY, LLC—ACQUISITION EXEMPTION—NC
RAILROAD, INC.

Docket No. FD 35364¹

R. J. CORMAN RAILROAD COMPANY/BARDSTOWN LINE—LEASE AND OPERATION
EXEMPTION—R. J. CORMAN RAILROAD PROPERTY, LLC

Digest:² When the Board allows a railroad to abandon a rail line (that is, to permanently cease operating over the line and dispose of it) the “offer of financial assistance” law allows another entity to step in and acquire the line to continue rail service over it, rather than it being abandoned. When a rail line is sold under that process, the new owner cannot resell the line to anyone except the original seller for the next 5 years. RJC Rail Property purchased a rail line prior to the termination of the 5-year waiting period provided under the offer of financial assistance process and is asking the Board to lift that restriction in this case. The Board is granting that request. Removing this restriction validates the acquisition of this line, allowing uninterrupted rail service.

Decided: June 28, 2011

RJC Railroad Property, LLC (RJC Railroad Property), filed a petition on June 4, 2010, seeking exemption from 49 U.S.C. § 10904(f)(4)(A) and waiver of the associated Board regulation at 49 C.F.R. § 1152.27(i)(2)(ii), regarding its acquisition of approximately 42 route-miles of rail line between milepost 0.95 at or near Oneida and milepost 42.0 at or near Devonia, in Scott, Campbell, and Anderson Counties, Tenn. (the line).³ RJC Railroad Property acquired

¹ These proceedings are not consolidated; they are being considered together for administrative purposes.

² The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

³ Although RJC Railroad Property calls its pleading a petition for waiver, it is actually both a petition for exemption from provisions of the statute and a petition for waiver of the Board’s regulations. This decision will refer to the requests as a petition for exemption.

the line from NC Railroad, Inc. (NCRL), which, less than 5 years earlier, had acquired the line through the offer of financial assistance (OFA) process of § 10904. RJC filed its petition for exemption because the cited sections of the statute and regulations prohibit a railroad from transferring a line acquired through the OFA process to any party, except the rail carrier from whom it was purchased, prior to the end of the fifth year after consummation of the sale. Under the circumstances presented here, the Board will grant RJC Railroad Property's petition for exemption.

BACKGROUND

RJC Railroad Property, a Class III rail carrier, filed in Docket No. FD 35363 a verified notice of exemption under 49 C.F.R. § 1150.41 to acquire the line by purchasing it from NC Railroad, Inc. (NCRL). In a related matter, R. J. Corman Railroad Company/Bardstown Line (RJCR) filed in Docket No. FD 35364 a verified notice of exemption under 49 C.F.R. § 1150.41 to lease the line from RJC Railroad Property and begin operating over it. Both notices were served and published in the Federal Register on April 9, 2010 (75 Fed. Reg. 18,253-54), and became effective on April 25, 2010. According to RJC Railroad Property, the parties consummated the purchase on May 20, 2010 (May 2010 acquisition).

The line previously had been acquired by NCRL in February 2006 through the OFA process from Tennessee Railway Company (TNR), a wholly owned subsidiary of Norfolk Southern Railway Company. Tenn. Ry.—Aban. Exemption—in Scott County, Tenn., AB 290 (Sub-No. 260X) et al. (STB served Mar. 3, 2006). Therefore, the 5-year period prohibiting resale of the line to a party other than the OFA transferor did not expire until February 2011, some 9 months after NCRL resold it to RJC Railroad Property in the May 2010 acquisition. The pleadings submitted to the Board for the acquisition notice in Docket No. FD 35363, however, did not disclose that the line previously had been purchased through an OFA. The 2006 OFA sale was not disclosed until RJC Railroad Property filed its petition for exemption on June 4, 2010—several weeks after the May 2010 acquisition was consummated.

The May 2010 acquisition violated the governing statute and regulations from which RJC Railroad Property now seeks exemption. Because RJC Railroad Property's exemption request did not explain why NCRL failed to comply with the Board's governing statute and regulations by improperly reselling the line before the 5-year period expired, the Board served a decision on January 10, 2011 (January 2011 decision), directing counsel for NCRL and RJC Railroad Property to address 3 specific concerns: first, that the May 2010 acquisition of the line by RJC Railroad Property and RJCR's subsequent lease of the line should not have occurred until after the Board decided the merits of the petition for exemption, and then only if the Board granted the exemption; second, that the exemption request should have been filed by NCRL—the party restricted by the OFA statute—rather than RJC Railroad Property; and third, that the status of the line—as one having been purchased through the OFA process—should have been disclosed in RJC Railroad Property's notice of exemption for authority to acquire the line.

On January 31, 2011, RJC Railroad Property filed a pleading addressing these concerns. RJC Railroad Property explains that the May 2010 acquisition transaction was necessitated by the financial circumstances surrounding NCRL's parent company, National Coal Corporation (National Coal). RJC Railroad Property states that National Coal, due to its debt situation, was forced to liquidate several of its assets, including the coal preparation plant in Devonia, Tenn., which is served by the line at issue here. National Coal sold that plant to Ranger Energy Investments, LLC (Ranger Energy). As part of that sale, Ranger Energy sought assurance that rail carrier service to the plant would continue. RJC Railroad Property states that it entered into negotiations with National Coal to purchase the line from National Coal's subsidiary, NCRL, to ensure continued rail operations.

RJC Railroad Property states that it first became aware that the transfer of the line was restricted on April 22, 2010, when NCRL produced copies of the deeds from the OFA sale. At that point, RJC Railroad Property had already filed its acquisition notice with the Board. RJC Railroad Property states that it proceeded with the acquisition of the line while NCRL still had sufficient control over its assets to do so, thereby permitting uninterrupted rail service to the Devonia plant. RJC Railroad Property also states that, upon learning of the OFA purchase, it immediately sought from TNR a waiver of its statutory protections as the only carrier able to purchase the line for the 5-year period after the OFA transaction.⁴ Upon receiving this waiver, RJC Railroad Property promptly filed the petition for exemption.⁵

As discussed below, RJC Railroad Property's submission is adequate to satisfy the Board's concerns, and the petition for exemption will be granted, notwithstanding the parties' failure to timely seek the necessary authority to proceed with the acquisition.

DISCUSSION AND CONCLUSION

As noted, under 49 U.S.C. § 10904(f)(4)(A), an entity that has acquired a rail line under the OFA process may not transfer that line to any entity other than the carrier from which it was originally purchased, prior to the end of the fifth year after consummation of the sale. In this case, that provision prohibited NCRL from selling the line to any purchaser other than TNR until after February 28, 2011 (5 years after NCRL purchased it), thus rendering the May 2010 sale to RJC Railroad Property unlawful. TNR, however, the carrier that sold the line under the OFA, does not object to RJC Railroad Property's purchase of the line prior to the end of the 5-year period.

⁴ RJC Railroad Property states that it also contacted Board staff by telephone to discuss the pending acquisition and the OFA restriction.

⁵ With its petition, RJC Railroad Property provided a letter from Norfolk Southern Corporation and instruments from TNR releasing TNR's right to repurchase the line under 49 U.S.C. § 10904(f)(4)(A) and 49 C.F.R. § 1152.27(i)(2). RJC Railroad Property also addressed why it, and not NCRL, filed the petition for exemption.

Under 49 U.S.C. § 10502, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Here, we find that applying the transfer restriction of § 10904(f)(4)(A) for the entire 5-year period to the acquisition by RJC Railroad Property is not necessary to protect shippers from the abuse of market power. The shipper on the line, Ranger Energy, sought assurance that rail carrier service to the coal preparation plant it was acquiring would continue—service that TNR does not seek to provide. Denying this exemption, and therefore the associated service provided to Ranger Energy at the Devonia plant, would harm rather than protect the shipper on the line. Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

Moreover, full regulation under § 10904 is not necessary to carry out the rail transportation policy. By removing this impediment to RJC Railroad Property’s acquisition of the line, an exemption in this case reduces regulatory barriers to entry, in accordance with 49 U.S.C. § 10101(7). An exemption also ensures the development and continuation of a sound rail transportation system with effective competition between rail carriers and other modes to meet the needs of shippers, and encourages and promotes energy conservation, consistent with 49 U.S.C. §§ 10101(4) and (14). Other aspects of the rail transportation policy will not be adversely affected.

We now turn to the Board’s specific areas of concern stated in the January 2011 decision. The Board’s primary concern was that the May 2010 acquisition of the line by RJC Railroad Property and RJCR’s subsequent lease of the line should not have occurred until after the Board decided the merits of the petition for exemption, and then only if the Board granted the exemption.

The Board is required by statute “to ensure the development and continuation of a sound rail transportation system . . . to meet the needs of the public . . .” 49 U.S.C. § 10101(4). Thus, the Board promotes the continuation of rail service, especially when there are active shippers who depend on that service and a carrier willing and able to provide that service. Nevertheless, although the Board has in the past granted petitions for exemption from the 5-year period in 49 U.S.C. § 10904(f)(4)(A) when appropriate,⁶ carriers must follow the established processes to gain Board authority. Here, RJC Railroad Property acknowledges that it should have taken steps more promptly to seek and obtain the necessary Board authority to proceed with the acquisition.

⁶ See CSX Transp., Inc.—Aban. Exemption—In Allegany Cnty., Md., AB 55 (Sub-No. 659X) (STB served Dec. 30, 2010).

RJC Railroad Property consummated the transaction before seeking and obtaining an exemption. As such, it is now requesting, in effect, the retroactive granting of an exemption from 49 U.S.C. § 10904(f)(4)(A) and a waiver of the associated Board regulation at 49 C.F.R. § 1152.27(i)(2)(ii). Although retroactive authority is generally to be avoided, the agency has granted it under appropriate circumstances when the failure to seek approval was unintentional. See Horsehead Corp.—Petition for Acquis. & Operation Exemption—Chestnut Ridge Ry., FD 34481 (STB served Mar. 12, 2004).

Here, we find that RJC Railroad Property’s failure to seek approval falls within the standard discussed in Horsehead Corp. and other Board decisions. The record shows that, upon learning of the line’s OFA history, RJC Railroad Property immediately undertook to obtain TNR’s consent to the sale of the line to RJC Railroad Property and a waiver of TNR’s rights under the statute, which RJC Railroad Property believed to be “a threshold prerequisite” to filing a petition for exemption and waiver with the Board. RJC Railroad Property obtained TNR’s consent and waiver on June 1, 2010, and promptly thereafter filed its petition with the Board on June 4. Although obtaining a consent and waiver from the original OFA seller is not a necessary prerequisite to filing for an exemption from the 5-year limitation, the record nevertheless shows that RJC Railroad Property acted diligently to take what it thought was the proper action and that TNR does not object to the sale of the line to another party. In addition, RJC Railroad Property explains that, given the precarious financial situation of NCRL’s parent, National Coal, the closing had to occur quickly to preserve uninterrupted rail service to the Devonian plant. Given all of these circumstances, the Board will grant the petition for exemption retroactively to May 20, 2010, the date RJC Railroad Property acquired the line. However, future parties should be aware that the Board is reluctant to grant retroactive waivers, and will only do so on rare occasions.

RJC Railroad Property also has adequately addressed the Board’s other 2 concerns. As to why RJC Railroad Property, not NCRL, filed the petition for exemption, RJC Railroad Property states that NCRL has been converted to a single-member limited-liability company that apparently engages in no business activities other than those associated with the winding up of its affairs. RJC Railroad Property further states that it filed the pleading because it concluded that awaiting a pleading signed by NCRL was not necessary. Although NCRL should have filed the petition for exemption, we will not reject RJC Railroad Property’s petition under these circumstances. Finally, RJC Railroad Property has addressed the Board’s concern regarding the failure to disclose the OFA purchase in its acquisition notice of exemption. RJC Railroad Property has explained that it was unaware of the OFA until April 22, 2010—after the acquisition notice was filed—and states that it would have included the information had it known about the OFA prior to filing the notice. While RJC Railroad Property’s delay violated the statute, the record here shows that RJC Railroad Property acted in a reasonably expeditious way in seeking Board authority when it learned of the restriction on its ability to purchase the line.

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

It is ordered:

1. Under 49 U.S.C. § 10502, we exempt from the requirements of 49 U.S.C. § 10904(f)(4)(A) RJC Railroad Property's acquisition of the line from NCRL, retroactive to May 20, 2010.

2. Application of the Board's regulation at 49 C.F.R. § 1152.27(i)(2)(ii) is waived with respect to RJC Railroad Property's acquisition of the line from NCRL, retroactive to May 20, 2010.

3. This decision is effective on its service date.

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