

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35558

UTAH SOUTHERN RAILROAD COMPANY, LLC—CHANGE IN OPERATORS
EXEMPTION—IRON BULL RAILROAD COMPANY, LLC

Digest:¹ This decision finds that Utah Southern Railroad Company submitted false or misleading information to the Board when it sought the Board’s permission to replace Iron Bull Railroad Company as an operator on a line of railroad known as the Comstock Subdivision, in Iron County, Utah. Although permission had already been given to Utah Southern to serve as operator on the Comstock Subdivision, the Board is now rejecting Utah Southern’s request and treating it as if it had never been granted due to the false and misleading statements it contains.

Decided: September 20, 2012

On October 21, 2011, Utah Southern Railroad Company, LLC (USRC), filed a verified notice of exemption (2011 Notice) under 49 C.F.R. § 1150.31 to change operators from Iron Bull Railroad Company (IBRC) to USRC on a line of railroad known as the Comstock Subdivision (Line). The Line extends between milepost 0.1, at or near Iron Springs, and milepost 14.7, at or near Iron Mountain, a distance of 14.6 miles in Iron County, Utah. The Line is leased from Union Pacific Railroad Company (UP) by PIC Railroad, Inc. d/b/a Comstock Mountain Lion Railroad (PIC), which is owned by CML Metals Corporation (CML), a rail-dependent iron ore producer and the sole shipper on the Line. Notice of the exemption was served and published in the Federal Register on November 4, 2011 (76 Fed. Reg. 68,523), and the exemption took effect on November 20, 2011.

On June 27, 2012, PIC filed a petition to reject USRC’s 2011 Notice, or in the alternative, revoke USRC’s exemption obtained pursuant to that notice. According to PIC, the 2011 Notice contains false or misleading information and is therefore void ab initio. PIC asserts, among other things, that the notice of exemption misleadingly implies that an agreement between USRC and IBRC has been reached for USRC’s operation of the Line and for USRC’s acquisition of IBRC’s authority to operate over the Line. On July 2, 2012, USRC filed a response asserting that, while a number of statements in PIC’s petition are “false and materially misleading,” it does not oppose the relief sought in the petition.

¹ 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).

As discussed below, we find that USRC's 2011 Notice contains false or misleading information. Thus, we will grant PIC's petition to reject the 2011 Notice as void ab initio. Because we are rejecting the 2011 Notice, PIC's alternative request to revoke USRC's exemption is denied as moot.

BACKGROUND

In 2006, PIC reached an agreement in principle with UP to lease the Line, and, as part of that agreement, UP allowed PIC to enter into a contract with IBRC to have IBRC operate over the Line. Shortly thereafter, PIC and IBRC jointly filed notices of exemption with the Board for PIC to lease and operate the Line and for IBRC to operate over the Line upon PIC's assumption of its leasehold interest.²

PIC and UP finalized the terms of PIC's lease of the Line on July 31, 2008.³ In the 2008 lease agreement between UP and PIC, UP retained the right to approve of any rail carrier that PIC designated to provide service on the Line. According to PIC, because UP had approved of IBRC as operator on the Line, PIC executed an operating agreement with IBRC on July 31, 2008 (2008 Operating Agreement). PIC states that the 2008 Operating Agreement prohibited IBRC from assigning or conveying its operating rights and/or operating authority to any third party, including affiliated parties.

In a letter dated September 30, 2008, USRC notified the Board that, effective October 1, 2008, the name of IBRC was being changed to USRC. According to PIC, however, that was not the case; PIC alleges that, unbeknownst to it at the time, rather than renaming IBRC as USRC, Michael R. Root, the indirect owner of IBRC, instead incorporated USRC as a new company separate and distinct from IBRC. Based upon the assumption that USRC was merely IBRC renamed,⁴ PIC states that the parties amended the 2008 Operating Agreement on November 17, 2008, to change all the references to IBRC to refer instead to USRC, leaving other provisions, including the non-assignment provisions, unchanged.

² See Iron Bull R.R.—Operation Exemption—PIC R.R., FD 34897 (STB served Sept. 14, 2006); PIC R.R.—Lease & Operation Exemption—Union Pac. R.R., FD 34896 (STB served Sept. 14, 2006). PIC sought an exemption to operate, as well as lease, the Line so that it could fulfill its common carrier obligation in the event that IBRC were to cease operations.

³ PIC states that the underlying objective of the rail line transactions among PIC, UP, and IBRC was to facilitate the resumption of iron mining activity at an open pit mine located on the Line. However, PIC submits that efforts to restore the mine to operation took longer than anticipated, and as a result, no rail service was needed until well after 2006.

⁴ The addendum to the 2008 Operating Agreement states that, "effective October 1, 2008, [IBRC]'s name has been changed to [USRC], but the ownership of USRC is the same as the ownership of [IBRC]" and that "PIC and [USRC] desire to execute an Addendum . . . that acknowledges and agrees to that name change." (See PIC's Pet., Ex. C at 1.)

PIC asserts that, in January 2011, CML, believing that USRC was the renamed IBRC, negotiated a Rail Track Agreement (2011 Operating Agreement) with USRC. According to PIC, the 2011 Operating Agreement was intended primarily to update the terms and conditions under which USRC (which CML thought was IBRC) would provide rail service to CML, and it adopted the same non-assignment provisions as in the 2008 Operating Agreement. PIC further states that it entered into an Assignment and Assumption Agreement with CML in November 2011 in which CML assigned its rights and obligations under the 2011 Operating Agreement to PIC.

According to PIC, under the belief that USRC was the renamed IBRC, neither PIC nor CML objected when USRC commenced operations over the Line in early 2011. PIC asserts, however, that by the end of 2011, USRC's service levels had deteriorated and were not in accordance with the rail service commitments outlined in the 2011 Operating Agreement. As a result, PIC states that CML sent USRC a notice of default on October 13, 2011.

A week later, on October 21, 2011, USRC filed its verified notice of exemption in this docket. In that 2011 Notice, USRC acknowledges that, despite previously having advised the Board that IBRC had merely changed its name to USRC, USRC in fact was "a corporation separate and distinct from IBRC" and sought an exemption to change the operator on the Line from IBRC to USRC. The 2011 Notice further states that the Line "is operated by USRC pursuant to an Operating Agreement with PIC" and that, as of October 1, 2008, USRC had "acquired IBRC's operating authority" to operate the Line. As part of the information required for notices of exemption under 49 C.F.R. § 1150.33, the 2011 Notice states that "[a]n agreement between USRC and IBRC was reached for USRC's acquisition of IBRC's authority to operate the [] Line, and for USRC's operation of the [] Line." According to PIC, it was through this filing that PIC first discovered that IBRC and USRC were separate corporations.

In December 2011, CML and PIC terminated the 2011 Operating Agreement with USRC. Thereafter, CML sought rail service from its subsidiary rail carrier, PIC, which began to provide exclusive rail service over the Line to CML's facility. On December 15, 2011, USRC sued CML in state court alleging breach of the 2011 Operating Agreement and asserting various claims against CML. The case was removed to the United States District Court for the District of Utah on December 17, 2011.

On June 20, 2012, the federal district court resolved the case before it by entering a consent decree between CML and USRC.⁵ The consent decree finds, among other things, that "[IBRC] and USRC are not the same company" and that IBRC "was voluntarily dissolved by Mr. Root effective December 31, 2009, on the grounds that it was 'no longer in business.'" Further, the consent decree provides that "USRC never obtained from the STB valid operational authority or a valid exemption under [Board] procedures to operate on the [Line] in its own

⁵ See PIC's Pet., Ex. H (filed June 27, 2012).

name; nor did it, or could it, derive such authority from [IBRC] without valid regulatory authority and the express contractual consent of PIC Railroad and CML, neither of which USRC obtained.” As such, the court found the 2011 Operating Agreement terminated for cause effective December 15, 2011.

The following week, on June 27, 2012, PIC filed its petition to reject USRC’s 2011 Notice or revoke the exemption. PIC claims that: (1) USRC misled the Board regarding the corporate status of USRC, as well as the relationship between USRC and IBRC; (2) USRC failed to disclose that IBRC’s corporate status was dissolved at the time of IBRC’s purported transfer of operating rights; (3) USRC misleadingly implied in its notice that IBRC possessed the contractual right to convey common carrier operating authority to USRC; and (4) USRC falsely stated that it had an agreement with PIC to operate over the Line. On July 2, 2012, USRC filed a one-page reply, stating that although “numerous statements” in PIC’s petition are “false and materially misleading,” USRC “does not oppose the relief sought” in the petition.⁶

DISCUSSION AND CONCLUSIONS

Under 49 C.F.R. § 1150.32(c), an exemption is void *ab initio*⁷ if the party’s verified notice contains false or misleading information. In applying this standard, the Board examines the allegedly false or misleading statement to determine if it is material to the exemption sought. U.S. Rail Corp.—Lease & Operation Exemption—Shannon G., a N.J. LLC, FD 35042 (STB served Oct. 8, 2008). A statement is material if, for example, the transaction would not have otherwise qualified for an exemption. Berkshire Scenic Ry. Museum, Inc. v. ICC, 52 F.3d 378 (1st Cir. 1995).

We find that the 2011 Notice materially misrepresents the facts related to the required statement in a verified notice of exemption under 49 C.F.R. § 1150.33(c) that “an agreement has been reached or details about when an agreement will be reached” for operation of the affected line. In purported satisfaction of that requirement, USRC states in the 2011 Notice that “an agreement between USRC and IBRC was reached for USRC’s acquisition of IBRC’s authority to operate the [Line], and for USRC’s operation of the [Line],” and USRC states elsewhere in the 2011 Notice that as of October 1, 2008, USRC had “acquired IBRC’s operating authority” to operate the Line. The federal court determined, however, through its consent decree, that IBRC and USRC “are not the same company” and that USRC did not, and could not, derive operational authority from IBRC without “the express contractual consent of PIC Railroad and CML, neither of which USRC obtained.”

⁶ The federal court’s negotiated consent decree enjoined USRC from contesting any action before the Board to reject or revoke the notice of exemption filed in this docket.

⁷ Authority sought pursuant to a notice of exemption found void *ab initio* is considered as never having taken effect. See S.F. Bay R.R.-Mare Island—Operation Exemption—Cal. N. R.R., FD 35304, slip op. at 2 n.5 (STB served Dec. 6, 2010).

Because USRC recites in its notice that an agreement with IBRC had been reached, it led the Board to believe that the requirements at 49 C.F.R. pt. 1150, subpart D, had been fulfilled. However, as the federal district court found, they had not. Such information was material to our grant of the exemption allowing USRC to replace IBRC as an operator on the Line. Because the required statement regarding an agreement with IBRC is false and misleading, and that information is material to the exemption sought, the 2011 Notice fails to qualify for an exemption under 49 C.F.R. § 1150.31 and the exemption is void ab initio. As such, the exemption is considered as never having taken effect; accordingly, USRC's notice will be rejected.

Because we are rejecting the 2011 Notice on the ground that it contained false and misleading information and thus the exemption is void ab initio under 49 C.F.R. § 1150.32(c), we need not consider whether the exemption should be revoked under the statutory revocation standard of 49 U.S.C. § 10502(d).

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

It is ordered:

1. PIC's petition to reject USRC's 2011 notice of exemption is granted.
2. USRC's exemption is void ab initio.
3. PIC's request to revoke the exemption is denied as moot.
4. This decision is effective on its service date.

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