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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34536

INDIANA & OHIO CENTRAL RAILROAD, INC.–
ACQUISITION AND OPERATION EXEMPTION–CSX TRANSPORTATION, INC.

Decided: August 23, 2005

We are denying petitions filed by the Brotherhood of Locomotive Engineers & Trainmen (BLET) and the United Transportation Union (UTU) (jointly, petitioners) seeking to revoke the exemption authorized in this proceeding.

BACKGROUND

By notice of exemption served and published in the Federal Register on October 1, 2004 (69 FR 58999), Indiana & Ohio Central Railroad, Inc. (IOCR),¹ a Class III rail carrier that is a subsidiary of RailAmerica, Inc. (RailAmerica), was authorized to operate under lease from CSX Transportation, Inc. (CSXT), approximately 107 miles of rail line in Ohio, consisting of the Cincinnati Terminal Subdivision between NA Tower, milepost BB 7.5, and Oakley, milepost BB 12.4, and the Midland Subdivision between Oakley, milepost BB 12.4, and Columbus, milepost BR 114.6 (collectively, “the Line”). The exemption became effective on October 16, 2004.

On September 13, 2004, BLET filed a protest, asking the Board to reject the exemption notice.² UTU filed a petition to revoke the exemption on September 15, 2004, and an amended petition to revoke on September 24, 2004. UTU also sought discovery from IOCR under 49 CFR 1121 and 1114 to obtain copies of all leases and other written arrangements between IOCR

¹ On or about May 1, 2005, IOCR was to be merged into its affiliate, Indiana & Ohio Railway Company, as part of a proposed corporate restructuring. See Indiana & Ohio Railway Company–Merger Exemption–Indiana & Ohio Central Railroad, Inc., STB Finance Docket No. 34686 (STB served May 18, 2005). For purposes of this decision, we will continue to refer to this entity as IOCR.

² Because the exemption has become effective, we will treat BLET’s filing as a petition to revoke the exemption.

and CSXT relating to the transaction. On October 1, 2004, IOCR replied to the petitioners' filings. On November 5, 2004, UTU filed a motion to compel IOCR to produce the materials sought by discovery, to which IOCR responded on November 15, 2004.

In a decision served on November 23, 2004, the Board instituted a proceeding to consider issues raised by the petitioners, granted UTU's motion to compel, directed IOCR to produce the material sought through discovery, and set a procedural schedule for UTU's supplemental filing and IOCR's reply.³ UTU filed its supplemental petition to revoke on January 18, 2005,⁴ to which CSXT and IOCR responded on February 2, 2005.

POSITIONS OF THE PARTIES

In their initial filings, petitioners claim that this transaction is part of a CSXT program to dispose of over 3,500 miles of track through various small transactions without Board review in a single proceeding under 49 U.S.C. 11323-24. They contend that this transaction has regional or national transportation significance, and that the Board should consider it under the procedures in 49 U.S.C. 11325(d), pointing out that, as a result of this transaction and another proposal in STB Finance Docket No. 34540, Columbus and Ohio Railroad Company—Acquisition and Operation Exemption—Rail Lines of CSX Transportation, Inc., CSXT will discontinue service in a well-populated area of Ohio.⁵

Petitioners contend that the Board cannot determine from the limited amount of information required by the class exemption procedures in 49 CFR 1150.41 whether this is an arm's length transaction that carries out the rail transportation policy (RTP) in 49 U.S.C. 10101. They are particularly concerned about the policy directive in 49 U.S.C. 10101(11) that the Board's regulation encourage fair wages and safety and suitable working conditions. Petitioners state that they are also concerned that IOCR could later use the abandonment rules that have been proposed by a group of short line and regional carriers in STB Ex Parte No. 647, Class

³ A decision served on December 21, 2004, extended the due date for UTU's supplemental filing and IOCR's reply.

⁴ With its supplemental petition, UTU submitted copies of various agreements entered into by CSXT and IOCR relating to the transaction, including the Transaction Agreement, the Lease and Purchase of Rail Improvements Agreement, Retention of Trackage Rights Agreement, and the Freight Operating Agreement. UTU filed full copies of the agreements under seal pursuant to a protective order served on December 23, 2004.

⁵ Petitioners raise the same issues in STB Finance Docket No. 34540, which will be addressed in a separate decision in that proceeding.

Exemption for Expedited Abandonment Procedure for Class II and Class III Railroads, notice served August 13, 2002, to expedite abandonment of the line. Petitioners further claim that the transaction was not motivated by the desire to realize legitimate business goals, and that IOCR was not a logical entity to be considered as the operator.

In its supplemental petition, UTU also contends that the transaction will enable CSXT to evade obligations in its collective bargaining agreements by moving a number of jobs to IOCR, which, it claims, is a nonunion carrier. UTU asserts further that the transaction is similar to a transaction that was disallowed in Sagamore National Corporation–Acquisition and Operation Exemption–Lines of Indiana Hi-Rail Corporation, Finance Docket No. 32523 *et al.* (ICC served Oct. 28, 1994) (Sagamore).

UTU asserts that the transaction agreements will enable CSXT to maintain significant control over IOCR's operation of the track and the property. UTU notes that the Lease and Purchase of Rail Improvements Agreement provides for IOCR to lease the land from CSXT and purchase the track and improvements, and it details CSXT's ownership rights as well as IOCR's obligations and limitations for using the property. According to UTU, the agreement precludes IOCR from granting trackage rights, hauling rights, or any other rail operational rights over the track to another carrier or third party without CSXT's consent; grants CSXT the right to inspect the land and buildings at any time; requires that IOCR obtain CSXT's consent to use the line as collateral for public funding; limits the assignment of the lease; and requires that IOCR obtain insurance to protect CSXT's interest in the property. UTU notes that CSXT will also retain rentals, fees or other payments on portions of the property that do not interfere with IOCR's operations.

UTU indicates further that CSXT and IOCR have agreed in the Retention and Trackage Rights Agreement that CSXT will retain trackage rights to operate its own trains with its own crews over a 28.65-mile segment of the Midland Subdivision between Columbus and Bloomingburg and that IOCR must purchase insurance for this arrangement, naming CSXT as the insured. UTU cites as another indication of CSXT control the fact that the Freight Operating Agreement permits CSXT to audit IOCR's records and makes CSXT responsible for billing of freight charges and related administrative functions. IOCR is also required to adopt and participate in designated CSXT tariffs. UTU notes that CSXT will be the primary source of supply for freight cars for IOCR, and that IOCR will be limited as to where and how these cars may flow. Further, according to UTU, the railroads' interchange agreement requires that IOCR obtain insurance, naming CSXT as beneficiary, and precludes IOCR from performing any local freight service on the designated interchange tracks or accessing the tracks without CSXT's authority.

Responding to the petitioners' initial submissions, IOCR states that it submitted a bid to CSXT to acquire and operate the Line, and that IOCR was selected by CSXT as the winning bidder. IOCR indicates that it then negotiated the necessary agreements with CSXT. IOCR points out that it is not commonly controlled with CSXT; rather, it is a subsidiary of

RailAmerica, while CSXT is a subsidiary of CSX Corporation (CSX). IOCR states that it has a fiduciary duty to RailAmerica to negotiate an arm's-length, commercially reasonable agreement with CSXT, and that RailAmerica, as a publicly traded company, has a fiduciary responsibility to its stockholders to ensure that its subsidiaries negotiate arm's-length, commercially reasonable agreements. IOCR states that the management of CSXT has a similar fiduciary duty to CSX, a publicly traded company, and CSX, in turn, has a similar duty to its stockholders. IOCR asserts that it and CSXT negotiated the necessary agreements at arm's length for legitimate business reasons.

IOCR states that it sought an exemption from the provisions of 49 U.S.C. 10902 to acquire the line and posted, served and certified a notice to labor interests on August 12, 2004, as required by the Board's rules at 49 CFR 1150.42(e). The notice advised CSXT employees that IOCR expected that it would hire four operating employees, one locomotive mechanic and two track inspectors, and that IOCR's collective bargaining agreement with BLET would apply to operating employees. IOCR asserts that the notice of exemption that it filed on September 1, 2004, contained all the information required by the Board's procedures at 49 CFR 1150.41, et seq., and that the petitioners have failed to show that the notice is not in compliance with the Board's requirements.

IOCR disputes petitioners' assertion that the transaction should be considered under 49 U.S.C. 11323 and 11324. It asserts that the procedures in section 10902 were established to enable Class II and Class III railroads to acquire rail lines as an alternative to the procedures in section 11323. IOCR argues that the only requirement for filing under section 10902 is that the acquiring railroad must be a Class II or Class III carrier. According to IOCR, the size of the transaction, the size of the selling railroad, whether the selling railroad is engaging in an ongoing or long-term plant rationalization program, whether the transaction is a sale or lease, and whether the line is to be acquired as a result of competitive bidding or a single offer are not factors to be considered in line sale actions under section 10902.

IOCR adds that section 10902 does not require an affirmative finding that a proposed transaction serves the public convenience and necessity. Rather, section 10902(c) specifies that the Board shall authorize a transaction unless it finds that it is inconsistent with the public convenience and necessity and that petitioners have not shown that the proposed acquisition is inconsistent with the public convenience and necessity.

IOCR also disputes petitioners' claim that the transaction has regional or national transportation significance, pointing out that there is not enough local or overhead traffic on the 107-mile line to raise regional or national concerns. IOCR assures us that it did not acquire the Line to abandon it, but rather, it is committed to providing service to shippers. Moreover, the region will continue to have CSXT's service because that carrier will continue to serve both Cincinnati and Columbus and will retain its main line between Chicago and the east through Ohio and will continue to operate other lines north and south of the Line. IOCR notes that the Norfolk Southern Corporation (NS) also serves Cincinnati and Columbus.

Responding to UTU's assertion that it is not a logical operator for the line, IOCR states that its existing lines connect with the Line at Midland City and Washington Court House. It states that it already serves the market and that it is familiar with the transportation needs of shippers between Cincinnati and Columbus. IOCR also disputes UTU's assertion that it is nonunion, pointing out that BLET currently represents its operating employees. It also disagrees with UTU's assertion that the transaction is similar to Sagamore.

IOCR states that the specific terms of the transaction agreements are typical for short line railroad transactions. It notes that the transaction was negotiated under the same guidelines that have been used in many other transactions involving RailAmerica rail subsidiaries. In IOCR's view, the terms of the agreements merely facilitate the smooth transition and operation of a short line railroad. IOCR indicates that the restrictions and limitations in the lease agreement are normal in real estate leases and result from arm's-length negotiations between willing parties, noting that the rights retained by CSXT are to protect CSXT's property interest while not interfering with IOCR's common carrier operation of the line.

According to IOCR, CSXT's retained trackage rights will enable CSXT to continue to serve the three shippers who entered into contracts with CSXT. IOCR notes that it is common practice for a transferor to retain trackage rights for contract moves over the transferor's system that provides more efficient service to the shipper than would an interchange with the transferee.

In its response, CSXT states that it reached an arm's-length agreement with IOCR to acquire the line, and notes that the provisions in its contractual arrangements with IOCR are typical in this type of line sale and lease. According to CSXT, the transaction here is one of many line transactions that it has entered into in the last 25 years as it focuses its business on operations that make the most business sense.⁶

CSXT acknowledges that it is the primary source of cars for IOCR, but states that this is not unusual in the industry. CSXT points out that short line railroads often rely on the Class I railroad they interchange with for cars. According to CSXT, the agreement between CSXT and IOCR does not obligate CSXT to provide cars to IOCR and does not preclude IOCR from acquiring cars itself.

⁶ See, e.g., Central Railroad Company of Indianapolis—Lease and Operation Exemption—CSX Transportation, Inc., STB Finance Docket No. 34508 (STB served July 30, 2004); M&B Railroad L.L.C.—Acquisition and Operation Exemption—CSX Transportation, Inc., STB Finance Docket No. 34423 (STB served Nov. 20, 2003); R.J. Corman Equipment Co., LLC—Acquisition Exemption—Lines of CSX Transportation, Inc., STB Finance Docket No. 34386 (STB served Sept. 12, 2003).

CSXT asserts that there is no basis for UTU's contention that this transaction is a means to move jobs out from under UTU's collective bargaining agreements with CSXT. CSXT states that the transaction met its business goal of focusing its capital and other resources on rail lines that contribute in a meaningful way to its return on investment. The transaction, CSXT notes, also met IOCR's goal of expanding its services in central Ohio.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10502(d), we may revoke an exemption, in whole or in part, if we find that regulation of a transaction is necessary to carry out the RTP of 49 U.S.C. 10101. To justify revocation, petitioners must demonstrate reasonable, specific concerns addressing the need for regulation. Wisconsin Central Ltd.—Exemption Acquisition and Operation—Certain Lines of Soo Line Railroad Company, Finance Docket No. 31102 (ICC served July 28, 1988); Minnesota Comm. Ry. Inc.—Trackage Exempt.—BN RR. Co., 8 I.C.C.2d 31 (1991); I&M Rail Link LLC—Acquisition and Operation Exemption—Certain Lines of Soo Line Railroad Company d/b/a Canadian Pacific Railway, STB Finance Docket No. 33326 et al. (STB served Apr. 2, 1997), aff'd sub nom. City of Ottumwa v. STB, 153 F.3d 879 (8th Cir. 1998). Petitioners have failed to make the requisite showing.

There is no merit to petitioners' assertion that the transaction should be considered under 49 U.S.C. 11323 and 11324, rather than section 10902. Section 10902 was enacted in the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, as a means of facilitating the acquisition or operation of additional lines by small, Class II or Class III railroads. Transactions involving acquisitions by Class II or Class III carriers under section 10902 are handled under the class exemption at 49 CFR 1150, subpart E. See Indiana & Ohio Railway Company—Acquisition Exemption—Lines of the Grand Trunk Railroad Inc., STB Finance Docket No. 33180 (STB served Feb. 10, 1997). IOCR, a Class III carrier, properly invoked the procedures in the class exemption at 49 CFR 1150, subpart E, and provided all of the required information in its notice of exemption. The fact that CSXT has entered into similar arrangements with other small railroads on other parts of its system does not mean that any or all of these small carrier transactions should be deemed to be a single, larger transaction under sections 11323 and 11324.

Similarly, petitioners have provided no evidence or argument to support their claim that the transaction has regional or national transportation significance. At issue is the lease and operation of a 107-mile line in central Ohio that generates only a limited amount of traffic. The transaction does not deprive the region of service from major carriers because both Columbus and Cincinnati will continue to be served by CSXT and by NS. Moreover, CSXT's line to the north and south of this Line will remain in service and CSXT will retain its main line through Ohio to serve Chicago and the eastern seaboard. As for shippers located along this Line, we credit IOCR's commitment to provide good service as a smaller carrier that can respond to local shippers' needs more easily than a larger carrier such as CSXT, which serves a large portion of the United States.

This transaction is in essence no different than many others that have routinely been approved by the Board for many years. See, e.g., Kaw River Railroad, Inc.–Acquisition and Operation Exemption–The Kansas City Southern Railway Company, STB Finance Docket No. 34509 (STB served May 3, 2005) (Kaw River); Port of Pend Oreille D/B/A Pend Oreille Valley Railroad–Acquisition and Operation Exemption–The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 33561 (STB served Oct. 23, 1998) (Pend Oreille); Portland & Western Railroad, Inc.–Lease and Operation Exemption–Lines of Burlington Northern Railroad Company, STB Finance Docket No. 32766 (STB served Oct. 15, 1997, and Feb. 24, 1998) (Portland & Western). Larger railroads have shed many of their lighter density lines and have focused more of their resources on their main line service, thus improving their financial health, as we noted in Meridian Southern Railway, LLC–Acquisition and Operation Exemption–Line of Kansas City Southern Railway Company, STB Finance Docket No. 33854 (STB served Aug. 29, 2000). Service has not been degraded because short line railroads have been able to fill in the gaps where Class I railroads no longer provide service. Indeed, in Buckingham Branch Railroad Company–Lease–CSX Transportation, Inc., STB Finance Docket No. 34495 (STB served Nov. 5, 2004) (Buckingham Branch), another recent case in which a small carrier took over operation of a CSXT line, numerous shippers indicated that they welcomed having CSXT replaced by a smaller carrier that would pay more attention to their needs. As in Buckingham Branch, CSXT has decided to focus its capital and other resources on more economically justified rail lines and has selected IOCR as the successful bidder to provide service on the Line. This transaction will enable CSXT to concentrate its resources on more economically justified lines, while enabling IOCR to expand its operations and provide local service to shippers on the Line. Petitioners have not shown how this transaction differs from those many previous transactions, including Buckingham Branch, that we have approved.

Petitioners offer no convincing evidence or argument to support their assertions that revocation of the exemption is necessary to carry out the RTP, particularly the directive regarding the impact on rail labor. And we see no basis for finding that labor impacts of this transaction warrant further regulatory inquiry. As noted, the labor notice informed local CSXT employees that IOCR expects to hire additional employees and that IOCR's collective bargaining agreement with BLET would apply to operating employees. Petitioners have not shown that the labor impact here is different in character from, or greater than, the impacts typically associated with acquisitions by Class III carriers. Petitioners have not rebutted either the presumption in section 10902(c) that this transaction is consistent with the public convenience and necessity, or the presumption reflected in the class exemption that this acquisition does not warrant detailed Board scrutiny to carry out the RTP. See Kaw River.

Nor have petitioners shown that the transaction is merely a device to move jobs out from under a collective bargaining agreement to a nonunion carrier, as the unions claim. As discussed above, employees performing the operations for IOCR will come under its collective bargaining agreement with BLET.

Moreover, the record shows that CSXT and IOCR are unrelated companies that negotiated a legitimate arm's-length transaction meant to realize each carrier's legitimate business goals. As noted, CSXT will be able to focus its capital and other resources on more economically justified rail lines, while IOCR, a Class III carrier that currently serves the central Ohio area, will be able to expand its operations to serve additional customers in the area consistent with its business goals and those of its parent, a longstanding and experienced owner of short line railroads. See Kaw River. Additionally, there is nothing in the record indicating that IOCR intends to abandon service, and we note that the more relaxed abandonment procedure that has been proposed in STB Ex Parte No. 647 (cited by petitioners) has not been adopted and remains pending. We find no evidence suggesting that abandonment of this Line will likely occur.

We do not agree with petitioners that this transaction is a sham resembling that disallowed in Sagamore. In that proceeding, our predecessor, the Interstate Commerce Commission, rejected the proposed transaction because a carrier with a collective bargaining agreement purported to "sell" its lines to a newly created carrier that actually was controlled by the same owners. The evidence indicated that the seller and buyer had the same address, president and other officers, and members of the respective boards of directors. But the record here does not show that the subject transaction is a sham similar to that in Sagamore. In contrast, the record here shows that IOCR was not created for this transaction, that IOCR and CSXT are separate, financially independent entities with no common management, and that the transaction was motivated by the carriers' desires to realize legitimate business goals. See Portland & Western (STB served Oct. 15, 1997); Kaw River.

Similarly, we find no merit to UTU's assertions that CSXT has retained too much control over the lines and their operation under the terms of the transaction agreements. The agreements resulted from arm's-length negotiations by willing and experienced carriers, and the terms of the agreements appear to be typical for these types of short line railroad transactions. See, e.g., Kaw River. Both IOCR and CSXT agree that the restrictions and limitations imposed on IOCR in the lease agreement are provisions normally found in real estate leases, and that the rights retained by CSXT protect CSXT's property interest. And provisions giving CSXT responsibility for car supply and for administrative functions, such as collection and billing of freight charges, are common in the industry. See Pend Oreille. Further, we agree that CSXT's retained rights do not interfere with IOCR's common carrier rights to operate the line.

In sum, having reviewed all of the evidence and arguments by the parties, we find no basis for revocation. Petitioners have failed to demonstrate that regulation of this transaction is needed to carry out the RTP. Thus, we deny the petitions to revoke.

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

It is ordered:

1. BLET's and UTU's petitions to revoke the exemption in this proceeding are denied.
2. This decision is effective on its date of service.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey. Commissioner Mulvey dissented with a separate expression.

Vernon A. Williams
Secretary

COMMISSIONER MULVEY, dissenting:

I dissent from the Board's decision in this case. I find that the lease agreement between Indiana & Ohio Central Railroad (IOCR) and CSXT includes fundamentally anti-competitive provisions, arguably circumvents labor protections, and should not qualify for consideration under our exemption process. I would have revoked the exemption and required the railroads to file a formal application with the Board so that these matters could have been explored to the fullest.

The lease agreement at issue includes a variety of provisions which greatly restrict the ability of the acquiring railroad to operate as a truly independent carrier. The lease allows CSXT to maintain significant control over IOCR's operations, use of property, relations with other carriers, shippers and the public. As such, CSXT is employing paper barriers to restrain trade in rail transportation in the region, and these and other anti-competitive effects on the shipping public should be examined in greater detail.

In addition, labor has charged that this transaction allows CSXT to circumvent its contractual agreements with its employees. IOCR counters by stating that it is a union carrier and notes that train crew members belong to the Brotherhood of Locomotive Engineers and Trainmen (BLET). Incongruously, however, the BLET was a party to this case protesting the transaction. Requiring CSXT to submit a full application would have afforded the parties the opportunity to provide the Board with more evidence on this issue.

Moreover, the class exemptions, such as the one invoked by CSXT in this case, were originally designed to facilitate the non-controversial and relatively minor streamlining of the nation's rail network to allow for a more rationalized system. But as Class I carriers continue to use these exemptions to shave off thousands of miles of track by subdividing their downsizing into smaller transactions, the Board should more regularly require full applications to allow for

complete review of the transactions and their potential impact on railroad employees, rail shippers, and the national transportation system. While I would prefer not to interfere with contracts between private parties, I believe that the Board must do so when contractual provisions run counter to key elements of our national transportation policy and the broader public interest as a whole.