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SERVICE DATE – DECEMBER 4, 2009

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35137

THE INDIANA RAIL ROAD COMPANY—TRACKAGE RIGHTS EXEMPTION—CSX
TRANSPORTATION, INC.

Decided: December 2, 2009

By verified notice of exemption filed on April 29, 2008, and amended on May 21, 2008, The Indiana Rail Road Company (INRD) invoked the Board's class exemption procedures under 49 CFR 1180.2(d)(7) to acquire trackage rights over 10 miles of rail line owned by CSX Transportation, Inc. (CSXT). Pursuant to the parties' written trackage rights agreement (CSXT/INRD trackage rights agreement), CSXT agreed to grant non-exclusive, limited local trackage rights to INRD between the connection of CSXT and INRD trackage at Sullivan, IN, at approximately CSXT milepost OZA 204.5, and the connection between CSXT's line and the tracks leading to the Sunrise Coal Company loading facility (Sunrise facility) at Carlisle, IN, at approximately CSXT milepost OZA 214.5.¹ According to INRD, the trackage rights are limited to empty hopper trains moving to, and loaded hopper trains carrying coal from, the Sunrise facility located on the line, and destined to two electric utility plants, the Indianapolis Power & Light's (IP&L) Harding Street Generating Station (Harding Station) at Indianapolis, IN, and Hoosier Energy's (Hoosier) Merrom Generating Station (Merrom Station) at Merrom, IN, both located on INRD's line. Notice of the exemption was served and published in the Federal Register on May 15, 2008 (73 FR 28189-90), and amended by decision served on May 22, 2008. The exemption became effective on May 30, 2008.

On June 19, 2008, the Brotherhood of Locomotive Engineers and Trainmen and the United Transportation Union (collectively, petitioners) filed a petition to revoke the exemption. They argue that the notice of exemption contains false and misleading information because the notice fails to disclose CSXT's controlling interest in INRD's common stock.² Petitioners also

¹ In Finance Docket No. 35287, INRD has submitted a verified notice of exemption for trackage rights over CSXT's line, from CSXT milepost OZA 204.5 to milepost OZA 219.05. The trackage rights agreement granting these rights would supplement the trackage rights agreement at issue here.

² The Board approved CSXT's acquisition of controlling stock interest in INRD's parent, Midland United Corporation, on November 7, 1996. See CSX Corporation and CSX Transportation, Inc.—Control—The Indiana Rail Road Company, STB Finance Docket No. 32892 (STB served Nov. 7, 1996).

argue that CSXT's operational and ownership control over INRD, as reflected in the terms of the trackage rights agreement, demonstrates that there is substantial identity of interest between the two carriers and that the transaction is a sham that was devised by CSXT to avoid its collective bargaining agreement.

On July 8, 2008, INRD replied to the petition. CSXT also filed a reply in opposition on July 9, 2008. INRD and CSXT (collectively, respondents) maintain that the notice of exemption is not false and misleading and that the trackage rights arrangement is not a sham, but rather a bona fide transaction that was entered into for legitimate business and transportation reasons.

By decision served on September 17, 2008, the Board instituted a proceeding under 49 U.S.C. 10502(d) to consider petitioners' request.

We have carefully considered the record but are unable to reach a majority decision on the petition to revoke. Accordingly, the requested relief cannot be granted, and INRD's notice of exemption remains in effect.

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

It is ordered:

1. The petition to revoke the exemption is denied as the Board was unable to reach a majority.
2. This decision is effective on December 4, 2009.

By the Board, Vice Chairman Nottingham and Commissioner Mulvey, Chairman Elliott is not participating. Vice Chairman Nottingham commented with a separate expression and Commissioner Mulvey commented with a separate expression.

VICE CHAIRMAN NOTTINGHAM, commenting:

This decision arises as a result of the recusal of one Board member and a disagreement between the two remaining voting members regarding the appropriate Board response to a petition to revoke a notice of exemption. I concur in the result here, as I would vote to deny the petition to revoke the exemption. The record reflects that the transaction was motivated by respondents' legitimate business goals, will result in improved operational efficiencies, and has permitted INRD to provide efficient single-line service for a new rail movement of coal that previously moved by truck, amounting to some 1.8 million tons per year. Petitioners' claims that

the notice of exemption is false or misleading and that the trackage rights were entered into as a sham to avoid obligations under collective bargaining agreements are not supported by the record in this case. Indeed, I strongly support the efforts of carriers to enter into agreements, such as this one, that create new, efficient single-line rail service that can compete with trucks and result in the shift of freight from the highways to the rails.

By way of background, on November 7, 1996, the Board approved CSXT's acquisition of control of INRD's parent (and thus INRD), finding that the standard required under 49 U.S.C. 11324(d) was met. That vote was unanimous.³ In this proceeding, CSXT and INRD have invoked our standard trackage rights class exemption to permit INRD to acquire certain trackage rights over CSXT to permit INRD to deliver coal in single-line service from the Sunrise facility on CSXT's line to the Harding and Merrom Stations on INRD's line. Petitioners have sought to revoke that exemption.

Under 49 U.S.C. 10502(d), the Board may revoke an exemption, in whole or in part, if it finds that regulation of a transaction is necessary to carry out the rail transportation policy of 49 U.S.C. 10101. The party seeking revocation has the burden of proof, and petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and that more detailed scrutiny of the transaction is necessary. See Consolidated Rail Corporation—Trackage Rights Exemption—Missouri Pacific Railroad Company, Finance Docket No. 32662 (STB served June 18, 1998); Minnesota Comm. Ry., Inc.—Trackage Exempt.—BN RR. Co., 8 I.C.C.2d 31, 35 (1991) (Minnesota).

When the Board considers whether to revoke an exemption, we address those factors that would be relevant in an application proceeding. See Village of Palestine v. ICC, 936 F.2d 1335 (D.C. Cir. 1991). If the underlying section of the statute does not require review of particular factors or claims, then logic dictates that our review of a notice of exemption from that same section would not require review of those factors or claims. The grant of trackage rights from CSXT to INRD, absent exemption, would have been subject to an application proceeding under 49 U.S.C. 11324(d), under which the agency is to approve the application if there is no anticompetitive impact from the transaction or if any anti-competitive impact is outweighed by the public interest in meeting significant transportation needs. Petitioners in this case do not argue or demonstrate that the trackage rights transaction has anticompetitive effects. Indeed, the record shows that the transaction has created new, efficient single-line rail service to provide new competition for coal shipments previously moving by truck.

Nor, in my view, have petitioners offered any other convincing reason to warrant revoking the exemption. They argue that the notice of exemption is false or misleading and therefore should be revoked as void ab initio under 49 CFR 1180.4(g)(1)(ii), because INRD did

³ CSX Corporation and CSX Transportation, Inc.—Control—The Indiana Rail Road Company, STB Finance Docket No. 32892 (STB served Nov. 7, 1996).

not disclose that CSXT owns 85% of the common stock of INRD's parent. The record shows, however, that the notice of exemption complied with the governing rules and provided all of the information required for seeking a trackage rights class exemption. Those rules do not require an applicant to identify commonly controlled railroads. See 49 CFR 1180.4(g). Whether a party invoking a class exemption has provided false or misleading information turns on whether the party has, in its notice, represented that it may lawfully invoke the class exemption when, in fact, it cannot.⁴ The trackage rights class exemption at 49 CFR 1180.2(d)(7) is available to any existing carrier, even an affiliate of the owner of the line. A corporate relationship between the parties to a trackage rights agreement does not affect the availability of the trackage rights class exemption; accordingly, not disclosing such a relationship does not render the notice false or misleading.⁵

Further, in my view the record does not support petitioners' argument that this transaction is a sham devised by CSXT to avoid obligations under its collective bargaining agreement. When a party challenges the bona fides of a transaction, the Board, like its predecessor, the ICC, may revoke an exemption to protect the integrity of its processes where it is shown that the proposed transaction is in fact a sham. See Minnesota, 8 I.C.C.2d at 37. But here I find no evidence that the integrity of our trackage rights exemption procedures has been abused or that this trackage rights transaction is a sham.

⁴ See R.J. Corman Railroad Company/Pennsylvania Lines, Inc.—Abandonment Exemption—in Clearfield, Jefferson, and Indiana Counties, PA, STB Docket No. AB-491 (Sub-No. 2X), slip op. at 2-3 (STB served Dec. 11, 2008); see, e.g., Buffalo & Pittsburgh Railroad, Inc.—Abandonment Exemption—in Erie and Cattaraugus Counties, NY, STB Docket No. AB-369 (Sub-No. 7X), slip op. at 2 (STB served Nov. 4, 2008).

⁵ I do not find persuasive petitioners' reliance on Sagamore National Corporation—Acquisition and Operation Exemption—Lines of Indiana Hi-Rail Corporation, Finance Docket No. 32523 (ICC served June 29, 1994). That case did not involve trackage rights under 49 U.S.C. 11323, but rather authority to acquire and operate a line of railroad under 49 U.S.C. 10901. That distinction is important because under section 10901 (unlike section 11323), the entity seeking authority must be a noncarrier and, therefore, independent of the carrier conveying the line. See Michigan Central Railway, LLC—Acquisition and Operation Exemption—Lines of Norfolk Southern Railway Company, STB Finance Docket No. 35063 *et al.* (STB served Dec. 10, 2007) (Michigan Central). The failure to disclose the controlling ownership in Sagamore was significant because that controlling interest demonstrated that the entity seeking the exemption was not independent enough to be a noncarrier, and thus the transaction did not qualify for approval under section 10901. Moreover, in Sagamore, the identity between the seller of a line and the purchaser, a newly created entity, was not publicly known, whereas CSXT's control of INRD was authorized by the Board in a public proceeding and is known to UTU and BLET.

Petitioners argue that CSXT would exercise too much control over INRD's management of and operation over the line, citing CSXT's 85% ownership of INRD and various terms of the CSXT/INRD trackage rights agreement. (INRD additionally volunteers that 3 of the 5 members of INRD's Board of Directors are CSXT employees nominated by CSXT.) However, CSXT's level of control over INRD is not a determinative factor in the validity of a trackage rights transaction. The Board has granted authority for trackage rights over the lines of another rail carrier under 49 U.S.C. 11323 and related exemptions without regard to the corporate relationship of the two carriers,⁶ even when one is a wholly-owned subsidiary of the other.⁷ The independence of a carrier seeking trackage rights is not a critical factor because trackage rights transactions (which are subject to labor protection) do not require the entity seeking authority to be a noncarrier. Moreover, in any event, INRD's CEO and president offers unrefuted testimony as to INRD's financial, operational, and managerial independence from CSXT, which I find persuasive.

In my view, the mere fact that two rail carrier parties to a trackage rights agreement are corporately related is not inherently suspicious and does not suggest any improper motivation underlying the trackage rights transaction or provide a basis for revoking the exemption. Other evidence is needed to show that the transaction is a sham. Compare N&W Ry. Co. (declining to revoke an exemption for trackage rights authority between a rail carrier and its wholly-owned subsidiary when the record included evidence of increased operational efficiencies and no evidence of an ulterior motive to circumvent collective bargaining obligations) with Burlington Northern R. Co. v. United Transp. Union, 862 F.2d 1266 (7th Cir. 1988) (Winona Bridge) (finding a trackage rights transaction between a carrier and its wholly-owned subsidiary "alter ego" to be a sham when the record also included indicia of anti-union animus and evidence of the grantor's intent to avoid union obligations).⁸

⁶ See, e.g., Gateway Western Railway Company—Trackage Rights Exemption—The Kansas City Southern Railway Company, STB Finance Docket No. 33894 (STB served Aug. 3, 2000); The Kansas City Southern Railway Company—Trackage Rights Exemption—Gateway Western Railway Company and Gateway Eastern Railway Company, STB Finance Docket No. 33780 (STB served Sept. 16, 1999); Missouri Pacific Railroad Company—Trackage Rights Exemption—Union Pacific Railroad Company, STB Finance Docket No. 32656 (STB served May 17, 1996); Baltimore and Ohio Railroad Company—Trackage Rights Exemption, Finance Docket 30562 (ICC served Oct. 19, 1984).

⁷ See, e.g., Norfolk and Western Railway Company—Trackage Rights Exemption—Norfolk Southern Railway Company, STB Finance Docket No. 32961 (STB served Aug. 22, 1997) (N&W Ry. Co.).

⁸ In Winona Bridge, the employee petitioners had been handling the traffic on the line, prior to the carrier granting trackage rights to a different entity after negotiations with the unions broke down. In contrast, CSXT employees have not demonstrated such harm here.

Here, the record includes no such evidence. Petitioners recite various provisions of the trackage rights agreement in support of their position, but the unrefuted testimony of INRD's CEO and president indicates that such provisions are industry-standard terms, which serve the clearly legitimate business purposes of ensuring safe operation of the tenant carrier over the landlord's lines and allocating liability between the landlord and tenant. CSXT also states that the trackage rights agreement is the standard agreement that CSXT uses with other railroads.

Moreover, the record includes substantial and persuasive evidence of sound economic and operational reasons for entering into the trackage rights agreement. CSXT convincingly asserts that, without the trackage rights agreement, service from the Sunrise facility to IP&L's Harding Station or to Hoosier's Merrom Station would have required the interchange of traffic between CSXT and INRD, which, according to CSXT, would not be operationally or cost effective. To accommodate the desire of the Sunrise facility, IP&L, and Hoosier for single-line service, CSXT states that INRD sought and received trackage rights over the line.

INRD further provides several reasons why single-line service via trackage rights is preferable to joint-line moves: the Merrom move and the Harding move are both short and not appropriate for operation as joint-line moves; joint-line moves would present problems because they would need an interchange at Sullivan, where the facilities are not appropriate for such operations; interchanging the traffic from the line onto the CSXT main line or passing sidings would disrupt the heavy traffic on the CSXT line; and interchanging onto INRD's single track main line would be similarly disruptive.

INRD submits evidence from IP&L, Hoosier, and Sunrise in support of the operational efficiency of the trackage rights arrangement. IP&L indicates that, before the loading facilities were completed at the Sunrise facility, IP&L trucked approximately 80,000 tons of coal a month to a transload facility on INRD's line. With the trackage rights arrangement, INRD now can provide direct rail service from the Sunrise facility to IP&L's Harding Station. And, unlike the transload facility, which could only handle 60-car unit trains, the Sunrise facility can accommodate 100-car unit trains. Similarly, Hoosier states that in the past it would obtain approximately 25,000 tons of coal per month from the Sunrise facility by truck and now the coal can move directly by rail. Sunrise indicates that it considered other alternatives to gain direct access to INRD, such as building beltline conveyors, developing a rail build-out, and trucking coal to a siding built on INRD, but these options were expensive and would have had a significant environmental impact.

In sum, I do not believe that petitioners have met their burden of proof to demonstrate that CSXT and INRD entered into the transaction for the purpose of circumventing collective bargaining obligations or for any other improper purpose. Nor have petitioners refuted respondents' showing that the transaction will result in improved operational efficiencies and permit INRD to provide new, efficient single-line service from the Sunrise facility to the users of the coal.

For these reasons, I believe that petitioners' request for revocation should be denied. To deem otherwise would be inconsistent with the law and with extensive Board precedent.

COMMISSIONER MULVEY, commenting:

I believe that INRD's trackage rights exemption over CSXT should be revoked. CSXT holds a controlling interest of 85% of INRD, and 3 of 5 directors on INRD's board are CSXT employees nominated by CSXT. This level of control indicates to me that the trackage rights are a sham designed primarily to circumvent CSXT's collective bargaining agreements to the detriment of rail labor. Thus, I would have revoked the exemption and required INRD to file a formal application with the Board so that these matters could have been explored to the fullest.