

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35205

U S RAIL CORPORATION—LEASE AND OPERATION EXEMPTION—  
WINAMAC SOUTHERN RAILWAY COMPANY AND KOKOMO GRAIN CO., INC.

Decided: March 8, 2013

U S Rail Corporation (U S Rail), a Class III rail carrier, filed on December 5, 2008, and corrected on December 17, 2008, a verified notice of exemption under 49 C.F.R. § 1150.41 to acquire by lease and to operate approximately 58.89 miles of rail lines in Indiana owned by Winamac Southern Railway Company (WSRY) and Kokomo Grain Co., Inc., between: (1) milepost 50.10 at Bringham and milepost 71.50 at Van Jct. (Logansport); (2) milepost 74.50 at Eighteenth St. Yard (Logansport) and milepost 97.90 at Kokomo; (3) milepost 0.00 at E. Markland Ave. (Kokomo) and milepost 1.50 at S. Union St. (Kokomo); and (4) milepost 147.07 at Amboy and milepost 134.48± at Marion. Under the lease agreement, U S Rail also sought to acquire incidental trackage rights over 3.0 miles of rail line owned by Toledo, Peoria & Western Railway Corporation (TP&W), between milepost 71.50 at Van Jct. and milepost 74.50 at Eighteenth St. Yard.<sup>1</sup>

At TP&W's request, the Board, in a decision served on January 15, 2009, stayed the effectiveness of the exemption with respect to U S Rail's proposed acquisition of the incidental trackage rights.<sup>2</sup> TP&W had argued that in January 2009 it terminated a 1995 Trackage Rights Agreement (Agreement) between WSRY and A. & R. Line, Inc. (A&R), that had given WSRY the right to operate over the 3.0 miles of rail line,<sup>3</sup> and, as a result, WSRY neither had authority to operate over, nor trackage rights to convey with respect to, the 3-mile rail line. TP&W cited Winamac Southern Railway—Trackage Rights Exemption—A. & R. Line, FD 35208 (STB served Jan. 9, 2009), where the Board rejected WSRY's notice of exemption to acquire the 3.0 miles of trackage rights because of a dispute regarding the status of the Agreement.

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<sup>1</sup> Notice of the exemption was served and published at 73 Fed. Reg. 80512 on December 31, 2008.

<sup>2</sup> The Board, at U S Rail's request, allowed the remainder of the exemption to become effective on January 16, 2009, as had been scheduled.

<sup>3</sup> In December 2002, the Board exempted from the prior approval requirements of 49 U.S.C. §§ 11323-25 the acquisition of control by Rail America, Inc., of A&R and J.K. Line, Inc. (J.K.), and the merger of A&R and J.K. into TP&W. See RailAmerica, Inc.—Control & Merger Exemption—A&R Line & J.K. Line, FD 34269 (STB served Dec. 12, 2002).

Also in the January 15, 2009 decision, the Board directed U S Rail to: (1) request that the stay be lifted if TP&W and WSRY resolve their dispute concerning their rights under the Agreement; or (2) notify the Board if TP&W and WSRY enter into a new trackage rights agreement. A year later, in a decision served on February 2, 2010, the Board directed U S Rail to file a report to update the Board on the status of the incidental trackage rights. U S Rail, in a letter filed on March 3, 2010, reported that WSRY and TP&W had failed to reach an agreement concerning their rights under the Agreement or to reach either a new trackage rights agreement or an acceptable alternative commercial arrangement to move traffic over the 3-mile line. U S Rail also reported that WSRY had filed an action against TP&W in “state court in Indiana” with respect to the disputed contract issues under the Agreement and requested that the effectiveness of the exemption remain stayed with respect to the 3.0 miles of incidental trackage rights. The Board, in a decision served on April 13, 2010, granted U S Rail’s stay request and directed it to notify the Board of any court decision on the merits within two weeks of issuance and to otherwise advise the Board promptly of any other resolution of this dispute.

On August 15, 2012, U S Rail filed a copy of the court decision in Winamac Southern Railway v. Toledo, Peoria & Western Railway, No. 3:09-CV-86 (N.D. Ind. July 9, 2012). In that decision, the court denied WSRY’s motion for a summary judgment and granted in part TP&W’s cross motion for a summary judgment, finding that WSRY under the Agreement is not entitled to assign its trackage rights over the 3.0 miles of rail line, and denying summary judgment on TP&W’s claim that WSRY’s trackage rights assignment constituted a material breach of the Agreement. Based on the court’s finding that WSRY was not entitled to assign its trackage rights over the 3.0 miles of rail line, WSRY could not convey trackage rights to U S Rail, and, as a result, U S Rail’s verified notice of exemption will be rejected with respect to the proposed acquisition of incidental trackage rights over the 3.0 miles of rail line owned by TP&W.

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

It is ordered:

1. U S Rail’s verified notice of exemption is rejected with respect to the proposed acquisition of incidental trackage rights over the 3.0 miles of rail line owned by TP&W.
2. This decision is effective on its service date.

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