

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34729

SAGINAW BAY SOUTHERN RAILWAY COMPANY–ACQUISITION AND OPERATION  
EXEMPTION–RAIL LINE OF CSX TRANSPORTATION, INC.

Decided: May 4, 2006

On March 16, 2006, Huron & Eastern Railway Company, Inc. (HESR) filed a petition seeking an order directing Saginaw Bay Southern Railway Company (SBS) to show cause why it should not be required either to seek appropriate regulatory authority for its operations over a line owned by HESR or to cease such operations. On March 30, 2006, SBS filed a reply. In a letter filed on April 13, 2006, HESR revised the relief it seeks to an order requiring SBS to obtain authority for its acquisition of trackage rights over the subject line.<sup>1</sup> Based on this record, SBS is directed to obtain authority from the Board for its acquisition and operation of trackage rights over HESR's line.

BACKGROUND

On September 1, 2005, SBS, then a noncarrier, filed a verified notice of exemption under 49 CFR 1150.31 to acquire and operate approximately 67 miles of rail line owned by CSX Transportation, Inc. (CSXT) in Bay, Saginaw, Genesee, and Midland Counties, MI.<sup>2</sup> Notice was served and published in the Federal Register on September 27, 2005 (70 FR 56525).

According to HESR, when SBS acquired the 67 miles of rail line from CSXT in the above transaction, two of the CSXT line segments were connected only by trackage rights over a 6.4-mile line owned by HESR running between Mershon and Paines, MI. HESR argues that SBS did not seek or obtain authority via assignment or otherwise to acquire or operate the trackage rights. HESR states that CSXT and its predecessors had operated exclusively over a 3-mile portion of the HESR line called the Paines Segment, and had agreed to maintain that portion of the line and indemnify the owner of the tracks and right-of-way for operations over the Paines

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<sup>1</sup> By letter dated April 17, 2006, SBS argues that HESR's April 13 filing is procedurally defective and fails to support the merits of HESR's arguments.

<sup>2</sup> SBS became a Class III carrier following consummation of this transaction on October 28, 2005.

Segment prior to SBS's acquisition.<sup>3</sup> HESR states that SBS has not accepted those responsibilities and that HESR intends to seek conditions on any regulatory approval granted by the Board that would require SBS to assume CSXT's maintenance and liability obligations for the Paines Segment, once SBS actually seeks such approval.

In its response, SBS advises the Board that it first became aware in February 2006 that its agreement with CSXT did not include, but should have included, a reference to certain trackage rights pursuant to an April 2, 1878 agreement between CSXT's and HESR's predecessors. SBS states that it subsequently reached an agreement with CSXT for the assignment of CSXT's trackage rights. SBS argues that given the original date of the agreement between CSXT's and HESR's predecessors, the assignment does not require Board approval. However, SBS states that, if the Board finds that additional authorization is required, it will submit any necessary materials. SBS asserts that HESR's request regarding maintenance responsibility is improper, as HESR is asking the Board to intervene in contractual matters between the parties.

### DISCUSSION AND CONCLUSIONS

The acquisition of the right to operate over a line of railroad by a noncarrier requires prior approval under 49 U.S.C. 10901 but can be exempted from regulation under the class exemption at 49 CFR 1150, subpart D. See Class Exemption for the Acq. & Oper. Of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810 (1985), aff'd mem. Illinois Commerce Comm'n v. ICC, 817 F.2d 145 (D.C. Cir 1987). The exemption procedures in 49 CFR 1150, subpart D specifically include the acquisition of incidental trackage rights, which is defined as: "the grant of trackage rights by the seller, or the assignment of trackage rights to operate over the line of a third party, that occurs at the time of the exempt acquisition or operation." 49 CFR 1150.31(a)(4).

Because SBS failed to include what would appear to have been a grant of incidental trackage rights for the 6.4-mile HESR line in its notice of exemption filed on September 1, 2005, and has not sought approval since then, SBS does not have Board authority to operate over HESR's line. The acquisition of the right to operate a line of railroad by a noncarrier or a carrier in 2006, whether by an assignment of trackage rights or otherwise, falls within the Board's jurisdiction and requires Board approval. Contrary to SBS's contention, the date of the underlying agreement between HESR's and CSXT's predecessors is irrelevant for SBS's purposes. Thus, SBS is required to seek Board authority for operation of the trackage rights it subsequently acquired from CSXT.

SBS must make a new filing under a new docket subnumber accompanied by a new filing fee. SBS is directed to file its new notice of exemption to acquire authority to operate over the 6.4-mile HESR line under 49 CFR 1150.41 instead of 49 CFR 1150.31, because SBS is now a Class III carrier.

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<sup>3</sup> According to HESR, CSXT's predecessor agreed to the maintenance and indemnity obligations for the Paines Segment following a grant of abandonment authority to HESR's predecessor, which included the Paines Segment, in Grand Trunk Western Railroad Company—Abandonment—In Saginaw County, MI, Docket No. AB-31 (Sub No. 21X) (ICC served Mar. 29, 1985, and Apr. 23, 1985).

Finally, HESR states that it expects SBS to assume maintenance and liability obligations for the Paines Segment after obtaining proper regulatory authority and that it will ask the Board to impose conditions if SBS does not do so. But whether SBS should be responsible for maintaining or indemnifying that portion of the line is a private contractual dispute subject to the terms of the agreement under which CSXT has made the assignment. The Board is not the proper forum to resolve such a dispute. Rather, contractual disputes such as this one are properly for the courts to decide. See Burlington Northern, Inc.–Trackage Rights, 347 I.C.C. 210, 213 (1974); Cleveland Cliffs Iron Co. v. Interstate Commerce Com., 664 F.2d 568 (6th Cir. 1981).

For the reasons discussed above, SBS is required to obtain appropriate Board authorization for its acquisition of trackage rights from CSXT by filing a new notice of exemption with the Board.

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

It is ordered:

1. SBS is directed to file a new notice of exemption under 49 CFR 1150.41 seeking Board authority for its acquisition and operation of trackage rights over the line owned by HESR.
2. This decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams  
Secretary