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SERVICE DATE - SEPTEMBER 1, 1999

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33760

INDIANA NORTHEASTERN RAILROAD COMPANY
— CHANGE IN OPERATORS —
BRANCH AND ST. JOSEPH COUNTIES RAIL USERS ASSOCIATION, INC.
IN BRANCH COUNTY, MICHIGAN

Decided: August 24, 1999

We are denying the petition to reject and/or to revoke the notice of exemption filed in the proceeding.

BACKGROUND

The Branch and St. Joseph Counties Rail Users Association, Inc. (RUA) owns a line of railroad running between milepost 376.56 near Quincy, MI, and milepost 406.84 near Sturgis, MI. By notice filed on June 1, 1999 and published in the Federal Register on June 30, 1999 at 64 FR 35250, RUA and the Indiana Northeastern Railroad Company (INE), a class III railroad, jointly invoked the class exemption at 49 CFR 1150.41 et seq. to allow INE to operate over a portion of the line owned by RUA. The portion runs from milepost 376.56 near Quincy, MI, to milepost 386.96.¹

The Wabash & Western Railway Company, d/b/a Michigan Southern Railroad Company (MSO), currently operates on part of the segment over which INE seeks to operate. That is the part between milepost 382.5 near Coldwater, MI, and milepost 386.96. MSO also operates over the adjacent segment from milepost 386.96 to the end of the track owned by RUA at milepost 406.84 near Sturgis.

Although INE and RUA captioned their notice as a notice for “change in operators” under 49 CFR 1150.41(c), we will treat the notice as an ordinary exemption for the commencement of operations under section 1150.41(b) because the notice does not claim that the authority of any

¹ On June 3, 1999, RUA and INE filed a Notice of Erratum.

current operator² or past operator³ on the line will be terminated along with INE's commencement of operations on the line. The notice became effective on June 8, 1999, seven days after its filing.

On June 8, 1999, MSO filed a petition to reject, to stay, and/or to revoke the notice of exemption.⁴ MSO takes issue with INE's attempt to operate over the portion between milepost 382.5 near Coldwater, MI, and milepost 386.96, i.e., the portion over which MSO is currently authorized to operate.⁵ On June 16, 1999, RUA and INE jointly filed a reply in opposition to MSO's petition to reject, to stay, and/or to revoke the notice of exemption.⁶ On July 7, 1999, Patrick Industries, Inc., filed a statement urging us to reject the notice.⁷ RUA and INE filed a reply in rebuttal to this statement on July 14, 1999.

DISCUSSION AND CONCLUSIONS

Request for Rejection. MSO argues that the notice must be rejected because it was not served on the parties opposing the notice or their counsel. We disagree. Our regulations at 49 CFR 1150.41 *et seq.* require only that notices be filed with the Board, not that they be served on

² The parties filing the notice assert that they do not seek to terminate any of MSO's current operating authority.

³ The Hillsdale County Railway Company, Inc. (HCRC) was granted an exemption to operate over the line in 1989. Hillsdale County Railway Company, Inc. — Operation Exemption — Consolidated Rail Corporation, Finance Docket No. 31524 (ICC served Sept. 27, 1989). In 1992, INE acquired HCRC's tangible assets, and HCRC was subsequently disincorporated; but HCRC never sought permission to discontinue service, and the parties filing the notice have expressed no intention to bring an involuntary discontinuance action against HCRC.

⁴ MSO's request for stay was not addressed earlier because the exemption went into effect before we had an opportunity to consider the request.

⁵ MSO raises no issue over INE's attempt to seek authority to operate over the remaining, adjacent segment covered by the notice, i.e, the segment from milepost 382.5 to milepost 376.56 near Quincy.

⁶ On the same date, Steuben County Co-op filed a statement asking us to allow both MSO and INE to serve its facility at Coldwater. On June 21, 1999, Darling International filed a statement asking us to allow both MSO and INE to serve its facility at Coldwater. We will not consider these statements because they do not indicate that they were served on the parties and there is no indication that the parties had actual knowledge of them.

⁷ Although this statement does not indicate that it was served on the parties, we will nevertheless consider it because INE and RUA, the parties whose interests are opposed in the statement, had actual knowledge of it and replied to it.

particular persons. The public receives notice of exemptions and an opportunity to request that they be voided ab initio or revoked when they are published in the Federal Register.⁸

MSO also argues that the notice must be rejected because it contains false or misleading information. In particular, MSO argues (Petition, at 6) that MSO's corporate parent has exercised a purchase option (on January 6, 1999) concerning the line. Our regulations contain no requirement that parties purporting to own lines identify title disputes connected with the lines. Moreover, MSO has not shown that RUA's ownership of the line was subject to serious question when the notice was filed. MSO itself claims only "beneficial" ownership of the line and does not deny that RUA had legal title to the line when the notice of exemption was filed. Moreover, the purchase of a line of railroad requires our approval under section 10901 or section 11323, and there is no indication that such approval has been either sought or given.

RUA contests MSO's claim to beneficial ownership. According to RUA, even MSO's alleged beneficial ownership was being tested in court when the notice was filed. Because any legal or transportation problems arising out of title disputes can be resolved later after being raised in a petition to revoke or to reopen the exemption, it would be inappropriate for us to take the drastic step of rejecting the notice as void ab initio now, before the nature of any such problems is determined.

MSO also maintains that the notice falsely stated, at footnote 2 on page 3, that RUA had terminated MSO's rights under its operating agreement with RUA. MSO asserts (Petition, at 7) that RUA notified it of merely a "notice of a breach," not a "notice of termination."

Even if the notice erred in this respect, such an error would not require rejection of the notice. The notice did not allege that RUA had a right to expel MSO from the line. Indeed, in the same footnote cited by MSO, RUA and INE state that the notice is not an attempt to terminate MSO's right to operate on the property and that any such termination would require a subsequent proceeding. Thus, RUA and INE made it clear that there is an ongoing controversy over MSO's presence on the line. A minor mistake as to the status or extent of this controversy would not warrant the drastic remedy of rejection of the notice.

MSO also alleges that the notice incorrectly represents that RUA owns a connecting line running from Quincy to milepost 421.2 near White Pidgeon. However, RUA and INE corrected this minor mistake in their errata notice filed on June 3, 1999.

Finally, MSO argues that the notice improperly states that the portion of the segment between milepost 382.5 and milepost 386.96 is a "neutral zone" that is presently operated jointly. Even if the notice were incorrect in this respect, however, the error would not be significant enough to warrant rejection of the notice as void ab initio. Our regulations do not require parties to submit

⁸ See also City of Rochelle, Illinois — Notice of Exemption — Commencement of Rail Common Carrier Obligations, STB Finance Docket No. 33587 (STB served July 7, 1998).

any information at all about whether there is an existing operator on the line. Moreover, interested parties would not be prejudiced by the alleged error. The parties with the most stake in the notice, MSO and shippers on the line, would not be misled by any such error because they are likely to know whether there is in fact more than one operator on the neutral zone.

Request for Revocation. Under 49 U.S.C. 10502(d), we may revoke an exemption if regulation is necessary to carry out the transportation policy of 49 U.S.C. 10101.

MSO argues (Petition, at 8-9) that the exemption should be revoked because INE has been unlawfully operating track in Michigan without authority from the Board. The argument is without merit. INE operates the track in question for the Michigan Department of Transportation pursuant to 49 CFR 1150.11 et seq., which allows parties to obtain a “certificate of designated operator” pursuant to a rail service continuation agreement under section 304 of the Regional Rail Reorganization Act of 1973, as amended by the Railroad Revitalization and Regulatory Reform Act 1976. INE’s certificate was issued in Certificate of Designated Operator--The Indiana Northern Railroad Company, D-OP 58 (U.S.R.A. Line Nos. 692a/693a, 398, 402, 404, and 401) (ICC served Sept. 3, 1993).

MSO also argues that the exemption should be revoked on the grounds that: (1) MSO’s agreement with RUA provides that MSO is the only carrier that may operate on the line; (2) because MSO is still operating on the line, INE’s presence would cause operational problems; (3) INE’s service would be inferior to MSO’s; and (4) RUA has no right to consent to INE’s presence on the segment because MSO has become the “beneficial owner” of the segment pursuant to its attempt to exercise a purchase option. Alternately, MSO argues (Petition, at 10) that, “[a]t the very least, the Board should make it clear that the Respondents may not consummate their proposed transaction unless and until they can establish a legal right to do so.”

MSO is asking us to interpret its agreement with RUA. The interpretation of contracts lies within the purview of the courts, not with us. We have consistently held that in exercising our licensing authority we look to compliance with the statutory standards, not to whether the applicant or petitioner will be able to exercise the authority sought. MSO argues that the mere presence of INE on the line would cause operational problems, but multiple carriers routinely operate over the same rail lines, and MSO provides no support for its assertion. MSO’s assertion that INE’s service would be inferior to MSO’s is likewise unsupported and is, moreover, irrelevant to a petition to revoke. If true, shippers would choose MSO’s service and MSO would not have to fear competition from INE.

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 for rejection and/or revocation is denied.

2. This decision is effective 30 days after its date of service.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary