

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35516

CSX TRANSPORTATION, INC.—TRACKAGE RIGHTS EXEMPTION—NORFOLK
SOUTHERN RAILWAY COMPANY

Decided: June 14, 2011

On May 16, 2011, Norfolk Southern Railway Company (NSR) filed a verified notice of exemption under 49 U.S.C. § 10502 and 49 C.F.R. § 1180.2(d)(7) to permit CSX Transportation, Inc. (CSXT) to acquire from NSR nonexclusive local trackage rights over approximately 11.6 miles of NSR's line of railroad between milepost WG 12.0 near Helen, W. Va., and milepost WG 23.6 at Pemberton, W. Va. (the Line).¹

The notice indicates that CSXT currently leases 13.5 miles of rail line between milepost WG 12.0 near Helen, W. Va., and milepost WG 25.5 at McVey, W. Va., which includes the Line. See CSX Transp., Inc.—Lease and Operation Exemption—Norfolk & W. Ry., FD 32768 (ICC served Oct. 27, 1995). According to NSR, it may terminate the lease on 30 days' notice, provided that NSR offers CSXT trackage rights or another appropriate agreement granting CSXT continuing rights to operate over the Line with its own trains and crews.² The notice indicates that NSR has elected to terminate the lease and has offered CSXT a draft trackage rights agreement that would govern CSXT's continued provision of common carrier service over the Line. It further states that NSR "understands" that its notice will "convert CSXT's leasehold interest in the Line to a local trackage rights tenancy, thereby enabling CSXT to continue to provide common carrier service over the Line." Notice at 6 n.4.

The notice of exemption will be rejected because the circumstances here are not appropriate for consideration under the abbreviated class exemption procedures of 49 C.F.R. § 1180.4(g). First, NSR states that the notice is filed "on behalf of the parties hereto," Notice at

¹ A redacted version of the trackage rights agreement between NSR and CSXT was filed with the notice of exemption. NSR concurrently filed the unredacted version of the agreement under seal along with a motion for protective order.

² NSR states that this lease provision only requires that trackage rights or a suitable alternative be offered with respect to the Line itself, not the additional 1.9 miles between milepost WG 23.6 at Pemberton and milepost WG 25.5 at McVey included in the lease. The notice states that "NSR anticipates that CSXT will proceed under a separate docket to obtain authority to terminate its common carrier status between Pemberton and McVey in keeping with its obligation under the Lease."

4, which presumably means on behalf of NSR and CSXT, the entities identified in the notice as parties to the transaction. There is no indication, however, that CSXT has authorized NSR to act on its behalf. That alone is a sufficient basis to reject the notice. Cf. Single—Continuance In Control Exemption—Charlotte S. R.R., FD 35253 (STB served Mar. 4, 2011) (rejecting a notice filed purportedly on behalf of a number of petitioners, one of whom did not consent to or know about the filing before it was made). Additionally, it is at least unusual, if not unprecedented, for the *grantor* of trackage rights to file such a notice, as it is not the grant but the acquisition of trackage rights that requires Board authorization. See 49 U.S.C. § 11323(a)(6); cf. 49 U.S.C. §11324(a) (the Board may begin a proceeding to authorize the acquisition of trackage rights “on application of the person seeking the authority”). NSR cites no authority for the proposition that a trackage rights grantor may use the notice of exemption process to seek trackage rights authority for a third party, absent any indication that the grantee consents to such a filing on its behalf. Moreover, NSR cites no authority for the proposition that the filing of a notice can automatically “convert” a third party’s operating authority from one form to another, as NSR seeks to do here.

Because NSR’s notice will be rejected, the motion for protective order is moot.

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

It is ordered:

1. NSR’s notice of exemption is rejected.
2. NSR’s motion for protective order is moot.
3. This decision is effective on the date of service.

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