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SERVICE DATE – JULY 14, 2016

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36011

CAYUGA COUNTY INDUSTRIAL DEVELOPMENT AGENCY, ONONDAGA COUNTY INDUSTRIAL DEVELOPMENT AGENCY, ONTARIO COUNTY INDUSTRIAL DEVELOPMENT AGENCY, SCHUYLER COUNTY INDUSTRIAL DEVELOPMENT AGENCY, AND YATES COUNTY INDUSTRIAL DEVELOPMENT AGENCY—ACQUISITION EXEMPTION— FINGER LAKES RAILWAY CORP.

Docket No. FD 36012

FINGER LAKES RAILWAY CORP.—ACQUISITION AND OPERATION EXEMPTION—CAYUGA COUNTY INDUSTRIAL DEVELOPMENT AGENCY, ONONDAGA COUNTY INDUSTRIAL DEVELOPMENT AGENCY, ONTARIO COUNTY INDUSTRIAL DEVELOPMENT AGENCY, SCHUYLER COUNTY INDUSTRIAL DEVELOPMENT AGENCY, AND YATES COUNTY INDUSTRIAL DEVELOPMENT AGENCY

Docket No. FD 36021

FINGER LAKES RAILWAY CORP.—SUBLEASE AND OPERATION EXEMPTION—CAYUGA COUNTY INDUSTRIAL DEVELOPMENT AGENCY, ONONDAGA COUNTY INDUSTRIAL DEVELOPMENT AGENCY, ONTARIO COUNTY INDUSTRIAL DEVELOPMENT AGENCY, SCHUYLER COUNTY INDUSTRIAL DEVELOPMENT AGENCY, AND YATES COUNTY INDUSTRIAL DEVELOPMENT AGENCY

Docket No. FD 36022

FINGER LAKES RAILWAY CORP.—ACQUISITION AND OPERATION EXEMPTION—SENECA COUNTY INDUSTRIAL DEVELOPMENT AGENCY

Docket No. FD 36023

SENECA COUNTY INDUSTRIAL DEVELOPMENT AGENCY—LEASE EXEMPTION—FINGER LAKES RAILWAY CORP.

Docket No. FD 36024¹

FINGER LAKES RAILWAY CORP.—SUBLEASE AND OPERATION EXEMPTION—
SENECA COUNTY INDUSTRIAL DEVELOPMENT AGENCY

Digest:² This decision grants a request from six county development agencies to dismiss two notices of exemption because Board authorization is not needed for the agencies to lease certain rail lines in New York. The Board also finds that authorization is not needed for Finger Lakes Railway Corp., a rail carrier, to acquire and sublease those rail lines because it would retain the obligation and ability to provide freight rail service and the agencies would not be able to materially interfere with that service.

Decided: July 11, 2016

The Board is dismissing the notices of exemption filed by Cayuga County Industrial Development Agency, Onondaga County Industrial Development Agency (OCIDA), Ontario County Industrial Development Agency, Schuyler County Industrial Development Agency, Yates County Industrial Development Agency, and Seneca County Industrial Development Agency (collectively, Agencies),³ to lease the physical assets of certain rail lines in New York from Finger Lakes Railway Corp.(FGLK) because the Agencies will not become common carriers and thus, Board authority is not needed. The Board is also dismissing the notices of exemption filed by FGLK to acquire, operate, and sublease the same rail lines from the Agencies. We find that 49 U.S.C. §§ 10901 and 10902 do not apply to these proposed transactions because FGLK already has operating authority and would continue to be the sole provider of railroad services and retain its common carrier obligation, and the Agencies could not materially interfere with FGLK's freight rail service.

BACKGROUND

On March 15, 2016, and April 12, 2016, the Agencies and FGLK jointly filed verified notices of exemption under 49 C.F.R. § 1150.31 and 49 C.F.R. § 1150.41, in Docket Nos. FD 36011, FD 36012, and FD 36021, for three transactions involving the following rail lines in New York: (1) Watkins Glen Industrial Track, located between milepost 41.35 at or near Penn Yan and milepost 16.55 at or near Watkins Glen, in Schuyler and Yates Counties, a distance of 24.8 miles; (2) Canandaigua Secondary, located between milepost 76.00 at or near Canandaigua and milepost 51.30 at or near Geneva, in Ontario County, a distance of 24.70 miles; (3) Auburn

¹ These proceedings are not consolidated. A single decision is being issued for administrative convenience.

² The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decision, EP 696 (STB served Sept. 2, 2010).

³ The Agencies are non-carrier (or non-operating carrier) agencies of the State of New York established to promote industrial development in their respective counties.

Secondary, located between milepost 37.56 at the Seneca/Cayuga County line and milepost 3.61 at or near Solvay Yard, in Cayuga County, a distance of 33.95 miles; (4) Geneva Running Track, located between milepost 344.40 at or near Geneva and milepost 342.8 at the Ontario/Seneca County line, in Ontario County, a distance of 1.6 miles; (5) Lehigh & Northern Industrial Track, located between milepost 349.20 and milepost 348.70 at or near Auburn, in Cayuga County, a distance of 0.90 miles; and (6) Auburn & Ithaca Industrial Track, located between milepost 349.20 and milepost 348.70 at or near Auburn, in Cayuga County, a distance of 0.50 miles. These proposed transactions would first transfer title to the rail lines to FGLK (Docket No. FD 36012). (Notice of Exemption 2, Mar. 15, 2016.) Next, FGLK would lease to each Agency the property comprising the rail lines located in the county (Docket No. FD 36011). (*Id.* at 3-4.) Lastly, FGLK would sublease the rail lines back from the Agencies to continue rail operations, including all common carrier service and maintenance of the tracks (Docket No. FD 36021).⁴ (*Id.* at 4.) Because no common carrier rights or obligations would be transferred from FGLK or assumed by the Agencies as a result of the proposed transactions, the Agencies and FGLK also filed a motion to dismiss the notice in Docket No. FD 36011 and a request for waiver of the employee notice requirements of 49 C.F.R. § 1150.42(e) in Docket Nos. FD 36012 and FD 36021.

On April 13, 2016, Seneca County Industrial Development Agency (Seneca County) and FGLK jointly filed a verified notice of exemption under 49 C.F.R. § 1150.41, in Docket Nos. FD 36022, FD 36023, and FD 36023, for three other transactions involving rail lines in Seneca County, New York: (1) the Auburn Secondary, located between milepost 37.56 at the Seneca/Cayuga County line and milepost 50.50 at or near Geneva and (2) the Geneva Running Track, located between milepost 342.8 at the Ontario/Seneca County line and milepost 329.30 at or near Kendaia. The three proposed transactions mirror those between FGLK and the other Agencies: transfer of the title to rail lines to FGLK from Seneca County (Docket No. FD 36022), a lease by FGLK to Seneca County (Docket No. FD 36023), and a sublease from Seneca County back to FGLK (Docket No. FD 36024).⁵ Because no common carrier rights or obligations would be transferred by FGLK or assumed by Seneca County as a result of the proposed transactions, Seneca County and FGLK simultaneously filed a motion to dismiss the notice in Docket No. FD 36023 and a request for waiver of the employee notice requirements of 49 C.F.R. § 1150.42(e) in Docket Nos. FD 36022 and FD 36024.

The transactions in Docket Nos. FD 36011, 36012, and 36021 involve the same issues as those in Docket Nos. FD 36022, 36023, and 36024, and the rail lines in these proceedings are connected. For administrative convenience, we will therefore consider all of these notices and related requests together in this decision.

⁴ Notices of exemption in Docket No. FD 36011 and Docket No. 36012 were served and published in the Federal Register on March 31, 2016 (81 Fed. Reg. 18,682 and 81 Fed. Reg. 18,682, respectively). Notice of exemption in Docket No. FD 36021 was served and published in the Federal Register on April 28, 2016 (81 Fed. Reg. 25,483).

⁵ Notices of exemption in Docket Nos. FD 36022, 36023, and 36023 were served and published in the Federal Register on April 29, 2016 (81 Fed. Reg. 25,752, 81 Fed. Reg. 25,751, and 81 Fed. Reg. 25,750, respectively).

According to the Agencies and FGLK, the proposed acquisition, lease, and sublease of the above-mentioned rail lines is structured to allow FGLK to continue to pay a negotiated “payment in lieu of taxes” (PILOT). (Mot. to Dismiss 3, Mar. 15, 2016.⁶) The parties state that the PILOT allows FGLK to make a payment that is tied to FGLK’s revenues rather than paying local and state taxes, which in turn enhances FGLK’s ability to build its railroad business. (*Id.* at 3-4.) The parties state that this PILOT arrangement dates back to 1994 when FGLK acquired the rail lines from Consolidated Rail Corporation (Conrail) pursuant to authority granted by the Board’s predecessor, the Interstate Commerce Commission (ICC) in Finger Lakes Railway—Acquisition & Operation Exemption—Consolidated Rail Corp., FD 32574 (ICC served Oct. 14, 1994). The parties state that following that acquisition, title to the rail lines was immediately transferred to the Agencies and then leased back to FGLK, in order to facilitate the PILOT payment arrangement as originally designed. (Notice of Exemption 3, Mar. 15, 2016.) Although the parties did not seek a jurisdictional determination from the ICC prior to implementing their transfer and lease arrangement, they state that FGLK retained the right to terminate the leases at any time and retained its common carrier rights and obligations to provide service on the rail lines. According to the parties, the Agencies never held themselves out to provide rail service over the rail lines. (*Id.* at 3.)

The Agencies and FGLK state that they have agreed to extend and restructure the existing PILOT arrangement through the transactions at issue in the instant proceedings. (Mot. to Dismiss 4.) The parties assert that the proposed transactions are intended solely to facilitate the PILOT arrangements and thereby provide financial support for the continued growth of FGLK.

In support of their motions to dismiss Docket Nos. FD 36012 and 36022, the parties state that the transaction documents—the deeds to FGLK (Deed), the leases from FGLK to the Agencies (Lease), and the amended and restated leases from the Agencies to FGLK (Sublease)—do not restrict FGLK’s operations and would not allow the Agencies to hold themselves out, nor give them any authority to perform railroad services or operations.⁷ The Sublease provides that the leasehold interest shall not include the “right, authority or potential for the Agency to control railroad or other operations . . . nor shall the Agency participate in the management or participate in the development of the Facility for railroad or other purposes. In particular, Agency shall not hold itself out to perform any railroad services . . .” (Mot. to Dismiss, Ex. C at 4.) Further, the Sublease states that FGLK would continue to have the obligation to operate, repair, and maintain the rail lines. (*Id.* at 9.) The parties state that, as a result, FGLK would retain ultimate

⁶ As previously discussed, two motions to dismiss were filed in these proceedings, the first on March 15, 2016, in Docket No. FD 36011, and the second on April 13, 2016, in Docket No. FD 36023. The information and arguments presented in each are nearly identical. Therefore, while this decision cites to the March 15 motion, the cites incorporate the same arguments made in the April 13, 2016 motion.

⁷ The Deed, Lease, and Sublease are attached as Exhibits A, B, and C in the motions to dismiss in Docket Nos. FD 36011 and FD 36023 (corrected Exhibits B and C filed on April 27, 2016).

ownership of the rail lines and the Agencies would not become carriers with respect to any of the rail lines. (Mot. to Dismiss 8.)

DISCUSSION AND CONCLUSIONS

The question presented here is whether our regulatory approval is required for the Agencies to lease the rail assets from FGLK. These leases would be the second step in the parties' series of proposed transactions (the parties did not file motions to dismiss the first step (the transfer of the title to the lines to FGLK) or the third step (the sublease of the rail assets from the Agencies back to FGLK)). The acquisition (or lease) of an active rail line, and the common carrier obligation that goes with it, ordinarily requires Board approval. When the carrier selling a rail line retains an exclusive permanent easement to provide common carrier freight service and has sufficient control over the line to carry out its common carrier obligation, the Board typically has found that Board authorization is not required, and that ownership of the line remains with the selling carrier for purposes of § 10901(a)(4). See Me. Dep't of Transp.—Acquis. & Operation Exemption—Me. Cent. R.R. (State of Maine), 8 I.C.C.2d 835, 836-37 (1991); Mich. Dep't of Transp.—Acquis. Exemption—Certain Assets of Norfolk S. Ry., FD 35606, slip op. at 3 (STB served May 8, 2012); Mass. Dep't of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35312, slip op. at 6 (STB served May 3, 2010), aff'd sub nom. Bhd. of R.R. Signalmen v. STB, 638 F.3d 807 (D.C. Cir. 2011). See also Cent. Puget Sound Reg'l Transit Auth.—Acquis. Exemption—Certain Assets of City of Tacoma in Pierce Cty., Wash., FD 35812 (STB served Feb. 5, 2015) (ownership of “the line” can refer to a permanent, exclusive freight rail easement and sufficient control over its operation to carry out the common carrier obligation without undue interference.)

A typical State of Maine transaction involves a carrier selling a rail line to a noncarrier entity, while retaining an unrestricted freight rail easement allowing it to provide rail freight service and meet its common carrier obligations. Here, the carrier, FGLK, and not the Agencies, would be the owner of the rail lines. Under these proposed transactions, FGLK would lease the physical assets to the Agencies and then sublease those physical assets back from the Agencies to continue its operations over the rail lines. Inasmuch as FGLK will retain its common carrier rights and obligations, and would continue to have sufficient control over its common carrier operations without undue interference, we find that the State of Maine doctrine can apply under the circumstances presented here.

One of the Agencies, OCIDA, owns other rail lines not involved in these proposed transactions; OCIDA does not operate over the lines it owns.⁸ While State of Maine cases

⁸ The New York Susquehanna & Western Railway Corporation currently provides service over these other rail lines. See Onondaga Cty. Indus. Dev. Agency—Acquis. & Operation Exemption—Line of Consolidated Rail Corp., FD 32287 (ICC served July 7, 1994); New York Susquehanna & W. Ry.—Trackage Rights Exemption—Onondaga Cty. Indus. Dev. Agency, FD 32772 (STB served Aug. 7, 2001). Because OCIDA is a rail carrier, its lease of the rail lines is treated as a request for an exemption from 49 U.S.C. § 10902 (as opposed to the rest of the transactions which are requests for exemption from § 10901).

usually involve state or local government organizations that are not carriers, the Board has applied the doctrine to transactions where an acquiring entity already had the status of a carrier on another railroad line in particular circumstances. See Mass. Dep't of Transp.—Acquis. Exemption—Certain Assets of Pan Am S. LLC, FD 35943 (STB served Dec. 4, 2015); Dallas Area Rapid Transit—Acquis. Exemption—Certain Assets of Reg'l Rail Right of Way Co., FD 34346 (STB served Nov. 12, 2003) (granting State of Maine motion to dismiss). Like the state and local government organizations in those cases, OCIDA is a non-operating carrier, a government entity, and its carrier status on other lines is incidental to its governmental functions. Accordingly, we find that OCIDA's status as a non-operating common carrier does not preclude it from the application of the State of Maine doctrine here.

Having examined all of the agreements submitted, we find that none of the transactions, as proposed, require Board approval. As required under State of Maine, FGLK would retain the common carrier obligation on all of the rail lines at issue here. The ICC authorized FGLK to acquire and operate the rail lines in 1994. While the physical rail lines were then immediately transferred to the Agencies to allow FGLK to pay a negotiated PILOT tied to its revenues, FGLK remained the common carrier operator under that lease, retained the right to terminate the lease at any time, and retained all of the common carrier obligations with respect to the rail lines. The Agencies also never held themselves out to provide rail service over the rail lines.

The proposed transactions, for Board purposes, do not make substantive changes to the parties' prior arrangements. FGLK retains the common carrier obligation, and the proposed transactions do not give the Agencies control over railroad operations. The Lease does not include any restriction on FGLK's operations and states that the leased premises will be surrendered to FGLK at the expiration of the Lease. (Mot. to Dismiss, Ex. B at 2.) Similarly, the Sublease restricts the Agencies from interfering with FGLK's rail operations and states that FGLK will retain its common carrier obligation and ownership interest in the rail lines upon termination of the Sublease. (Mot. to Dismiss, Ex. C at 20.) Further, the Deed, Lease and Sublease would not allow the Agencies to hold themselves out as common carriers performing common carrier freight rail service over the rail lines. (Mot. to Dismiss, Ex. B at 2; Ex. C at 4.) We therefore conclude that the Deed, Lease, and Sublease would not restrict the continuation of freight rail service by FGLK, and that the proposed transactions have been entered into solely to facilitate the PILOT arrangements. Accordingly, we are satisfied that the three proposed transactions are structured to allow FGLK to hold permanent, exclusive freight rail operating rights over the rail lines to permit it to fulfill its common carrier obligation.⁹

Because nothing in the proposed transactions, as structured, would affect FGLK's ability to continue to provide freight rail service or would otherwise permit the Agencies to interfere unduly with FGLK's ability to fulfill its common carrier obligation, the Board will grant the

⁹ We note that the parties did not submit the original transactions to the ICC in advance for a determination on whether agency authority was required. When that is the case, parties proceed at the risk that they may be found to be rail carriers subject to our jurisdiction. Notwithstanding our finding in this case, parties contemplating State of Maine type transactions still should submit them to the Board for our examination prior to their putting them into effect.

Agencies' requests that the notices in Docket Nos. FD 36011 and FD 36023 be dismissed. In addition, because the other proposed transactions do not change our original approval of FGLK's operation and common carrier obligation, nor do they transfer control over railroad operations to the Agencies, Board approval of these transactions is not necessary. Accordingly, we will also dismiss the proceedings in Docket Nos. FD 36012, FD 36021, FD 36022, and FD 36024. Under these circumstances, we find that the proposed transactions do not require Board authorization under § 10901 (or § 10902) or an exemption under § 10502.

Waiver of 49 C.F.R. § 1150.42(e). As noted, FGLK has requested waiver of the employee notice requirements of 49 C.F.R. § 1150.42(e). The purpose of that requirement is to ensure that rail labor unions and employees who would be affected by the transfer of a line are given sufficient notice of the transaction before consummation. Because these proceedings are being dismissed, the waiver requests in Docket Nos. FD 36012, FD 36021, FD 36022, and FD 36024 will be denied as moot.

It is ordered:

1. The Agencies' motion to dismiss the verified notices of exemption in Docket Nos. FD 36011 and FD 36023 is granted.
2. The proceedings in Docket Nos. FD 36012, FD 36021, FD 36022, and FD 36024 are dismissed.
3. The requests for waiver in Docket Nos. FD 36012, FD 36021, FD 36022, and FD 36024 are denied as moot.
4. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.