

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35660

GWI VOTING TRUST AND R. LAWRENCE MCCAFFREY, VOTING TRUSTEE—
CONTROL EXEMPTION—RAILAMERICA, INC., ET AL.

Digest:¹ This decision denies Napa Valley Railroad Company and Yreka Western Railroad Company's request to nullify the notice filed by the GWI Voting Trust and R. Lawrence McCaffrey for an exemption to control RailAmerica until the Board issues a final decision on Genesee and Wyoming Inc. and RailAmerica, Inc.'s merger application.

Decided: September 14, 2012

On August 24, 2012, Napa Valley Railroad Company (NVR) and Yreka Western Railroad Company (YW) jointly filed a petition to declare as void ab initio a notice of exemption filed by the GWI Voting Trust and R. Lawrence McCaffrey (collectively, the Trust Parties) to acquire control of RailAmerica, Inc. (RailAmerica). Because we find that the designation of Mr. McCaffrey as trustee is not in violation of our regulations, we deny NVR/YW's petition.

BACKGROUND

On August 6, 2012, the GWI Voting Trust, a noncarrier created by noncarrier holding company Genesee & Wyoming, Inc. (GWI), and Mr. McCaffrey, a noncarrier individual, filed a verified notice of exemption under 49 C.F.R. § 1180.2(d)(2) to acquire control of RailAmerica and the 41 Class III rail carriers RailAmerica indirectly controls in the United States.² Mr. McCaffrey was designated as the voting trustee. Notice of this filing was published in the Federal Register on August 22, 2012, and became effective on September 5, 2012. 77 Fed. Reg. 50,761-62.

On August 24, 2012, NVR and YW filed a petition to declare the notice filed by the Trust Parties as void ab initio, to which the Trust Parties replied on August 27, 2012.

¹ 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 Decisions, EP 696 (STB served Sept. 2, 2010).

² GWI created the Voting Trust to provide for control of RailAmerica while their application for approval for GWI to acquire RailAmerica is pending before the Board. See Genesee & Wyoming Inc.—Control—RailAmerica, Inc., et al., Docket No. FD 35654.

DISCUSSION AND CONCLUSIONS

In their petition, NVRR and YW argue that the notice of exemption filed by the Trust Parties contained materially false and misleading information and should be declared as void ab initio on that basis. Specifically, NVRR and YW argue that Mr. McCaffrey was designated as the voting trustee in violation of 49 C.F.R. § 1013.1(c), which states that “[n]either the [voting] trustee, the settlor, nor their respective affiliates should have any officers or board members in common or direct business arrangements, other than the voting trust, that could be construed as creating an indicium of control by the settlor over the trustee.” NVRR and YW state that Mr. McCaffrey is the President of UniRail LLC (UniRail), which they claim is engaged in joint railroad ventures with GWI in South America, thus giving GWI an “indicium of control” over Mr. McCaffrey.

In response, the Trust Parties state that all UniRail business with GWI formally ended in 2011 and that GWI has not engaged in any business (other than the voting trust) with Mr. McCaffrey, UniRail, or any other entity controlled by Mr. McCaffrey. They point out that the only materials attached to the filing submitted by NVRR and YW were copyrighted in 2007. In support of their reply, the Trust Parties submit a verified declaration in which Mr. McCaffrey states, among other things, that the relationships identified by NVRR and YW “terminated prior to the end of 2011,” that he has “never had any consulting or other form of business arrangement with GWI with respect to any domestic rail operation,” that he is not owed “any financial remuneration of any kind from GWI, directly or indirectly through UniRail or any other entity,” and that he has “no business or other relationship with RailAmerica or any of the RailAmerica affiliate railroads.”³

Pursuant to 49 C.F.R. § 1150.42(c), if a verified notice contains false or misleading information, the exemption is void ab initio. Consequently, it may be revoked or rejected after-the-fact on that basis. See Chi., Lake Shore & S. Bend Ry.—Aquis. and Operation Exemption—Norfolk S. Ry., FD 34960 (STB served Feb. 14, 2008); Yolo Shortline R.R.—Lease and Operation Exemption—Port of Sacramento, FD 34114, slip op. at 2 (STB served Feb. 3, 2003). NVRR and YW’s allegations do not support a finding that the notice was false or misleading. Any relationship between GWI and UniRail/Mr. McCaffrey was terminated by the end of 2011, well prior to the notice. Accordingly, GWI has no “indicium of control” over Mr. McCaffrey, and Mr. McCaffrey is qualified to act as the voting trustee in this case pursuant to our regulations.

³ See Trust Parties’ Reply, Decl. of R. Lawrence McCaffrey 2-3.

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

It is ordered:

1. The request by NVRR and YW to declare the Trust Parties' notice of control exemption as void ab initio is denied.
2. This decision is effective on its date of service.

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