

SERVICE DATE - OCTOBER 28, 1997

SURFACE TRANSPORTATION BOARD¹

DECISION

Finance Docket No. 32112

CLARK SHORTLINE RAILROAD COMPANY—ACQUISITION
AND OPERATION EXEMPTION—INDIANA PORT COMMISSION

Finance Docket No. 32113

SOUTHWIND SHORTLINE RAILROAD COMPANY—ACQUISITION
AND OPERATION EXEMPTION—INDIANA PORT COMMISSION

Finance Docket No. 32114

INDIANA PORTS RAILROAD HOLDING CORPORATION—CONTINUANCE IN
CONTROL EXEMPTION—CLARK SHORTLINE RAILROAD COMPANY AND
SOUTHWIND SHORTLINE RAILROAD COMPANY²

Decided: October 16, 1997

BACKGROUND

The Indiana Port Commission (IPC) is a state agency that administers three public ports in the State of Indiana. Through its subsidiary, Indiana Ports Railroad Holding Company (IPRHC), IPC organized three shortline railroads to acquire and operate terminal track located at the ports. Each of the port lines had previously been owned by IPC and had been operated as an exempt spur or terminal track. Acquisition and operation proposals were concurrently filed on July 21, 1992, as notices of exemption under 49 U.S.C. 10505 and 49 CFR 1150, Subpart D, together with a related continuance in control exemption notice under 49 U.S.C. 10505 and 49 CFR 1180.2(d)(2). The notices of exemption were served and published in the Federal Register on August 13, 1992.

The first notice of exemption was filed in Finance Docket No. 32104³ by Burns Harbor Shortline Railroad Company (BHSL) proposing to acquire and operate 5.27 miles of rail lines in Burns International Harbor, Porter County, IN. The line was then being operated by Consolidated Rail Corporation (Conrail) under agreement with IPC. BHSL filed on July 21, 1992, a related

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10901 and 11323. Therefore, this decision applies the law in effect prior to the ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

² This proceeding was originally titled: Indiana Ports Railroad Holding Corporation—Continuance in Control Exemption—Burns Harbor Shortline Railroad Company, Clark Shortline Railroad Company, and Southwind Shortline Railroad Company.

³ Burns Harbor Shortline Company—Acquisition and Operation Exemption—Indiana Port Commission.

petition for exemption in Finance Docket No. 32105,⁴ under 49 U.S.C. 10505 and 49 CFR part 1121, to cover a proposed extension of its line over tracks of Conrail to connect directly with other carriers.

The second notice of exemption was filed in Finance Docket No. 32112 by Clark Shortline Railroad Company (Clark) proposing to acquire and operate a 32,110-foot line at the Clark Maritime Centre, Clark County, IN. The line was then being operated by Conrail, CSX Transportation, Inc. (CSXT), and MG Rail, Inc. (MGRI), under agreements with IPC.

The third notice of exemption was filed in Finance Docket No. 32113 by Southwind Shortline Railroad Company (Southwind or SWSL) proposing to acquire and operate a 33,012-foot line in Southwind Maritime Centre, Posey County, IN. The line was then being operated by CSXT.

A related notice of exemption was filed in Finance Docket No. 32114 by IPRHC proposing to continue in control of BHSL, Clark, and Southwind, upon each one becoming a carrier under its respective notice of exemption.

Conrail had opposed the proposals in Finance Docket Nos. 32104, 32105, and 32114. The Brotherhood of Locomotive Engineers (BLE) opposed all proposals.

On June 15, 1993, BHSL filed petitions requesting leave to withdraw the notice of exemption in Finance Docket No. 32104 and the petition for exemption in Finance Docket No. 32105. On the same date, IPRHC filed a petition requesting leave to amend the notice of exemption in Finance Docket No. 32114 to delete reference to BHSL as a railroad as to which IPRHC seeks to remain in control. Conrail and BLE did not object to the withdrawal petitions. On June 25, 1993, decisions were served granting the withdrawal and amendment petitions of BHSL and IPRHC, respectively.

There remains to be resolved BLE's petitions to revoke the notices of exemption in Finance Docket Nos. 32112 and 32113, which permitted Clark and Southwind to acquire and operate rail lines.

BLE questions whether the ICC had jurisdiction to exempt these transactions. The union asserted that IPC did not conduct rail operations or hold itself out to perform rail operations and, thus, is not a rail carrier. Because each of the lines was operated by a carrier (Conrail, CSXT or MGRI), BLE asserts that IPC may not unilaterally displace the existing operator. Furthermore, BLE submits that no other carrier can obtain the right to operate through an exemption from 49 U.S.C. 10901. BLE also contends that IPC, through IPRHC, created the short line railroads to circumvent IPC's commitments to the operating carrier and that carrier's employees. Finally, BLE maintains that, because IPRHC is creating rail subsidiaries, 49 U.S.C. 11343 governs, rather than 49 U.S.C. 10901.

Clark and Southwind reply that BLE does not address the standards under 49 U.S.C. 10505(d) to revoke the exemption notices. The two respondents argue that: (1) the line each prospective carrier is acquiring is a line of railroad; (2) each prospective carrier will serve enough shippers to be a railroad; and (3) each prospective carrier will hold itself out to be railroad. Clark and Southwind also cite cases where the ICC asserted jurisdiction over rail carriers seeking to serve marine terminals.⁵ Responding to assertions that the current operators will be displaced, Clark and Southwind contend that current operators could possibly continue to serve each facility, either as

⁴ Burns Harbor Shortline Railroad Company—Extension and Operation Exemption—In Porter County, IN.

⁵ Assoc. of P&C Dock Longshoremens v. The Pitts. & Conneaut, 8 I.C.C.2d 280 (1992); , Jackson County Port Authority—Construction Exemption—Pascagoula, MS. Finance Docket No. 31536 (ICC served Aug. 21, 1990); Columbia-Astoria Rail Service Inc.—Construction and Operation Exemption--At Tongue Point, OR. Finance Docket No. 31304 (ICC served Nov. 1, 1988); and Louisville & Jefferson Co & CSX Const. & Oper. Jeff. KY. 4 I.C.C.2d 749 (1988).

contract operators or through trackage rights.

It appears that none of the transactions here has gone forward and that neither Clark nor Southwind has acquired the lines or has assumed the status of a common carrier railroad. There are no indications that rail operations at the Clark Maritime Centre and the Southwind Maritime Centre have changed. Apparently, the tracks at these ports are still being operated by Conrail, CSXT, and MGRI as terminal track. In view of these circumstances, a decision on issues raised in BLE's petitions might not be required. Accordingly, the parties are directed to show cause within 30 days why the Board should not vacate the exemptions in these proceedings and dismiss these proceedings.

It is ordered:

1. Within 30 days of the service date of this decision, the parties are directed to show cause why the exemptions in these proceedings should not be vacated and why the proceedings should not be dismissed. To the extent that a party wishes to respond to a filing by another party, it may do so within 50 days of the service date of this decision.

2. This decision is effective on the date served.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary