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SERVICE DATE – APRIL 1, 2016

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35984

OHIO RIVER PARTNERS LLC—ACQUISITION AND OPERATION EXEMPTION— HANNIBAL DEVELOPMENT, LLC

Digest:¹ This decision denies a request to reject the verified notice of exemption filed in this proceeding.

Decided: March 30, 2016

On January 7, 2016, Ohio Terminal Railway Company (OTRC) filed a petition to reject a verified notice of exemption filed by Ohio River Partners, LLP (ORP) to acquire and operate 12.2 miles of rail line in Monroe County, Ohio. By decision served on January 15, 2016, the Board put the proceeding into abeyance and postponed the effective date of the exemption to provide sufficient time to fully consider the arguments presented. This decision denies the petition to reject.

BACKGROUND

On December 18, 2015, ORP, a noncarrier, filed a verified notice of exemption under 49 C.F.R. § 1150.31 to acquire from Hannibal Development, LLC (Hannibal Development), and operate 12.2 miles of rail line known as the Omal Secondary Track (the Line). The Line extends from milepost 60.5 at or near Powhatan Point to milepost 72.2 at or near Hannibal, in Monroe County, Ohio. In a concurrently filed verified notice of exemption in Fortress Investment Group LLC—Continuance in Control Exemption—Ohio River Partners, LLC, Docket No. FD 35985, Fortress Investment Group LLC (Fortress) sought Board approval to continue in control of ORP and two other rail carriers currently controlled by other companies within the Fortress corporate family following consummation of the proposed transaction. The separate notices of exemption were served and published in the Federal Register, 80 Fed. Reg. 81,878-79, on December 31, 2015. These notices stated that the exemptions would become effective on January 17, 2016.

On January 7, 2016, OTRC filed in this proceeding a petition to reject the notice of exemption to acquire and operate the Line. OTRC further requested that the Board stay the effectiveness of that exemption to afford the Board sufficient time to consider the arguments

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).

presented.² OTRC argues that the streamlined notice of exemption procedures under § 1150.31 are not appropriate for the transaction contemplated by ORP because the transaction presents non-routine and controversial issues. OTRC notes that it has an easement to operate over the Line, see Ohio Terminal Ry.—Operation Exemption—Hannibal Real Estate, FD 35703 (STB served Jan. 11, 2013), and that the exemption would therefore permit dual operations over the Line. OTRC claims that dual operations would not be feasible based on the Line's limited capacity and constrained interchange facilities with Norfolk Southern Railway Company (NSR). OTRC is thus concerned about its ability to meet its common carrier obligation if the exemption becomes effective. It faults ORP for not addressing these issues in its verified notice and asserts that any such authorization should only be granted after a full regulatory review, including the development of a complete factual record.

OTRC also claims that ORP's notice should be rejected because it is false and misleading. OTRC argues that, beyond not addressing the issues presented by dual operations, ORP did not disclose that there is an ongoing dispute between Hannibal Development (ORP's proposed transferor)³ and Hannibal Real Estate, LLC (HRE), the owner of the easement operated by OTRC. OTRC asserts that there is a mediation/arbitration proceeding currently pending in Ohio between HRE and Hannibal Development regarding the scope of the easement under which OTRC operates; specifically, whether the easement permits Hannibal Development to allow another operator to use the Line.

In a reply filed on January 12, 2016, ORP argues that the Board should deny OTRC's petition because its notice of exemption contains all of the information that is required by the Board's regulations and is not false or misleading. ORP asserts that it did not need to disclose the easement dispute and that, regardless, such a dispute is not grounds for rejecting its notice. Similarly, ORP argues that dual operations on a line are common and that its notice did not need to address OTRC's operational or interchange concerns, which, ORP contends, are exaggerated and premature at this point.

NSR submitted a comment letter on January 22, 2016, in which NSR agrees with OTRC's description of the existing capacity and geography constraints on the ability of carriers to conduct interchange operations with NSR on the Line. NSR asks that, if another carrier is allowed to operate over the Line, the Board require agreement among NSR and the carriers on the Line to ensure efficient and safe interchange operations, citing Central Illinois Railroad—Operation Exemption—Rail Line of City of Peoria & Village of Peoria Heights in Peoria & Peoria Heights, Peoria County, Ill. (CIRY), FD 34518 (STB served July 1, 2004 & Feb. 23, 2005). NSR warns that, unless all carriers operating over the Line coordinate their operations, congestion and service failures will likely result.

² OTRC also filed a motion for protective order, which the Board granted on January 13, 2016.

³ OTRC states that all contacts regarding ownership addressed in its petition have been with Hannibal Development Partners, LLC, but it is not certain whether Hannibal Development is the same or a separate entity.

DISCUSSION AND CONCLUSIONS

An exemption under 49 C.F.R. pt. 1150 Subpart D is void ab initio if the notice contains false or misleading information. Failure to disclose material information can render a notice misleading by omission, and therefore void ab initio. See U S Rail Corp.—Lease & Operation Exemption—Shannon G., a N.J. LLC, FD 35042, slip op. at 3-4 (STB served Oct. 8, 2008). Material means the transaction would not have otherwise qualified for an exemption. See Berkshire Scenic Ry. Museum, Inc. v. ICC, 52 F.3d 378, 381 (1st Cir. 1995). Here, OTRC has failed to demonstrate that the information is false or misleading, or that the transaction is too controversial or non-routine for approval under the class exemption process. We will therefore let ORP’s exemption become effective.

ORP has provided the information required by our regulations, and its failure to disclose the dispute between Hannibal Development and HRE does not make the notice false and misleading. The Board has found that its regulations at 49 C.F.R. §§ 1150.31-36 do not require the disclosure of such third-party contractual disputes, and the existence of such a dispute is not grounds for rejecting an exemption. See N. H. Cent. R.R.—Lease & Operation Exemption—Line of N. H. Dep’t of Transp., FD 35022 (STB served Dec. 11, 2007); Ind. Ne. R.R.—Change in Operators—Branch & St. Joseph Ctys. Rail Users Ass’n in Branch Cty., Mich., FD 33760 (STB served Sept. 1, 1999). However, the Board’s grant of authority to operate under a notice of exemption is permissive only, and in order to exercise that authority and commence operations, the carrier must still obtain the necessary rights under state property and/or contract law.⁴ Where, as here, there is a dispute about whether an entity can exercise its operating authority by obtaining the property and/or contractual rights in a line of railroad, the dispute generally should be decided by a court, applying state law, and not by the Board. N.H. Cent. R.R., slip op. at 3 (“the issue of whether the lease agreement grants exclusive rights to Twin State [incumbent operator seeking rejection] lies within the purview of the courts, not with this agency.”); see also Lackawanna Cty. R.R. Auth.—Acquis. Exemption—F&L Realty, Inc., FD 33905 et al., slip op. at 6 (STB served Oct. 22, 2001); Ind. Ne. R.R., slip op. at 3-4. Accordingly, this order permitting ORP’s notice of exemption to become effective should not affect the ongoing proceeding in Ohio involving whether HRE’s freight rail operating easement is exclusive, as the grant of permissive operating authority to ORP does not constitute a ruling on any of the parties’ contractual or property claims or purported rights. See Saratoga & N. Creek Ry.—Operation Exemption—Tahawus Line, FD 35631, slip op. at 4 (STB served Oct. 11, 2012).

⁴ See, e.g., James Riffin—Pet. for Declaratory Order, FD 35245, slip op. at 6 (STB served Sept. 15, 2009), aff’d Riffin v. STB, No. 09-1277, 2010 WL 4924719 (D.C. Cir. Nov. 30, 2010) (per curiam) (permissive authority from the Board did not allow operation where the proposed operator lacked a suitable legal interest that would give him the ability to exercise that authority).

OTRC's claim that there is no information in the notice concerning dual operations and how such operations might be coordinated also does not warrant rejection of the notice. The exemption ORP has invoked does not require the information OTRC contends should have been provided here. Moreover, notices of exemption have been used to permit dual operations on capacity-constrained lines. See CIRY; City of Rochelle, Ill.—Notice of Exemption—Commencement of Rail Common Carrier Obligations, FD 33587 (STB served July 7, 1998); Luzerne & Susquehanna Ry.—Lease & Operation Exemption—Certain Lines of Luzerne Cty. Rail, FD 32563, et al. (ICC served Sept. 1, 1994). We note that OTRC states that it anticipates working out joint use issues as part of the Ohio proceedings (see Pet., V.S. Peterson at 19-20), and we encourage these efforts. To ensure that such issues are satisfactorily resolved, we will adopt NSR's request and require that, before ORP may commence any operations on the Line, NSR, ORP, and OTRC must: (1) negotiate and agree on interchange and operating protocols, and (2) jointly certify to the Board that these protocols are in place. See CIRY. If there are issues that the parties cannot resolve on their own or other issues arise, any party may ask the Board to facilitate discussions or provide other relief.

It is ordered:

1. OTRC's petition to reject is denied.
2. ORP's exemption is effective immediately.
3. Before ORP may commence any operations on the Line, NSR, ORP, and OTRC must negotiate and agree on interchange and operating protocols, and jointly certify to the Board that these protocols are in place.
4. This decision is effective on its service date.

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