

41186
EB

SERVICE DATE – DECEMBER 30, 2010

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 55 (Sub-No. 659X)

CSX TRANSPORTATION, INC.–ABANDONMENT EXEMPTION–IN ALLEGANY
COUNTY, MD.

Digest:¹ The offer of financial assistance law provides a process to acquire a rail line to continue rail service over it after the rail carrier has obtained regulatory approval to stop operating the line and dispose of it. Here, the Board removes the restriction that prohibits, for a 5-year period, the sale of a rail line acquired under that law to anyone other than the rail carrier that previously owned the line. Removing this restriction will allow the proposed sale of this line to go forward so that rail service may be restored on the line in a more timely manner.

Decided: December 29, 2010

By petition filed on October 19, 2010, Eighteen Thirty Group, LLC (Eighteen Thirty) seeks an exemption under 49 U.S.C. § 10502 from the requirements of 49 U.S.C. § 10904(f)(4)(A) to permit Eighteen Thirty to acquire an 8.54-mile line of railroad between milepost BAI 27.0 near Morrison and milepost BAI 18.46 at the end of the track near Carlos, in Allegany County, Md. (the Line). The latter statutory provision forbids an entity that has acquired a rail line under the offer of financial assistance (OFA) process from transferring that line to any entity other than the rail carrier from which it was originally purchased prior to the end of the fifth year after consummation of the sale. Eighteen Thirty states that, unless we grant an exemption from that statutory restriction, it would not be able to acquire the Line until July 10, 2011, 5 years after CSX Transportation, Inc. (CSXT) issued the deed for the sale of the Line under the OFA process to WMS, LLC (WMS). In support of its request, Eighteen Thirty has attached a letter from CSXT confirming that it issued the deed for the sale of the Line on July 10, 2006, and declaring that it will not exercise its statutory right to reacquire the Line and waives its rights under the statute.

James Riffin filed comments on November 3, 2010, opposing the exemption and questioning the need for expedited handling. Alternatively, he requests that the Board not limit the applicability of the exemption to Eighteen Thirty, but make the exemption applicable to any entity that otherwise receives authority to acquire the Line.

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).

We will grant the exemption from 49 U.S.C § 10904(f)(4)(A) as sought by Eighteen Thirty.

BACKGROUND

The Board authorized abandonment of the Line in CSX Transportation, Inc.–Abandonment Exemption–in Allegany County, Md., AB 55 (Sub-No. 659X)(STB served Aug. 25, 2005). By decision served December 14, 2005, WMS was authorized to acquire the Line pursuant to the Board’s OFA provisions at 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27.² Eighteen Thirty states that the financing that WMS had originally sought failed to materialize, and its promoters turned to investor James Riffin, who agreed to furnish funds for the purchase of the Line in exchange for a 98% interest in WMS. Subsequently, Riffin was authorized to be substituted as the acquiring entity in lieu of WMS.³ According to Eighteen Thirty, the Line has yet to have rail service restored over it, and Riffin has filed for personal bankruptcy under Chapter 7 of the United States Bankruptcy Code.

This transaction is related to three simultaneously filed notices of exemption: (1) Eighteen Thirty Group, LLC–Acquisition Exemption–in Allegany County, Md., FD 35438, in which Eighteen Thirty has sought an exemption under 49 C.F.R. § 1150.31 to acquire the Line pursuant to an agreement with Mark J. Friedman, Chapter 7 Trustee of the Bankruptcy Estate of James Riffin (Trustee); (2) Georges Creek Railway, LLC–Operation Exemption–in Allegany County, Md., FD 35437, in which Georges Creek has sought an exemption under 49 C.F.R. § 1150.31 to operate the Line; and (3) Duncan Smith and Gerald Altizer–Continuance in Control Exemption–Eighteen Thirty Group, LLC and Georges Creek Railway, LLC, FD 35436, in which Duncan Smith and Gerald Altizer, the owners of Eighteen Thirty and Georges Creek, have sought an exemption to continue in control of Eighteen Thirty and Georges Creek upon their becoming Class III rail carriers. These notices of exemption all were served November 4, 2010, and published in the Federal Register on November 5, 2010 (75 Fed. Reg. 68,400-02). Eighteen Thirty notes that its acquisition agreement with the Trustee is subject to approval by the bankruptcy court. Eighteen Thirty intends to take ownership of the Line and plans to restore it to operating condition for resumption of common carrier rail service by Georges Creek.

² CSX Transp., Inc.–Aban. Exemption–in Allegany County, Md., AB 55 (Sub-No. 659X)(STB served Dec. 14, 2005).

³ CSX Transp., Inc.–Aban. Exemption–in Allegany County, Md., AB 55 (Sub-No. 659X) (STB served Aug. 18, 2006) (August 2006 decision). In 2009, the Board found that Riffin had not established that he had a suitable interest in the Line to be considered a rail carrier. The Board noted that the ownership issue was pending in state courts. James Riffin–Pet. for Decl. Order, FD 35245, slip op. at 6 (STB served Sept. 15, 2009), aff’d per curiam sub nom. Riffin v. STB, No. 09-1277 (D.C. Cir. Nov. 30, 2010).

On November 3, 2010, Riffin and Lois Lowe filed almost identical comments in opposition to those notices of exemption and asked the Board to reject the notices. On November 10, 2010, Riffin and Lowe also filed almost identical motions to stay the notices of exemption and to revoke the exemptions, should they become effective. The motions for stay were denied in a decision served November 17, 2010. On that date, Smith, Altizer, Eighteen Thirty, and Georges Creek jointly filed a reply to the comments and motions of Riffin and Lowe. On December 1, 2010, Riffin and Lowe filed replies to the jointly filed reply of Smith, Altizer, Eighteen Thirty, and Georges Creek. On December 8, 2010, Riffin filed a motion to dismiss the notices of exemption for lack of jurisdiction. Smith, Altizer, Eighteen Thirty, and Georges Creek jointly filed a reply to those filings on December 21, 2010. The motions to reject, revoke, and dismiss will be addressed in a separate decision.

PRELIMINARY MATTER

Also on November 3, 2010, Riffin filed a motion to consolidate the 3 notice of exemption proceedings in FD 35436, 35437, and 35438 and the petition for exemption proceeding here in AB 55 (Sub-No. 659X). Riffin argues that the 4 proceedings involve the same parties, the same line of railroad, and many of the same issues, and that consolidation would conserve the limited resources of the Board.

We will deny Riffin's consolidation request as it pertains to this proceeding. We see no reason to delay deciding the petition for exemption before us in AB 55 (659X) while the requests by Riffin and Lowe to reject or revoke the 3 exemption notices are decided. Our decision here does not pre-determine or prejudge how we will rule on the motions to reject or revoke the exemptions in FD 35436, 35437, or 35438.

DISCUSSION AND CONCLUSIONS

As noted, under 49 U.S.C. § 10904(f)(4)(A), an entity that has acquired a rail line under the OFA process may not transfer that line to any entity other than the carrier from which it was originally purchased, prior to the end of the fifth year after consummation of the sale. Under 49 U.S.C. § 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

The 5-year restriction against transferring the Line to an entity other than CSXT is scheduled to expire on or about July 10, 2011. In its letter filed with the Board, CSXT states that it does not object to the acquisition of the Line by Eighteen Thirty and waives its statutory right to reacquire the Line. Thus, the carrier for whose benefit the transfer restriction continues to operate has waived its right to that benefit so that Eighteen Thirty may pursue a more timely acquisition of the Line and restoration of rail service.

In these circumstances, applying the transfer restriction of § 10904(f)(4)(A) for the entire 5-year period to the proposed acquisition by Eighteen Thirty is not necessary to carry out the rail transportation policy.⁴ By removing this impediment to Eighteen Thirty's plan to acquire the Line now, an exemption will minimize the need for Federal regulatory control over the rail transportation system and will reduce regulatory barriers to entry, in accordance with 49 U.S.C. §§ 10101(2) and (7). An exemption also will ensure the development and continuation of a sound rail transportation system with effective competition between rail carriers and other modes, and encourage and promote energy conservation, consistent with 49 U.S.C. §§ 10101(4) and (14). Other aspects of the rail transportation policy will not be adversely affected.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. Currently, no rail service is being provided on the Line. Granting this exemption will allow Eighteen Thirty to proceed to seek to acquire the Line and to have service instituted more expeditiously, all to the benefit of potential shippers on the Line. Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

In his filing in AB 55 (Sub-No. 659X) objecting to the exemption being sought here, Riffin also stated that he incorporated by reference his November 3, 2010 comments in FD 35438. In those comments, Riffin argued that the notice of exemption filed under 49 C.F.R. § 1150.31 should be rejected because (1) the proceeding is controversial and the time constraints associated with the notice of exemption process do not permit the development of a sufficient record; (2) Eighteen Thirty's petition falsely claims that environmental review under 49 C.F.R. § 1105 is unnecessary and that Riffin, or the Trustee, would be the railroad transferring the Line; and (3) Eighteen Thirty's attorney, John Heffner, has a conflict of interest in that he represented Riffin and WMS in the earlier OFA sale. None of these arguments provides a basis for denying the requested exemption from § 10904(f)(4)(A). First, although the Board has rejected controversial *notices* of exemption due to the accelerated time frames for processing such matters, here Eighteen Thirty has filed a *petition* for exemption, where those time limits do not apply. Second, the request for an exemption from § 10904(f)(4)(A) does not trigger environmental review under 49 C.F.R. § 1105. Third, the identity of the entity that will transfer its ownership interest now is irrelevant to the request for an exemption from the 5-year restriction, since that restriction is designed to give the prior owner a right of first refusal. Fourth, although Riffin has argued that Mr. Heffner has a conflict of interest, he has not shown how that alleged conflict has any bearing on whether to grant the requested exemption.

Eighteen Thirty requests expedited action by the Board to have the effectiveness of the exemption coincide with a decision by the bankruptcy court ruling on the sale of the Line to Eighteen Thirty. Eighteen Thirty states that it is anxious to acquire the Line because there

⁴ CSXT has not acquiesced to the transfer of the Line to anyone other than Eighteen Thirty. We therefore are exempting only the proposed acquisition of the Line by Eighteen Thirty from the § 10904(f)(4)(A) transfer restriction.

are potential customers who would like service restored on the Line now. The request is reasonable. Accordingly, our decision granting the exemption will be effective on the service date of this decision, rather than the normal 30 days after service of the decision and publication in the Federal Register.

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

It is ordered:

1. The motion to consolidate AB 55 (Sub-No. 659X) with FD 35436, FD 35437, and FD 35438 is denied.

2. Under 49 U.S.C. § 10502, we exempt from the requirements of 49 U.S.C. § 10904(f)(4)(A) the acquisition by Eighteen Thirty of the Line.

3. Notice will be published in the Federal Register on January 4, 2011.

4. This decision will be effective on December 30, 2010. Petitions to reopen must be filed by January 18, 2011.

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