

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35220

UNION PACIFIC RAILROAD COMPANY, IOWA INTERSTATE RAILROAD, LTD.,
RED GIANT OIL COMPANY, AND MIDWEST WALNUT COMPANY OF IOWA—
ACQUISITION AND DISCONTINUANCE OF SERVICE EXEMPTION—
IN COUNCIL BLUFFS, IOWA

Digest:¹ Union Pacific Railroad Company, Iowa Interstate Railroad, Ltd., Red Giant Oil Company, and Midwest Walnut Company of Iowa have filed a joint request for approval of a transaction that would transfer railroad operating responsibilities over a stretch of track in Council Bluffs, Iowa, from Union Pacific to Iowa Interstate, while transferring the physical assets of the rail line to Red Giant, a shipper on the line. Because Petitioners' filings do not support the relief they seek, their joint request is denied.

Decided: September 20, 2010

By petition filed on October 20, 2009 (October 2009 petition), Union Pacific Railroad Company (UP), a Class I rail carrier, Iowa Interstate Railroad, Ltd. (IAIS), a Class II rail carrier, and 2 shippers, Red Giant Oil Company (Red Giant), and Midwest Walnut Company of Iowa (Midwest Walnut) (collectively, Petitioners), jointly seek an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10902. Petitioners state that the exemption would permit IAIS to acquire UP's operating rights and full common carrier obligations with respect to: (1) UP's Great Western Industrial Lead (UP Line) from milepost 503.6 to milepost 504.05, a distance of approximately 0.45 miles, in Pottawattamie County, Iowa; and (2) approximately 900 feet of track (the Connecting Track) connecting the UP Line to IAIS' main line (IAIS Line). Petitioners also request an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10903, that would permit UP to discontinue operations over the UP Line and Connecting Track. In a supplemental letter filed on June 14, 2010, at page 3 (June filing), Petitioners state that the purpose of the transaction is to restructure their ownership and operating rights while leaving unchanged IAIS' rights and common carrier obligation to provide service to the shippers. But while parts of Petitioners' filings suggest that UP will be transferring its operating assets directly to IAIS, other parts appear to show that Red Giant will acquire the Connecting Track and the UP Line and then "will grant

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. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

IAIS unrestricted rights to use the UP Line and the Connecting Track for common carrier rail service.”

As discussed below, the petition will be denied because Petitioners did not submit sufficient information for the Board to determine whether prior Board approval under 49 U.S.C. § 10901 would be necessary to carry out the transactions, whether Red Giant would become a rail carrier under the proposed transactions, and whether the exemption process is suitable for the transactions.

BACKGROUND

According to Petitioners, the UP Line was formerly a part of the Chicago Great Western Railway (CGW) main line between Council Bluffs, Iowa, and Fort Dodge, Iowa. In 2000, UP abandoned a portion of the former CGW line to the immediate north and west of the UP Line, from UP milepost 504.05 to milepost 505.2, as part of a joint relocation project authorized in Iowa Interstate Railroad—Joint Relocation Project Exemption—in Council Bluffs, Pottawattamie County, Iowa, FD 33883 (STB served June 30, 2000) (joint relocation project). As part of the joint relocation project, UP obtained overhead trackage rights over the IAIS Line to access the UP Line, and IAIS obtained local trackage rights over the UP Line. UP constructed a Connecting Track between the IAIS Line and the UP Line, thereby allowing both carriers to provide direct service to shippers on the UP Line. Petitioners state that, since the joint relocation project, all traffic accessing the UP Line has moved via the IAIS Line and the Connecting Track. According to Petitioners, UP has not provided service over the UP Line and Connecting Track in more than 2 years and IAIS has been the sole rail service provider on the UP Line and Connecting Track, both as a switch carrier for UP traffic and as a line-haul carrier for its own traffic. Red Giant and Midwest Walnut are located on the UP Line, and no shippers are served directly from the Connecting Track.

The trackage at issue in this proceeding was also the subject of a joint petition for exemptions in Docket Nos. AB 33 (Sub-No. 274X) and AB 414 (Sub-No. 4X), which the Board denied on December 12, 2008. In those proceedings, UP and IAIS sought to use exemption procedures to permit: (1) UP to abandon and discontinue service over the UP Line; (2) IAIS to discontinue trackage rights over the UP Line; and (3) UP to discontinue its overhead trackage rights over the IAIS Line from milepost 486.8 to milepost 488.0, a distance of 1.2 miles, in Pottawattamie County. The petition was denied because UP and IAIS failed to demonstrate that the interests of the 2 shippers utilizing the line, Red Giant and Midwest Walnut, would be protected.

In response to the Board’s denial decision, Petitioners jointly filed the petition in this proceeding, asserting that they have restructured the proposed transaction to enable Red Giant to acquire the UP Line and Connecting Track, thereby allowing UP to discontinue operations over both. The petition states that, simultaneously with Red Giant’s acquisition of the UP Line and Connecting Track, Red Giant will grant IAIS rights “sufficient” for “IAIS to perform common

carrier operations over the UP Line [and Connecting Track] in perpetuity, or until IAIS obtains lawful abandonment authority from the [Board] or [its] successor regulatory agency.” Further, Petitioners submit an “Industrial Track Agreement,” made by and between Red Giant and IAIS that purports to allow IAIS to operate over the UP Line and Connecting Track and provides that Red Giant will maintain the lines. At the conclusion of the proposed transaction, Petitioners maintain that IAIS will retain the common carrier obligation for the UP Line and Connecting Track, and Red Giant, as owner of the UP Line and Connecting Track, will become responsible for their maintenance and upkeep.

By letter filed on January 13, 2010 (January filing), Petitioners requested that the Board defer a decision on the petition for exemption until the Board had the opportunity to consider supplemental information that they expected to submit within 30 days. Because no additional filings were received, the Board, in a decision served on May 25, 2010, directed Petitioners to submit supplemental information to clarify the following issues: (1) the procedural steps to be followed for the transfer of property interests and easements; (2) supplemented labor notification; (3) inconsistencies contained in the petition; (4) the interests and obligations retained by the various Petitioners; (5) further definition regarding the responsibilities of any parties with the common carrier obligation; (6) the interests to be transferred; and (7) the interests to be retained.

In the June filing, Petitioners submitted supplemental information that amended their description of the proposed transactions. Petitioners state that Midwest Walnut and UP will transfer their “respective ownership interests (held or claimed) in the Connecting Track right-of-way to Red Giant;” UP will transfer the Connecting Track structure and related personal property to Red Giant; and UP will transfer all of its operating rights and obligations over the UP Line and associated Connecting Track to IAIS. As noted, Petitioners also state that Red Giant will grant IAIS unrestricted rights to use the UP Line and Connecting Track for common carrier rail service, referring to an “Industrial Track Agreement,” which was submitted as part of their October 2009 petition. Petitioners explain that “Red Giant’s grant of operating rights to [IAIS] is not an easement,” but rather a contractual grant for IAIS to provide common carrier rail service over the right-of-way and track structure. As part of the transaction, Petitioners state that Red Giant will grant Midwest Walnut an easement over the Connecting Track and a portion of the UP Line for private switching to Midwest Walnut’s facility.

According to Petitioners, the proposed transfer of property interests and operating rights will occur simultaneously at a single closing, and that, to the extent that property interests and descriptions are inconsistent with Petitioners’ October 2009 petition, Petitioners advise that the June filing should govern. As a result of the above transactions, Petitioners state that UP will no longer have any property interests or obligations to provide service over the UP Line and Connecting Track.²

² Petitioners also included a supplemental labor notification reflecting how IAIS will acquire the UP Line and Connecting Track and clarifying IAIS’ employment intentions.

DISCUSSION AND CONCLUSIONS

Pursuant to 49 U.S.C. § 10902, the acquisition of a rail line by a Class II carrier requires an application to, and authorization by, the Board. Likewise, a noncarrier may not acquire a line of railroad without prior Board approval under 49 U.S.C. § 10901(a)(4). Also, common carrier service may not be discontinued on a rail line without the Board's prior approval. See 49 U.S.C. § 10903.

The exemption process of 49 U.S.C. § 10502, which is designed to minimize regulatory burdens, provides applicants the opportunity to utilize abbreviated entry or exit licensing procedures in appropriate circumstances. However, the Board will not grant an exemption for a specific transaction unless the information provided is sufficient for the Board to find that an exemption is appropriate. It is incumbent upon applicants to provide the Board with the information necessary for an informed decision. Petitioners have failed to do so here.

Petitioners' filings here, even as supplemented, are unclear. Even though Petitioners may intend that Red Giant avoid acquiring any common carrier responsibilities, under the transaction as proposed, it appears that Red Giant would acquire UP's ownership interest in the UP Line and Connecting Track and would grant IAIS contractual operating rights to provide service over these lines. Under that circumstance, IAIS would not have a property interest, such as an easement, in the lines. It thus appears that the transaction would make Red Giant a rail carrier, which would require Board authorization under § 10901(a)(4) for a noncarrier to acquire a line of railroad. Petitioners have requested exemption authority under 49 U.S.C. § 10902, 49 U.S.C. § 10903, and "any other applicable regulatory requirements," but have not specifically invoked 49 U.S.C. § 10901 and have not attempted to address the requirements of § 10901. The Board will not base an exemption from statutory requirements on this catch-all reference and unsupported record.

Moreover, Petitioners have failed to submit any agreements or documents that fully explain the transfer of UP's common carrier rights and obligations and property interests to IAIS or Red Giant. The only agreement submitted by Petitioners was an "Industrial Track Agreement" filed with their October 2009 petition, but that agreement simply allows IAIS to operate over the UP Line and Connecting Track and sets forth the parties' respective responsibilities to maintain those lines. It is not determinative as to the extent of Red Giant's rights on those lines.

Petitioners bear the burden of providing to the Board a complete and accurate record of the nature of the proposed transactions. It would appear that the purposes of the transactions could be accomplished most simply by IAIS acquiring and operating the UP Line and the Connecting Track. Or, alternatively, if Red Giant is intent upon acquiring the lines itself, it could do so, thus becoming a rail carrier, and then lease the lines to IAIS. If, however, Petitioners want to propose a more unusual and complex transaction in which Red Giant were to

seek to acquire just the rail lines' physical assets, while IAIS holds the common carrier obligation, then Petitioners would need to describe and document the exact nature of the proposed transactions, demonstrate that these transactions properly qualify for an exemption, and demonstrate that Red Giant's acquisition of the rail assets would not require Board approval. Because they have not done so here, the joint petition will be denied.

The denial of Petitioners' request for exemption moots the need to impose any labor protection.

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

It is ordered:

1. Petitioners' request for exemption is denied as discussed in this decision.
2. This decision will be effective on its service date.

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