

38633
EB

SERVICE DATE – LATE RELEASE DECEMBER 18, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35098

GENESEE & WYOMING INC.—CONTROL EXEMPTION—
MARYLAND MIDLAND RAILWAY, INC.

STB Finance Docket No. 35099

MARYLAND MIDLAND RAILWAY, INC.
—ACQUISITION AND OPERATION EXEMPTION—
CERTAIN ASSETS OF THE MARYLAND TRANSIT ADMINISTRATION

[REQUEST FOR WAIVER OF 49 CFR 1150.42(e)]

Decided: December 18, 2007

On October 22, 2007, Genesee & Wyoming Inc. (GWI), a noncarrier, filed a verified notice of exemption¹ to permit GWI to acquire indirect control of Maryland Midland Railway, Inc. (MMID), upon consummation of a merger agreement between GWI, MMID Holding Inc. (MMID Holding), MMID Acquisition Sub Inc. (MMID-ASI), and MMID.² Pursuant to the merger agreement, MMID-ASI would merge with MMID and the surviving corporation would continue as MMID. MMID's sole shareholder would be MMID Holding and GWI would own a majority of the shares of MMID Holding. Accordingly, MMID Holding would have direct control and GWI would have indirect control over MMID.³

Also, on October 22, 2007, MMID, a Class III rail carrier with annual revenues in excess of \$5 million, filed a verified notice of exemption under 49 CFR 1150.41 to acquire (by purchase) two active rail lines and acquire (by purchase) and operate one inactive rail line,

¹ The notice was initially filed on October 22, 2007. Because supplemental information was filed on November 2, 2007, that date was considered to be the filing date.

² The full version of the merger agreement, as required by 49 CFR 1180.6(a)(7)(ii), was concurrently filed under seal along with a motion for protective order. A decision on GWI's motion for protective order was issued in a separate decision on November 9, 2007.

³ According to GWI, MMID Holding was not listed as an applicant in the verified notice of exemption because MMID Holding would obtain control of only one rail carrier (MMID) following consummation of the proposed merger transaction and therefore would not be subject to the provisions of 49 U.S.C. 11323.

totaling approximately 34 miles, owned by the Maryland Transit Administration (MTA). The two active lines extend from milepost 32.6 at or near Westminster, MD, to milepost 24.3 at or near Cedarhurst, MD, and from milepost 60.1 at or near Walkersville, MD, to milepost 39.6 at or near Littlestown, PA; and the inactive line extends from milepost 45.1 at Taneytown, MD, to milepost 39.6 at Littlestown. In its notice of exemption, MMID stated that, due to an inadvertent error, it neglected to obtain authority in advance of its acquisitions. MMID informs us that it has already acquired the lines from MTA, pursuant to a purchase and sale agreement that was executed on February 16, 2005 (Agreement), and a quitclaim deed that was executed on January 23, 2006, and that it filed the notice of exemption to correct its error.

On November 16, 2007, notice of the control exemption in STB Finance Docket No. 35098 was served and published in the Federal Register at 72 FR 64702, and notice of the acquisition and operation exemption in STB Finance Docket No. 35099 was served and published in the Federal Register at 72 FR 64702-03. The control exemption was scheduled to become effective on December 2, 2007, and the acquisition and operation exemption was scheduled to become effective on December 21, 2007 (unless the Board granted MMID's request for waiver of the 60-day advance labor notice requirement, which is discussed further below).

On November 19, 2007, MTA filed a petition to stay the effective dates in both proceedings. MTA requested the stay in order to give it time to correct the deeds that conveyed the lines from MTA to MMID, and to conduct an investigation into the legitimacy of the transaction between MTA and MMID. On November 30, 2007, the Board's Chairman issued a housekeeping stay, staying the effective dates in both proceedings until December 21, 2007, and directing the parties to submit additional information to allow the Board to determine whether a further stay should be issued.

On December 7, 2007, MTA filed a pleading requesting withdrawal of its stay request. MTA states that MMID has provided MTA with a proposed deed to correct the erroneous deed, and that MTA's investigation of the transaction between MTA and MMID is complete, and thus, that it no longer seeks a stay of the effective dates of the exemptions. MMID also filed a pleading on December 7, 2007, maintaining that there is no basis for staying the effectiveness of the exemptions in these proceedings. The parties are thus in agreement that there is no need to continue the housekeeping stay and, accordingly, the housekeeping stay will be lifted. As a result, the exemption in STB Finance Docket No. 35098 authorizing GWI to acquire control of MMID will be effective on the date of service of this decision.

The effective date of the acquisition and operation exemption in STB Finance Docket No. 35099 is a different matter. On October 22, 2007, MMID filed a request for a waiver of the requirements of 49 CFR 1150.42(e)⁴ to permit the acquisition and operation exemption in STB

⁴ Under 49 CFR 1150.42(e), "If the projected annual revenue of the rail lines to be acquired or operated, together with the acquiring carrier's projected annual revenue, exceeds

(continued . . .)

Finance Docket No. 35099 to become effective 30 days after the posting of the advance labor notice required to be given to employees who may be affected by MMID's planned acquisition and operation of three lines of railroad and to the national offices of the employees' labor unions. MMID certified to the Board on October 22, 2007, that the advance labor notice had been posted on that date at the workplace of MMID's affected employees. Unless the Board grants MMID's waiver request, the earliest this transaction can be consummated with the necessary Board authorization would be 60 days after MMID's October 22 certification that it has satisfied the requirements of section 1150.42(e), which would be December 21, 2007. Conversely, if the Board were to grant this waiver request, the exemption could become effective immediately (because 30 days has already passed).

In its request for waiver, MMID states that it has been the operator of the two active MTA-owned lines for more than 15 years and that it will continue to be the sole common carrier. MMID notes that there have been no operations over the inactive line for several years. MMID also notes that it has provided 30 days' notice to its employees of MMID's acquisition of these lines from MTA.⁵ Accordingly, MMID argues that there will be no operational changes or other adverse impacts on MMID employees as a result of the filing of its notice of exemption. MMID therefore requests a waiver of the requirement in 49 CFR 1150.42(e), asking that the notice of exemption to acquire and operate become effective 30 days after the labor notice was posted, rather than the requisite 60 days.

DISCUSSION AND CONCLUSIONS

The purpose of the Board's notice requirements at 49 CFR 1150.42(e) is to ensure that rail labor unions and employees who would be affected by the transfer of a line are given sufficient notice of the transaction before consummation.⁶ MMID claims that no employees will be adversely affected by waiver of the requirements here. While this may indeed be true and no opposition to the request has been filed with the Board, the claim is predicated on MMID's

(. . .continued)

\$5 million, the applicant must, at least 60 days before the exemption becomes effective, post a notice of applicant's intent to undertake the proposed transaction at the workplace of the employees on the affected line(s) and serve a copy of the notice on the national offices of the labor unions with employees on the affected line(s), setting forth the types and numbers of jobs expected to be available, the terms of employment and principles of employee selection, and the lines that are to be transferred, and certify to the Board that it has done so."

⁵ In its notice of exemption and waiver request, MMID states that its employees are not represented by national labor unions and therefore no advance labor notice has been provided to such unions.

⁶ See Acq. of R. Lines Under 49 U.S.C. 10901 & 10902 – Advance Notice, 2 S.T.B. 592 (1997).

failure to file a notice of exemption prior to its execution of the sales contract for purchase of the three lines. MMID's waiver request implies that, since MMID has already taken control of the three lines, any effect on its employees, adverse or otherwise, has already occurred. If the Board were to grant MMID's waiver request, it would merely have the effect of allowing the exemption covered by the notice to become effective prior to December 21, 2007. The Board does not countenance MMID's failure to follow Board procedure. Under the circumstances, MMID has not justified Board action that would expedite the effectiveness of the exemption. It is important to preserve the integrity of the labor notice requirement and MMID has failed to justify the relief it seeks. MMID's waiver request will be denied.

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

It is ordered:

1. The housekeeping stay entered on November 30, 2007, is lifted.
2. The control exemption in STB Finance Docket No. 35098 will become effective on the date of service of this decision.
3. MMID's request for waiver is denied. The acquisition and operation exemption in STB Finance Docket No. 35099 will become effective on December 21, 2007.
4. This decision is effective on its date of service.

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

Vernon A. Williams
Secretary