

STB FINANCE DOCKET NO. 33997

TEXAS CENTRAL BUSINESS LINES CORPORATION – OPERATION
EXEMPTION – MIDTEXAS INTERNATIONAL CENTER

Decided September 17, 2002

The Board denies a motion to dismiss an exemption from 49 U.S.C. 10901 to operate approximately 5 miles of yard and switching tracks because the operations at issue would constitute the carrier's entire line of railroad, enabling it to serve shippers in territory it had not previously served. Because the larger purpose and effect of the transaction is to create a new common carrier by rail, the track is deemed a line of railroad under 49 U.S.C. 10901, rather than spur, industrial, team, switching, or side track excepted from the Board's licensing authority by 49 U.S.C. 10906.

BY THE BOARD:

On January 10, 2001, Texas Central Business Lines Corporation (TCBL) filed a verified notice of exemption under 49 CFR 1150.31 to operate over the Inland Port Trackage, approximately 5 miles of yard and switching track owned by MidTexas International Center, Inc. (MidTexas) located entirely within an industrial park. The notice was served and published in the *Federal Register* at 66 Fed. Reg. 9748 (2001). Concurrently with its notice, TCBL also filed a petition to dismiss the notice, arguing that 49 U.S.C. 10906 excepts the track at issue from the Board's licensing authority under 49 U.S.C. 10901.¹ For the reasons discussed below, we disagree and will deny the petition.

¹ TCBL's petition to dismiss refers throughout to 49 U.S.C. 10907. However, in the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which became effective on January 1, 1996, former section 10907 was reenacted as 49 U.S.C. 10906. It provides in pertinent part: "The Board does not have authority under [49 U.S.C. 10901-10905 and 10907] over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks."

BACKGROUND

The Inland Port Trackage is located north of State Highway 287 and east of U.S. Highway 67 in Midlothian, Ellis County, TX. The trackage is currently used to serve five motor vehicle distribution facilities (Isuzu, Kia, Mazda, Nissan, and Toyota); in the past, it has also been used to provide service to six other facilities (DaimlerChrysler, Ford, General Motors, Honda, Mitsubishi, and Subaru). The trackage is also used to switch railcars carrying steel products, industrial manufacturing materials, and cement to and from three other customers. In recent years, the total number of railcars moving over the Inland Port Trackage for all commodities has ranged between 8,000 and 10,000 cars annually.

The Inland Port Trackage is owned by MidTexas, the developer of the industrial park. TCBL and MidTexas have negotiated an agreement for TCBL's services for an initial term of 10 years. In the past, switching service on the trackage has been provided by the Union Pacific Railroad Company (UP). According to TCBL, UP provided this service on an unregulated and non-exclusive basis, pursuant to agreements under which UP paid usage fees² for movements over, and for maintenance and repair of, the trackage. The Burlington Northern and Santa Fe Railway Company (BNSF) also has tracks in the vicinity of the industrial park, but apparently all line-haul traffic to and from the industrial park moved over UP track before TCBL took over operation of the Inland Port Trackage in 2001.

TCBL states that it will provide switching service to the industries now located on the Inland Port Trackage and to any customers that may locate there in the future and desire rail service.³ Under its agreement with MidTexas, TCBL will provide all maintenance and repairs for the trackage. TCBL will connect all customers to both UP and BNSF, and will provide service to the shippers located in the industrial park pursuant to a switching tariff or by contract.

TCBL seeks relief here based on 49 U.S.C. 10906, which excepts, as noted, "spur, industrial, team, switching, or side tracks" from the Board's prior approval requirements at 49 U.S.C. 10901. TCBL maintains that it does not need Board authority to operate because its operations are "switching" and are thus excepted from the licensing provisions of section 10901. TCBL argues that, because the

² Presumably the fees were paid to MidTexas, although this is not specified in TCBL's filing.

³ UP will apparently also be permitted to continue to use the trackage for some period of time to accommodate its "contractual rights," which are not further described.

Board lacks the licensing authority to exempt the transaction on which the notice was based, the relief it seeks should be granted.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10901, a person may acquire or operate an extended or additional railroad line only with Board authorization, either in the form of a certificate of public convenience and necessity or an exemption. However, the Board does not have licensing authority under section 10901 over the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks. 49 U.S.C. 10906. The statute does not define what constitutes “spur, industrial, team, switching or side tracks.” Where, as here, the operations at issue would constitute the carrier’s entire line of railroad, enabling it to serve shippers in territory it had not previously served, we have held that the larger purpose and effect of transactions such as the one before us is to create a new common carrier by rail. The track thus dedicated is therefore deemed, for the purpose of the transaction, to be a line of railroad, and not excepted side, spur, industrial, team, or switching track. *Effingham RR Co.—Pet. for Declaratory Order*, 2 S.T.B. 606 (1997), *aff’d sub nom. United Transportation Union v. STB*, 183 F.3d 606, 613 (7th Cir. 1999).

TCBL compares its situation to that in *San Francisco Belt Railroad – Petition for Exemption – Abandonment*, Finance Docket No. 30884 (ICC served February 12, 1987). However, in that case, the operations by the San Francisco Belt Railroad (SFBR), which had no direct contact with shippers, appear to have been conducted on behalf of the connecting Class I railroads. Accordingly, the ICC reasonably concluded that SFBR was not acting in its own capacity but, rather, as an agent for the line-haul carriers. Thus, SFBR’s situation is distinguishable from TCBL’s.⁴

⁴ TCBL points to several decisions explaining that the Board and its predecessor, the Interstate Commerce Commission (ICC), have looked to the intended use of a particular segment of track to determine whether it should be categorized as switching track (the “use test”). However, the agency and the courts, while recognizing the validity of the use test, have also recognized that it is sometimes necessary to look beyond the track’s use to determine whether Board authorization of a particular transaction is required. *See, e.g., Brotherhood of Locomotive Engineers v. United States*, 101 F.3d 718, 728 (D.C. Cir. 1996) (the agency may look to the track’s use but “may not allow its focus on use to obscure the larger purpose and effect of the transaction”). Thus, *Louisiana & Arkansas Railway v. Missouri Pacific Railroad*, 288 F. Supp. 320 (E.D.La. 1968), *aff’d*, 415 F.2d 751 (7th Cir. 1969), *cert. denied*, 396 U.S. 1060 (1970) (*L&A*), which TCBL cites, is different from this case. In

(continued...)

For these reasons, we conclude that TCBL's operations fall within the Board's licensing authority. TCBL's motion to dismiss the notice 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. TCBL's petition is denied.
2. This decision is effective on October 20, 2002.

By the Board, Chairman Morgan and Vice Chairman Burkes.

⁴(...continued)

L&A, pickup and delivery service inside a port facility was deemed excepted switching when performed by a line-haul carrier ancillary to its already authorized common carrier line-haul service. For TCBL, in contrast, the pickup and delivery service it offers to all tenants within the industrial park is all it does. The result of TCBL (a noncarrier) undertaking this service has been to create a new common carrier by rail, for which Board authorization is required.

6 S.T.B.