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ENTERED
Office of Proceedings
April 28, 2020
Part of
Public Record

April 28, 2020

VIA E-FILING

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street SW
Washington, DC 20024

Re: STB Docket No. FD 36401
Indiana & Ohio Railway Company
-Operation Exemption-
Fulton Railroad Co. LTD.

Dear Ms. Brown:

Enclosed for e-filing on behalf of Indiana & Ohio Railway Company is a Notice of Exemption being filed under 49 USC 10902 and 49 CFR 1150.41. The filing fee of \$2,100 was paid using Pay.gov.

Please let me know if there are any questions regarding this filing.

Sincerely,



Justin J. Marks
Counsel for Indiana & Ohio Railway Company

Enclosures
FEE RECEIVED
April 28, 2020
SURFACE
TRANSPORTATION BOARD

FILED
April 28, 2020
SURFACE
TRANSPORTATION BOARD

Before the
SURFACE TRANSPORTATION BOARD

STB Docket No. FD 36401

INDIANA & OHIO RAILWAY COMPANY
- OPERATION EXEMPTION –
FULTON RAILROAD CO. LTD.

VERIFIED NOTICE OF EXEMPTION
UNDER 49 U.S.C. §10902

(includes color images)

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*Attorneys for Indiana & Ohio Railway
Company*

Dated: April 28, 2020

Before the
SURFACE TRANSPORTATION BOARD

STB Docket No. FD 36401

INDIANA & OHIO RAILWAY COMPANY
- OPERATION EXEMPTION –
FULTON RAILROAD CO. LTD.

VERIFIED NOTICE OF EXEMPTION
UNDER 49 U.S.C. §10902

Indiana & Ohio Railway Company (“IORY”), a Class III railroad, files this Notice of Exemption under 49 U.S.C. § 10902 to exempt from regulation IORY’s entry into an amended and restated operating rights agreement (“Amended Agreement”) to amend the existing operating agreement (the “Current Agreement”), originally entered into between IORY and Fulton Railroad Co. Ltd. (Fulton Railroad) on January 6, 2002. The Current Agreement, and the Amended Agreement, allow for IORY operations from the connection at IORY milepost 0.0 and continuing for 4,800 feet to the end of Fulton Railroad’s tracks in the City of Cincinnati, Millcreek Township, Hamilton County, Ohio, a total distance of approximately 4,800 feet (the “Rail Line”).

IORY and Fulton Railroad wish to amend the Current Agreement to further extend its term and to make other commercial revisions.

Notice

In accordance with 49 C.F.R. §1150.43, IORY hereby provides the following information:

- (a) The full name and address of Applicant: Indiana & Ohio Railway Company, 4349

Easton Way, Suite 110, Columbus, Ohio 43219.

(b) Applicant's Representatives:

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2001 Market St.
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- (c) IORY is currently the operator of the Rail Line under the Current Agreement. *See Indiana & Ohio Railway Company – Trackage Rights Exemption – Fulton Railway Co., Ltd.*, STB Finance Docket No. 34800 (served Dec. 23, 2005). IORY and Fulton Railroad have now entered into the Amended Agreement dated as of April 22, 2020 for continued operation of the Rail Line.
- (d) The current operator of the Rail Line is IORY, and IORY will continue to be the operator after the transaction.
- (e) Brief Summary of the Proposed Transaction: IORY is currently operating the Rail Line under the Current Agreement. This proposed transaction extends the term, and revises other commercial provisions, which will allow IORY to continue operating the Rail Line until either party decides to terminate it. In 2005, IORY filed the Notice of Exemption under 49 C.F.R. §1180.2(d)(7) but is filing this notice under 49 C.F.R. § 1150.41 because the Amended Agreement contains characteristics more closely aligned

with a lease than a trackage rights agreement – IORY will dispatch and maintain the Rail Line, and it provides for a flat fee instead of a per-car charge.

- (1) The name and address of the owner of the Rail Line granting the operating rights is Fulton Railroad Co. Ltd., 1725 Riverside Drive, Cincinnati, Ohio 45202.
- (2) The Amended Agreement will be effective upon the effective date of this Notice of Exemption, thirty days after filing (or upon the grant of the requested labor notice waiver). IORY is currently operating the Rail Line under the terms of the Current Agreement and will continue to do so until the Amended Agreement becomes effective.
- (3) The milepost of the Rail Line is from IORY milepost 0.0 and continuing for 4,800 feet to the end of Fulton Railroad's tracks in the City of Cincinnati, Millcreek Township, Hamilton County, Ohio.
- (4) The total distance to be acquired and operated is approximately 4,800 feet.
- (f) Attached as Exhibit A to this Notice of Exemption is a map of the Rail Line.
- (g) IORY certifies that its projected revenues as a result of the transaction will not exceed those that would qualify it as a Class III carrier.
- (h) IORY certifies that the Amended Agreement does not include an interchange commitment.
- (i) In addition to the information set forth above, IORY certifies that its revenues currently exceed \$5,000,000. However, since IORY will continue to be the operator of the Rail Line both before and after the transaction, IORY is requesting a waiver of the labor notice requirements under 49 C.F.R. §1150.42(e). *See* request for waiver set forth below.

Labor Protection

IORY is a Class III carrier, and pursuant to 49 U.S.C. §10902(d), approval of this transaction may not be subjected to labor protection conditions. Additionally, since IORY is already the operator of the Rail Line, there will be no employees adversely affected by the amended agreement.

Environmental and Historic Reports

This is an extension of an agreement for continued rail operations that will not result in changes in carrier operations that will exceed the thresholds established in 49 C.F.R. §1105.7(e)(4) or (5). Further Board approval is required for IORY to discontinue (or for Fulton Railroad to abandon service), or to dispose of or alter properties subject to the Board's jurisdiction that are 50 years old or older. Accordingly, no environmental or historic documentation is required. *See* 49 C.F.R. §1105.6(c)(2); 49 C.F.R. §1105.8(b)(1).

Caption Summary

Attached hereto as Exhibit B is the caption summary required by 49 C.F.R. §1150.44.

Request for Waiver of Notice Requirements of 49 C.F.R. §1150.42(e)

As noted above, IORY's total revenues exceed \$5,000,000. Under the Board's regulations at 49 C.F.R. §1150.42(e), IORY would be required to give sixty days' notice to employees working on the Rail Line (and the national offices of their collective bargaining representatives). However, the Board has held: "The purpose of 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." *Louisiana & Delta Railroad, Inc. – Lease Amendment and Operation Exemption – Union Pacific Railroad Company*, STB Finance

Docket No. 36379, slip op. at 2 (served Mar. 4, 2020). *See also Acquisition of Leased Lines under 49 USC 10901 and 10902 – Advance Notice of Proposed Transactions* (“*Advanced Notice of proposed Transactions*”), 2 STB 592 (1997). In adopting the notice requirement, the Board specifically recognized that “exceptional situations may occur necessitating acquirer requests for waiver of the 60 day notice provision ...” *Advanced Notice of Proposed Transactions, supra* at 601.

In this instance, IORY should not be required to comply with the requirements of Section 1150.42(e) because there will be no changes for any employees working on the Rail Line. IORY already operates the rail facilities and has been the sole common carrier operating on the Rail Line since at least 2005. The Amended Agreement extends the term of the Current Agreement and IORY will continue to be the sole common carrier operating over the Rail Line. No employees of the transferring carrier, Fulton Railroad, have worked on the Rail Line since at least 2005, and there are no employees of Fulton Railroad who will be affected or have to make any career choices as a result of the sale. Posting notices on the Rail Line would not provide notice to any Fulton Railroad employees since none work on the Rail Line. Further, there will be no operational changes, and no employees of IORY will be affected.¹ Thus, under the circumstances of this transaction, compliance with the notice requirements will not further the purposes of the rule and should be waived. Granting IORY a waiver would be consistent with other circumstances in which the Board has granted waivers from the labor notice requirements when a common carrier has filed to extend the term of its operation of a line it was previously leasing and to remain as the common carrier operator on the line. *See North Carolina & Virginia*

¹ Notwithstanding that there will be no effect on employees of IORY, IORY is providing notice of the Amended Agreement to the national office of the union that represents employees working on the Rail Line by serving it with a copy of this Notice of Exemption.

Railroad Company, LLC, Chesapeake & Albemarle Railroad Division – Lease Amendment Exemption – Norfolk Southern Railway Company, STB Docket No. FD 35564 (Sub-No. 1) (served December 23, 2011). See also Louisiana Southern Railroad, LLC – Lease Exemption containing Interchange Commitment – The Kansas City Southern Railway Company, STB Docket No. FD 35983 (served February 18, 2016).

IORY asks that the waiver of the labor notice requirements be granted expeditiously so that this Notice of Exemption can become effective as scheduled 30 days after it is filed.

Conclusion

Accordingly, IORY requests that the Board issue a notice allowing the Amended Agreement to become effective 30 days from the filing of this Notice of Exemption.

Respectfully submitted,



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jmarks@clarkhill.com

Attorneys for Indiana & Ohio Railway Company

Dated: April 28, 2020

VERIFICATION

I hereby verify on behalf of Indiana & Ohio Railway Company, under penalty of perjury, that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verification.

Executed on 04/27/2020.



Leonard Wagner, President

EXHIBIT A

MAP

Indiana & Ohio Railroad/Fulton Railroad: Cincinnati, OH

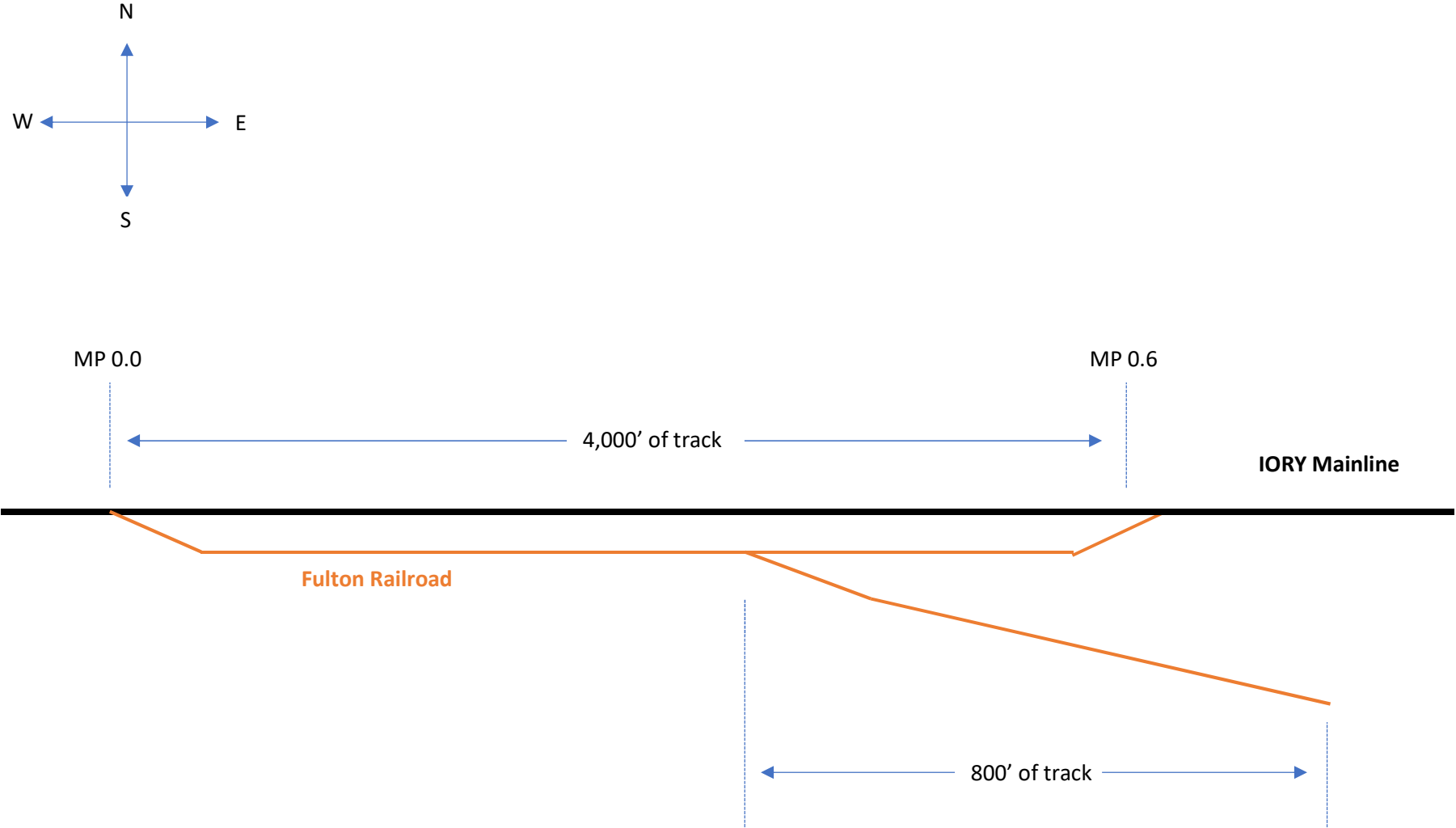


EXHIBIT B

CAPTION SUMMARY

SURFACE TRANSPORTATION BOARD

Notice of Exemption

STB Docket No. FD 36401

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- OPERATION EXEMPTION –
FULTON RAILROAD CO. LTD.**

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Comments must be filed with the Board and served on IORY’s representative, Eric M. Hocky, Esq., Clark Hill, PLC, Two Commerce Square, 2001 Market St., Suite 2620, Philadelphia, PA 19103; (215) 640-8500.

The Notice is filed under 49 C.F.R. §1150.41. If the Notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. §10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

Board decisions and notices are available at www.stb.gov.

Decided: _____, 2020.

By the Board, Allison C. Davis, Director, Office of Proceedings.

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing document was served by U.S.
first class mail, postage pre-paid on the following national representative of IORY employees
working on the Rail Line:

Rick Gibbons
Brotherhood of Locomotive Engineers and Trainmen
National Vice President
7126 North Norton Avenue
Gladstone, MO 64119



Justin J. Marks

Dated: April 28, 2020