

SERVICE DATE – NOVEMBER 6, 2020

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36434

THE ELK RIVER RAILROAD, INC.—MERGER EXEMPTION—THE BUFFALO CREEK
RAILROAD COMPANY

Digest:¹ The Board grants The Elk River Railroad, Inc., after-the-fact authority to merge with The Buffalo Creek Railroad Company but does not make the authority retroactive.

Decided: November 5, 2020

On August 27, 2020, The Elk River Railroad, Inc. (TERRI), a Class III rail carrier, filed a petition under 49 U.S.C. § 10502 seeking an exemption from the prior approval requirements of 49 U.S.C. §§ 11323-25 to authorize the merger of The Buffalo Creek Railroad Company (BCR), a Class III rail carrier, with and into TERRI, which is the surviving corporation. Because the merger took place in 1995, TERRI is seeking after-the-fact authority and asks that the requested exemption be granted with retroactive effect. For the reasons discussed below, the Board will grant TERRI's petition for an exemption authorizing its merger with BCR but will deny the request to make the exemption retroactive.

BACKGROUND

According to the petition, William T. Bright (Bright) is the sole owner of TERRI, a West Virginia corporation that acquired a rail line previously owned and operated by CSX Transportation, Inc.² (Pet. 1-3.) In 1992, BCR, at that time a noncarrier also owned by Bright, acquired the rail line of the Buffalo Creek and Gauley Railroad Company (BC&G) pursuant to

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).

² See Elk River R.R.—Lease, Operation & Acquis. Exemption—Line of CSX Transp., Inc., FD 31497 (ICC served July 26, 1989) (authorizing TERRI to acquire a line of railroad between milepost 6.2, at or near Gilmer, and milepost 67.2, at or near Hartland, in Gilmer, Braxton, and Clay Counties, W. Va.).

authority granted by the Board's predecessor, the Interstate Commerce Commission (ICC),³ and Bright obtained authority to control BCR as a rail carrier.⁴ (Pet. 3-4.)

TERRI states that in December 1995, "[d]ue to an inadvertent oversight and lack of knowledge that additional agency approval was necessary," BCR was merged with and into TERRI, the surviving corporation, without prior agency authorization as required under 49 U.S.C. §§ 11323-25. (Pet. 4-5.) TERRI explains that, had it "been aware of its obligation to obtain additional agency authorization, it would have timely filed a verified notice of exemption under 49 C.F.R. § 1180.2(d)(3) prior to consummating the merger." (*Id.* at 5.) In its petition, TERRI disclaims any intention "to flout the law," as it "only became aware of the need for such authorization as part of current Counsel's due diligence relating to the imminent and expected sale" of BC&G to the State of West Virginia. (*Id.*) To address this oversight, TERRI seeks expedited consideration of its petition under 49 U.S.C. § 10502 for an exemption from the prior approval requirements of 49 U.S.C. §§ 11323-25 to authorize its 1995 merger with BCR and seeks retroactive effect.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 11323(a)(1), the merger of two rail carriers into one corporation for the ownership, management, or operation of the previously separately owned properties requires prior approval of the Board. When a transaction does not involve the merger or control of at least two Class I railroads, it is governed by 49 U.S.C. § 11324(d). However, under 49 U.S.C. § 10502(a), the Board must exempt a transaction or service from regulation upon finding that: (1) regulation is not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not needed to protect shippers from the abuse of market power.

Here, an exemption from the prior approval requirements of §§ 11323-25 is consistent with § 10502(a). Detailed scrutiny of this transaction is not necessary to carry out the RTP here. An exemption from the application process would promote a fair and expeditious regulatory decision-making process, minimize the need for Federal regulatory control, encourage honest and efficient management of railroads, and result in the expeditious handling of this proceeding. See 49 U.S.C. § 10101(2), (9), (15). Other aspects of the RTP would not be adversely affected.

³ See Buffalo Creek R.R.—Acquis. & Operation Exemption—Buffalo Creek & Gauley R.R., FD 31968 (ICC served Feb. 11, 1992) (authorizing BCR to acquire from BC&G an 18.6-mile rail line extending from a junction point at Dundon (milepost 62.2 on the TERRI line; milepost 0 on the BC&G line) to Widen (milepost 18.6 on the BC&G line) in Clay County, W. Va.).

⁴ See Bright—Control Exemption—Buffalo Creek R.R., FD 31969, slip op. at 3 (ICC served Mar. 9, 1992) (granting an exemption for Bright to control BCR). Bright placed the stock of BCR in an independent voting trust before BCR acquired the BC&G line in order to avoid controlling BCR as a rail carrier before obtaining his ICC authority to do so. See id. at 1; (Pet. 3-4).

Regulation of this transaction is not needed to protect shippers from the abuse of market power.⁵ At the time of the 1995 merger, TERRI and BCR already were commonly controlled by Bright, and indeed, as TERRI points out, the transaction likely would have qualified for the class exemption for transactions within a corporate family under 49 C.F.R. § 1180.2(d)(3) had it been timely sought. Moreover, the record indicates there has been no loss of rail competition, no adverse change in the competitive balance in the transportation market, and no change in the level of service to any shippers because, as TERRI explains in its petition, the BC&G rail line does not connect with another rail line other than TERRI's at Dundon, W. Va., and has not carried any traffic in over twenty years. (Pet. 6.)

Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Section 11326(c), however, precludes the Board from imposing labor protection for Class III rail carriers receiving authority under §§ 11324-25. Accordingly, the Board may not impose labor protective conditions here because TERRI and BCR were both Class III carriers at the time of the merger.

This transaction is categorically excluded from environmental review under 49 C.F.R. § 1105.6(c)(1) and from the historic reporting requirements under 49 C.F.R. § 1105.8(b).

As stated above, TERRI seeks an exemption with retroactive effect, arguing that its failure to obtain prior approval or an exemption for its merger with BCR was “an inadvertent oversight” and “was in no way intended to flout the law[.]” (Pet. 5.) Although the Board on occasion has granted authority retroactively,⁶ it generally disfavors retroactive grants of authority.⁷ As TERRI provides no explanation as to why retroactive authority is needed, the Board declines to grant retroactive authority here.

⁵ Because the Board concludes that regulation is not needed to protect shippers from the abuse of market power, it is unnecessary to determine whether the proposed transaction is limited in scope. See 49 U.S.C. § 10502(a).

⁶ See, e.g., Grand Elk R.R.—Acquis. of Incidental Trackage Rights Exemption—Norfolk S. Ry., FD 35187 (Sub-No. 1) et al., slip op. at 4 (STB served Nov. 20, 2017) (after having previously denied a request for retroactive authority, reopening the proceeding to make exemption retroactive in light of changed circumstances).

⁷ See, e.g., Ark.-Okla. R.R.—Acquis. & Operation Exemption—Okla., FD 36323, slip op. at 3 (STB served Sept. 19, 2019) (declining a request for retroactive authority and stating that the Board “generally disfavors retroactive grants of authority”).

It is ordered:

1. Under 49 U.S.C. § 10502, the Board exempts from the prior approval requirements of 49 U.S.C. §§ 11323-25 BCR's merger with and into TERRI.
2. Notice of the exemption will be published in the Federal Register.
3. The exemption will be effective on the service date of this decision.

By the Board, Board Members Begeman, Fuchs, and Oberman.