

SERVICE DATE – NOVEMBER 19, 2020

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36432

INDEPENDENCE RAIL WORKS LTD.—ACQUISITION AND OPERATION
EXEMPTION—BYESVILLE SCENIC TRAILS, LLC

Decided: November 18, 2020

On August 26, 2020, Independence Rail Works Ltd. (IRW) filed a petition for exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10901 to authorize after-the-fact the acquisition and operation of 3.6 miles of track in Guernsey County, Ohio, extending from milepost 4.9 to milepost 8.5 (the Line). IRW asks that the requested exemption be granted with retroactive effect.

According to IRW, in 2013, it purchased from Byesville Scenic Trails, LLC (BST), a total of 13.3 miles of track in Guernsey and Noble Counties, Ohio, extending from milepost 4.9 to milepost 18.23, that connects with the Columbus and Ohio River Railroad (CUOH) in Byesville, Ohio, at milepost 4.9. (Pet. 1-2.) IRW states that, when it purchased the track, it believed that all 13.3 miles were private track outside the Board’s jurisdiction. (Id. at 3.)

IRW states that the segment from milepost 8.5 to milepost 18.23 has been in disrepair since IRW purchased it in 2013 and is not in useable condition. (Id. at 1, 4.) IRW further claims that it has maintained the Line (i.e., the segment extending from milepost 4.9 to milepost 8.5) but that the only rail operations on the Line are deliveries by CUOH of approximately 30 cars of aggregate and sand per week to Mar-Zane, Inc. (Mar-Zane), the only shipper on the Line, at milepost 8.0. (Id. at 4.) IRW states that Mar-Zane leases property from IRW’s affiliate, Cambridge Southern Industrial Parkway LLC (Cambridge Southern). (Id. at 2, 4.) IRW claims that, when CUOH began providing service over the Line, IRW believed that the Line was private track and that this service was outside the Board’s jurisdiction.¹ (Id. at 6.) IRW explains that it entered into an operating agreement with CUOH on April 29, 2016, and the agreement states that IRW “operates a private railroad not in common carrier service, which connects to CUOH’s rail line at Byesville, Ohio.” (Id. at 8 n.7.)

IRW asserts that recently, when it was evaluating the potential expanded use of the Line, it discovered that the Line is not private track and is in fact a rail line within the Board’s

¹ IRW states that it previously advertised its commercial services in a manner that could imply a holding out of rail service to the public but that it was unaware that these actions might be inconsistent with its assumption that the Line was private track. IRW further states that no shipper other than Mar-Zane requested service over the Line. (Pet. 3 n.3.)

jurisdiction. (*Id.* at 4-5.) IRW explains that all 13.3 miles of track it purchased were originally owned by CSX Transportation, Inc. (CSXT), and that the Board authorized CSXT to abandon those 13.3 miles in June 1999. See CSX Transp., Inc.—Aban. Exemption—in Guernsey & Noble Cntys., Ohio, AB 55 (Sub-No. 569X) (STB served June 4, 1999). After receiving an extension of time to file a notice of consummation, CSXT subsequently filed its notice for the portion between milepost 8.5 and milepost 18.23, thereby terminating the Board’s jurisdiction as to that portion. (*See* CSXT filing, Sept. 1, 2000, AB 55 (Sub-No. 569X).) However, the Board previously had approved the purchase, by Cambridge-Guernsey County Community Improvement Corporation (CIC), of the Line under the offer of financial assistance (OFA) process and dismissed CSXT’s petition for exemption to abandon the Line.² CSX Transp., Inc.—Aban. Exemption—in Guernsey & Noble Cntys., Ohio, AB 55 (Sub-No. 569X) (STB served Aug. 11, 1999). Therefore, because the Line was never abandoned and remains within the Board’s jurisdiction, IRW seeks after-the-fact authority for its acquisition and operation of the Line and asks for it to be made retroactive. (Pet. 1.)

Finally, IRW claims that it never intended to provide common carrier service, and that if the Board grants the requested exemption to acquire and operate the Line, IRW plans to file a petition for discontinuance of service over the Line. (*Id.* at 2.) According to IRW, upon receipt of discontinuance authority, IRW will convey an easement to Cambridge Southern for the track and underlying property, which will continue to allow CUOH to use the Line to deliver freight to Mar-Zane. (*Id.* at 5.) IRW also claims that it will seek discontinuance authority so that it will be relieved of any common carrier obligation it may have with respect to the Line and “to preserve the arrangement that IRW, CUOH, and the one shipper located on the [L]ine thought was in place since 2016, which was limited rail operations over a private track.” (*Id.* at 5, 8.)

IRW’s petition raises issues that require clarification before the Board can determine how to proceed. The Board, therefore, will institute a proceeding under 49 U.S.C. § 10502(b) and request that IRW and other relevant parties provide additional information on the following issues.

1. Ownership of the track segment extending from milepost 4.9 to milepost 5.14

In 2004, CUOH obtained Board authorization to lease from CSXT track extending from milepost 0.0 to milepost 5.14. Columbus & Ohio River R.R.—Acquis. & Operation Exemption—Rail Lines of CSX Transp., Inc., FD 34540 (STB served Dec. 20, 2004). IRW asserts, without providing supporting evidence, that the lease between CSXT and CUOH erroneously described the rail line at issue in that case, as it appears to overlap with the portion of the Line from milepost 4.9 to milepost 5.14. (Pet. 4 n.4.) IRW states that, “[b]ased on a title

² CSXT subsequently informed the Board that the sale of the Line to CIC had been consummated. CSX Transp., Inc.—Aban. Exemption—in Guernsey & Noble Cntys., Ohio, AB 55 (Sub-No. 569X), slip op. at 1 (STB served Nov. 7, 2000).

search and a review of records,” it determined that it, rather than CSXT, owns the portion of track from milepost 4.9 to milepost 5.14. (*Id.* at 4-5.)³

Given the apparent conflicting information with respect to the segment of track between milepost 4.9 and milepost 5.14, the Board will serve this decision on CSXT and CUOH. IRW, CSXT, and CUOH should provide all relevant information relating to the ownership of this segment of track.

2. BST’s Previous Acquisition of the Line

The Board also seeks clarification regarding the circumstances surrounding BST’s previous acquisition of the Line. The Board approved CIC’s purchase of the Line from CSXT in 1999 under the OFA process, CSX Transp., Inc.—Aban. Exemption—in Guernsey & Noble Cntys., Ohio, AB 55 (Sub-No. 569X) (STB served Aug. 11, 1999), and IRW states that it purchased the Line from BST in 2013, (Pet. 2). However, IRW provides no information concerning how and when BST acquired the Line and it does not appear that BST ever sought Board authority for its acquisition of the Line. The Board will serve this decision on BST and CIC and request that the parties provide any information that they have regarding BST’s previous acquisition of the Line.

3. IRW’s Planned Discontinuance

IRW states that, if it obtains after-the-fact authority to acquire the Line, it plans to seek discontinuance authority. (Pet. 5.) IRW’s petition indicates that, if it obtains discontinuance authority, the Line can be considered private track while CUOH continues to provide service to Mar-Zane.⁴ (*Id.* at 5-6, 8 (stating that IRW’s petition and plan to file for discontinuance authority are intended to “preserve the positions” of Mar-Zane, IRW, and CUOH, each of whom believed until recently that the Line was private track).) However, a common carrier line subject to the Board’s jurisdiction cannot become private track unless and until the Board authorizes its abandonment and the abandonment is consummated. V&S Ry.—Pet. for Declaratory Order—R.R. Operations in Hutchinson, Kan., FD 35459, slip op. at 9 (STB served July 12, 2012); see

³ The Board also notes that CSXT’s system map and CUOH’s system map appear to differ as to where the segment of track leased by CUOH ends and where the track owned by IRW begins. See <https://www.csx.com/index.cfm/customers/maps/csx-system-map/> (last visited Nov. 16, 2020); https://www.gwrr.com/railroads/north_america/columbus__ohio_river_railroad#m_tab-one-panel (click “view interactive map”) (last visited Nov. 16, 2020).

⁴ Generally, exercising Board authority to discontinue service over a line has the effect of extinguishing a railroad’s common carrier obligation to provide service over that line, even though the line remains under the Board’s jurisdiction. A railroad may provide non-common carrier service over such a line but may cease that service at any time without obtaining Board authority. Mar-Zane has filed a letter in support of IRW’s petition, stating that it supports the planned discontinuance to “put the line in a status consistent with Mar-Zane’s understanding,” which it asserts is private track, and to allow Mar-Zane to continue to receive service, by which it presumably refers to non-common carrier service. (See Pet., Ex. C.)

also St. Lawrence & Atl. R.R.—Discontinuance of Service Exemption—in Cumberland Cnty., Me., AB 1117X, slip op. at 4 (STB served Feb. 25, 2014) (“[B]ecause [the railroad] is seeking only discontinuance, not abandonment, the Line will remain part of the national rail transportation system within our jurisdiction and available for restored rail service in the future if economic circumstances warrant.”).⁵ In addition, IRW indicates that it will continue to own and maintain the Line. (Pet. 2 n.2, 8.)⁶ Although IRW has not sought discontinuance authority yet, the Board will provide IRW an opportunity to provide additional clarification in this docket addressing this precedent, should it so choose.

It is ordered:

1. Under 49 U.S.C. § 10502(b), a proceeding is instituted in this docket.
2. Filings addressing the requested additional information described above are due by December 18, 2020.
3. This decision will be served on BST, CIC, CSXT, CUOH, and Mar-Zane.
4. This decision is effective on its service date.

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

⁵ The Board has found under certain circumstances that private carriage outside of the Board’s jurisdiction can be conducted on common carrier rail line. V&S Ry., FD 35459, slip op. at 10 (STB served July 12, 2012); S.D. Warren Co. d/b/a Sappi Fine Paper N.A.—Acquis. & Operation Exemption—Maine Cent. R.R., FD 34133, slip op. at 2 (STB served Sept. 30, 2002).

⁶ The Board has previously said that private track is typically owned and maintained by a shipper, or for the shipper at the shipper’s expense. See, e.g., JGB Prop., LLC—Pet. for Declaratory Order, FD 35817, slip op. at 7 n.10 (STB served Dec. 10, 2015); B. Willis, C.P.A., Inc.—Pet. for Declaratory Order, FD 34013, slip op. at 2 (STB served Oct. 3, 2001).