

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36475

MIDWEST & BLUEGRASS RAIL, LLC, AVORY BEGGS, BRIAN MILLER AND DUSTIN
SHAVER AND MB RAIL TTI, LLC—CONTROL EXEMPTION—TRANSKENTUCKY
TRANSPORTATION RAILROAD, INC.

Decided: January 27, 2021

On December 29, 2020, Midwest & Bluegrass Rail, LLC (MBR Rail), Avory Beggs (Beggs), Brian Miller (Miller), and Dustin Shaver (Shaver) (collectively, MBR), all noncarriers, filed a verified notice of exemption pursuant to 49 C.F.R. § 1180.2(d)(2) to acquire indirect control of TransKentucky Transportation Railroad, Inc. (TransKentucky), upon acquisition of all of the stock in TransKentucky by MB Rail TTI, LLC (MB Rail TTI)¹ from the Carrollton Railroad (TCR), a wholly owned subsidiary of CSX Transportation, Inc. (CSXT). MBR Rail is owned by Beggs, Miller, and Shaver. (Verified Notice 1.) According to the verified notice, MB Rail TTI is also a noncarrier, and MBR “will control MB Rail TTI per a management contract and a combined ownership interest of less than 30%,” and Beggs and Miller will be the designated managers of MB Rail TTI. (*Id.*) MBR states that it also controls other railroads through MB Rail IB, LLC (MB Rail IB) per a management contract and a combined ownership interest of less than 40%.² (*Id.* at 1-2.)

Concurrently with the verified notice, MBR filed a motion for protective order to permit MBR to file under seal the unredacted Draft Contract between MB Rail TTI and TCR, and the Draft Operating Agreement between CSXT and TransKentucky. (Mot. for Protective Order 1; Verified Notice Ex. B, C.) The motion for protective order was granted by decision served on January 15, 2021.

As noted above, it appears from the filings that MB Rail, Beggs, Miller, and Shaver seek authority to acquire control of TransKentucky. However, due to several discrepancies within

¹ As discussed below, the Board seeks confirmation that MB Rail TTI itself is not an applicant here. In the event MBR confirms that MB Rail TTI is not applicant, the docket title will be adjusted accordingly.

² According to the verified notice, MB Rail IB owns or controls the following Class III carriers: (1) Chesapeake & Indiana Railroad; (2) Vermilion Valley Railroad; (3) Camp Chase Rail, LLC; and (4) Youngstown & Southeastern Railroad, LLC (collectively, the Controlled Railroads). See MB Rail IB, LLC—Acquis. & Continuance in Control Exemption—Chesapeake & Ind. R.R., et al., FD 36413 (STB served July 1, 2020).

and between the filings, the Board seeks to confirm whether that understanding is correct and, if not, seeks further clarification from the applicants. For example, the verified notice first states that MBR seeks “to acquire indirect control of [TransKentucky] upon the acquisition of all of the stock in [TransKentucky] by MB Rail TTI,” (Verified Notice 1), yet later characterizes the request as seeking to “allow MBR to continue in control of MB Rail TTI,” (Verified Notice 5; *id.* at 7). The motion for protective order then describes the verified notice as seeking authority for “MBR’s continued control of MB Rail IB” upon acquisition of all the stock of TransKentucky by MB Rail TTI. (Mot. for Protective Order 2.)³ In addition, the verified notice states that MBR Rail, Beggs, Miller, and Shaver seek control authorization here, (Verified Notice 1), but includes MB Rail TTI as an applicant seeking authority in the caption title, (*id.* at 1).⁴

Additionally, the fact that MBR is seeking control authority here raises a question as to why MBR was not an applicant when MB Rail IB filed a verified notice of exemption to acquire control of the Controlled Railroads last year. See MB Rail IB, LLC—Acquis. & Continuance in Control Exemption—Chesapeake & Ind. R.R., et al., FD 36413 (STB served July 1, 2020). The verified notice in this docket states that MBR controls the Controlled Railroads through MB Rail IB, just as MBR proposes to control TransKentucky through MB Rail TTI.⁵ It thus appears that MBR acquired control of the Controlled Railroads without obtaining the necessary

³ The class exemption at 49 C.F.R. § 1180.2(d)(2) for acquisition of a non-connecting carrier or one of its lines was amended in 1986 to add the current provision for continuance in control. The purpose of the amendment was to address “a technical and unintended gap in the regulations” that arose when a person already in control of an existing carrier or carriers adds another nonconnecting carrier to its holdings not by directly acquiring one, but by “creat[ing] a new noncarrier subsidiary that subsequently achieves carrier status by acquiring a nonconnecting line and the parent then continues in control of the subsidiary.” Rail Consol. Procs.—Continuance in Control of a Nonconnecting Carrier, 2 I.C.C.2d 677, 678 (1986). That does not appear to be the case here, as it does not appear that applicants intend MB Rail TTI to become a rail carrier through its acquisition of the stock of TransKentucky; rather, the intent appears to be that MB Rail TTI would be a noncarrier holding company of TransKentucky (and that MB Rail IB would remain a noncarrier holding company of the Controlled Railroads).

⁴ If, as suggested by the filings, MB Rail TTI will acquire control of TransKentucky but does not and will not control any other carriers, it would not need Board authority. See § 11323; see also W. Coal Traffic League—Pet. for Declaratory Order, FD 35506, slip op. at 24-25 n.50 (STB served July 25, 2013) (“[p]rior Board approval of the acquisition of a controlling interest in the stock of a rail carrier is only required where the purchaser already controls a rail carrier”) (citing § 11323).

⁵ The verified notice states that MBR Rail is owned by Beggs (34%), Miller (33%), and Shaver (33%). (Verified Notice 1.) Although control is a fact-intensive determination, the Board assumes that these individuals control MBR Rail for purposes of 49 U.S.C. § 11323 given their request for such authority in this docket. See OmniTRAX Holdings Combined, Inc.—Acquis. of Control Exemption—Ala. & Tenn. River Ry., FD 36032 (STB served July 14, 2016) (granting authority only to OmniTRAX Holdings Combined, Inc., which represented that it was owned by three separate entities, none of which possessed a controlling interest). If this assumption is not correct, the Board seeks further clarification from the applicants.

Board authority. See 49 U.S.C. § 11323(a)(4) (Board authority required for acquisition of control of at least two rail carriers by a person that is not a rail carrier). Consequently, MBR will be directed to explain this issue as well.

Applicants will be directed to file a supplement addressing these issues by February 10, 2021. In the meantime, the exemption will not become effective until further order of the Board.

It is ordered:

1. The exemption in this docket will not become effective until further order of the Board.
2. MBR is directed to file a supplement addressing the issues described above by February 10, 2021.
3. This decision is effective on its service date.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.