

SERVICE DATE – APRIL 13, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36432

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

Digest:¹ The Board grants Independence Rail Works Ltd. after-the-fact authority to acquire and operate 3.6 miles of rail line but does not make the authority retroactive.

Decided: April 9, 2021

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, its 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. On November 19, 2020, the Board initiated a proceeding and requested additional information from various parties. Indep. Rail Works Ltd.—Acquis. & Operation Exemption—Byesville Scenic Trails, LLC (November 2020 Decision), FD 36432 (STB served Nov. 19, 2020). The parties have now provided sufficient information, and the Board will grant IRW an exemption to acquire and operate the Line. However, the exemption will not be granted retroactively.

BACKGROUND

According to IRW, the Line is a portion of a longer segment of track that IRW purchased from Byesville Scenic Trails, LLC (BST), in 2013.² IRW claims that it has maintained the Line but that the only rail operations on the Line are shipments 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. (Pet. 4, 8.) IRW claims that, when CUOH began providing service over the Line, IRW believed that the Line was private track and that CUOH's service to Mar-Zane was outside the Board's jurisdiction. (Id. at 6.)

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 Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

² That longer track segment, approximately 13.3 miles in length, extended from milepost 4.9 to milepost 18.23 in Guernsey and Noble Counties, Ohio, connecting with the Columbus and Ohio River Railroad (CUOH) in Byesville, Ohio, at milepost 4.9. (Pet. 1-2.)

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 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. (*Id.* at 3); see CSX Transp., Inc.—Aban. Exemption—in Guernsey & Noble Cntys., Ohio, AB 55 (Sub-No. 569X) (STB served June 4, 1999). Thereafter, CSXT consummated abandonment of the segment between milepost 8.5 and milepost 18.23, (see CSXT filing, Sept. 1, 2000, AB 55 (Sub-No. 569X)), but the remaining portion—the Line—was sold to the Cambridge-Guernsey County Community Improvement Corporation (CIC) under the Board's offer of financial assistance (OFA) process, see 49 U.S.C. § 10904; 49 C.F.R. § 1152.27, thus remaining a rail line under the Board's jurisdiction. See CSX Transp., Inc.—Aban. Exemption—in Guernsey & Noble Cntys., Ohio, AB 55 (Sub-No. 569X) (STB served Nov. 7, 2000).

As noted above, IRW states in its petition that it acquired the Line from BST in 2013. IRW now seeks after-the-fact authority for its unauthorized 2013 acquisition and for its right to operate the Line. (Pet. 3-4.) IRW asks for the exemption to be made retroactive to the date of its acquisition. (*Id.* at 13.) In its petition, IRW provided no information concerning how and when BST acquired the Line.

Because IRW's petition raised issues that required clarification, the Board in the November 2020 Decision requested that IRW and other relevant parties provide additional information with respect to BST's previous acquisition of the Line, the ownership of the track segment extending from milepost 4.9 to milepost 5.14, and the statement in IRW's petition indicating that it planned to seek discontinuance authority. In response, IRW filed a supplement to its petition on December 18, 2020; CSXT filed a reply on December 18, 2020; and CUOH filed a letter in response on December 17, 2020.

First, having noted that the Board approved CIC's purchase of the Line from CSXT under the OFA process in 1999 and that IRW purchased the Line (without authorization) from BST in 2013, the November 2020 Decision sought clarification regarding the circumstances surrounding BST's previous acquisition of the Line. In response, IRW's supplement states that, after reviewing property records and consulting with responsible representatives of CIC,³ IRW determined that Mr. Jerry J. Jacobson, or an entity under his control, purchased the Line from CIC on March 6, 2008, and that the Line was transferred to BST, which was owned by Mr. Jacobson, on August 12, 2008.⁴ (IRW Supplement 3-4.) IRW states that Mr. Jacobson died in 2017. (*Id.* at 3.)

³ IRW's supplement included a verification from the Economic Development Director of CIC for the section of IRW's supplement regarding BST's acquisition of the Line.

⁴ According to IRW, the Line was held by Sugarcreek Real Estate Investments, LLC for five months before being transferred to BST. (IRW Suppl. 4.) IRW states that the Articles of Organization for Sugarcreek Real Estate Investments, LLC, were signed by Ms. Laura Jacobson, the wife of Mr. Jacobson. (*Id.* at 4 n.4.)

Next, the November 2020 Decision pointed out that, in 2004, CUOH obtained Board authorization to lease track from CSXT extending from milepost 0.0 to milepost 5.14, and that thus there appeared to be a segment of that leased track between milepost 4.9 and milepost 5.14 that overlapped with the Line. See also Columbus & Ohio River R.R.—Acquis. & Operation Exemption—Rail Lines of CSX Transp., Inc., FD 34540 (STB served Dec. 20, 2004). Given the apparent conflicting information with respect to the segment of track between milepost 4.9 and milepost 5.14, the Board requested all relevant information relating to the ownership of this segment of track. November 2020 Decision, FD 36432, slip op. at 3.

In their filings, both IRW and CSXT confirm there is no overlap between the 2004 transaction and the transaction at issue in this proceeding. IRW states that the confusion over the ownership of this segment of track was due to a relabeling of mileposts. (IRW Suppl. 2.) IRW states that the quitclaim deed evidencing the sale from BST to IRW, which IRW provided with its supplement, indicates that the Line starts at CSXT Val Station 2647+60,⁵ which IRW's records list as corresponding to milepost 4.9.⁶ (Id.) CSXT states that the quitclaim deed for the sale from CSXT to CIC and the lease between CSXT and CUOH⁷ both indicate that the dividing line between the track owned by CSXT and the track owned by IRW is located at Val Station 2647+60. (CSXT Reply 3.)

Finally, in response to certain statements in IRW's petition regarding IRW's plan to seek discontinuance authority and the Line's potential subsequent status as private track, the November 2020 Decision noted that 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. November 2020 Decision, FD 36432, slip op. at 3-4. In response, IRW's supplement acknowledges that the Line will remain subject to the Board's jurisdiction unless it is abandoned pursuant to abandonment authority granted by the Board. (IRW Suppl. 4.) IRW states that following the Board's decision on the petition, IRW either will contract with a carrier to provide service on the Line, subject to any requisite Board approval or exemption, recognizing that IRW will have a residual common carrier obligation, or it will seek discontinuance authority. (Id. at 4-5.)

⁵ IRW states that the quitclaim deed shows that Val Station 2647+60 is located just north of Main Street in Byesville, Ohio. (IRW Suppl. 2-3.) According to IRW, Guernsey County property records also indicate that IRW's ownership of the Line begins just north of Main Street. (Id. at 3.)

⁶ IRW states that going forward neither CSXT nor IRW will assign mileposts at the location of Val Station 2647+60 to avoid any discrepancies in future filings and records. (IRW Suppl. 3.)

⁷ CSXT's reply includes a copy of the quitclaim deed for the sale from CSXT to CIC in September 2000 and a copy of an exhibit from the lease between CSXT and CUOH containing a map showing the point where the leased track ends and the track previously sold to CIC begins. (CSXT Reply, V.S. Elizabeth Walsh 3-6.)

DISCUSSION AND CONCLUSIONS

Preliminary Issues. The Board finds that the parties have provided sufficient information regarding the issues raised in the November 2020 Decision to enable the Board to rule on the merits of the petition. The additional information provided by CSXT and IRW establishes that there is no dispute regarding the ownership of the track segment extending from IRW's milepost 4.9 to IRW's milepost 5.14. Both IRW and CSXT have provided documentation establishing that the Line extends from Val Station 2647+60, which IRW's records list as corresponding to milepost 4.9, to Val Station 2834+40, which IRW's records list as corresponding to milepost 8.5.⁸ Accordingly, the Board finds that CSXT does not own any part of the track for which IRW seeks an acquisition and operation exemption.

With respect to the prior unauthorized acquisition of the Line by BST, the additional information provided indicates that Mr. Jacobson, or an entity under his control, purchased the Line from CIC on March 6, 2008, over five years after the transfer of the Line pursuant to the OFA process, and that the Line was transferred to BST, which was owned by Mr. Jacobson, on August 12, 2008. The Ohio Secretary of State's listing of businesses registered in Ohio lists BST's status as "dead" and indicates that the company was dissolved in June 2018.⁹ In these circumstances, the Board will not require any further action with respect to BST's prior acquisition of the Line.¹⁰

Finally, IRW's supplement clarifies that it understands that the Line may not be treated as private track unless it obtains abandonment authority from the Board and consummates the abandonment.¹¹

Exemption from 49 U.S.C. § 10901. The acquisition of a line of railroad by a noncarrier requires prior approval by the Board under 49 U.S.C. § 10901(a)(4). Under 49 U.S.C.

⁸ In light of the information provided by IRW and CSXT in this proceeding, the Board will issue a corrected notice of exemption in Docket No. FD 34540 stating that the southern terminus of the leased segment of track is located at CSXT Val Station 2647+60.

⁹ Business Search, Ohio Sec'y of State, <https://businesssearch.ohiosos.gov/> (enter "Byesville Scenic Trails, LLC" in the "Business Name" search box, click "Search", and then click "Show Details" in the search results) (last visited Apr. 6, 2021).

¹⁰ Cf. ABE Fairmont, LLC—Aban. Exemption—in Fillmore Cnty., Neb., AB 1106X et al., slip op. at 5 (STB served Jan. 29, 2018).

¹¹ As noted above, IRW indicates that it might seek authority to discontinue service on the Line. Acquisitions of active rail lines are generally supposed to be for continued rail use, though the Board has, in certain limited situations, granted acquisition authority when discontinuance/abandonment was subsequently planned, where the circumstances warrant it. See, e.g., Wis. Rapids R.R.—Lease & Operation Exemption—Line of Wis. Cent. Ltd., FD 36339, slip op. at 1-2 n.1 (STB served Aug. 16, 2019); Ga. Dep't of Transp.—Aban. Exemption—in Fulton Cnty., Ga., AB 1096X, slip op. at 1 n.2 (STB served May 30, 2012). The Board will address any request for discontinuance authority that IRW might file at the appropriate time.

§ 10502(a), however, 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, the Board finds that an exemption after-the-fact with respect to IRW's 2013 acquisition of the Line from BST should be granted. Detailed scrutiny of the proposed transaction through an application for review and approval under 49 U.S.C. § 10901 is not necessary here to carry out the RTP. An exemption would promote the RTP by: minimizing the need for federal regulatory control over the transaction, (49 U.S.C. § 10101(2)); reducing regulatory barriers to entry into the rail industry, (49 U.S.C. § 10101(7)); encouraging efficient management of railroads, (49 U.S.C. § 10101(9)); and providing for the expeditious handling and resolution of proceedings, (49 U.S.C. § 10101(15)). Other aspects of the RTP will not be adversely affected.

Regulation of this transaction is not needed to protect shippers from the abuse of market power.¹² Mar-Zane, the only shipper on the Line, supports IRW's petition. In addition, there would be no loss of rail competition and no adverse change in the competitive balance in the transportation market as a result of the acquisition exemption. Nor would there be a change in the level of service. Rather, providing the exemption sought here will ensure that service on the Line continues because IRW will have a common carrier obligation to provide service on the Line upon reasonable request unless and until it receives abandonment or discontinuance authority.

Employee Protection. 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. However, 49 U.S.C. § 10901(c) states that when authorizing a transaction governed by 49 U.S.C. § 10901 the Board may require compliance with conditions "other than labor protective conditions" that are necessary in the public interest. Accordingly, the Board may not impose labor protective conditions here.

Environmental and Historic Review. Under 49 C.F.R. § 1105.6(c)(1), this action, which will not result in significant changes in carrier operations, is categorically excluded from environmental review. Similarly, under 49 C.F.R. § 1105.8(b)(1), no historic report is required because the subject transaction is for continued rail service, IRW has indicated no plans to alter railroad properties 50 years old or older, and any abandonment would be subject to Board jurisdiction.

Effective Date. As stated above, IRW seeks an exemption with retroactive effect. Although the Board on occasion has granted authority retroactively,¹³ it generally disfavors such

¹² Given this finding, the Board need not determine whether the transaction is limited in scope. See 49 U.S.C. § 10502(a).

¹³ 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

grants.¹⁴ Given that IRW has failed to explain why retroactive authority is needed in this case, the Board is unable to assess the need and declines to make its authority retroactive here. The exemption will be effective on May 13, 2021, unless it is stayed.

It is ordered:

1. Under 49 U.S.C. § 10502, the Board exempts from the prior approval requirements of 49 U.S.C. § 10901 IRW's acquisition and operation of the Line.
2. Notice of this exemption will be published in the Federal Register.
3. This exemption will be effective on May 13, 2021. Petitions for stay must be filed by April 23, 2021. Petitions to reopen must be filed by May 3, 2021.

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

having previously denied a request for retroactive authority, reopening the proceeding to make exemption retroactive in light of changed circumstances, including a state court decision that declined to rule on a contractual issue because Board previously only granted prospective authority).

¹⁴ See, e.g., Elk River R.R.—Merger Exemption—Buffalo Creek R.R., FD 36434, slip op. at 3 (STB served Nov. 6, 2020); Ark.-Okla. R.R.—Acquis. & Operation Exemption—State of Okla., FD 36323, slip op. at 3 (STB served Sept. 19, 2019).