

BEFORE THE
SURFACE TRANSPORTATION BOARD

FD 36475

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

**NOTICE OF SUBSTITUTION OF COUNSEL AND VERIFIED REQUEST FOR
PERMISSION TO WITHDRAW NOTICE OF EXEMPTION**

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MIDWEST & BLUEGRASS RAIL, LLC,
AVORY BEGGS, BRIAN MILLER, AND
DUSTIN SHAVER AND MB RAIL TTI, LLC**

Dated: August 26, 2021

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Midwest & Bluegrass Rail, LLC (“MB Rail”), Avory Beggs (“Beggs”), Brian Miller (“Miller”), and Dustin Shaver (“Shaver”),¹ and MB Rail TTI, LLC (“MBRT”)² hereby notify the Surface Transportation Board (the “Board”) of a change in legal counsel for the above-captioned control exemption proceeding. The Parties request that the Board update the subject docket to list the undersigned counsel as attorney for the Parties.

For the reasons supplied below the Parties request Board permission to withdraw the Notice of Exemption filed in this proceeding on December 29, 2020 (the “December Notice”) as part of a renewed effort (via concurrently-filed and forthcoming exemption notices) to exercise management control of four other common carrier railroads (concurrent) in common with TransKentucky Transportation Railroad, Inc. (“TransKentucky”) (forthcoming).

¹ Beggs, Miller, and Shaver will be referred to collectively as the “Individuals.”

² MB Rail, the Individuals, and MBRT, when referred to collectively, are the “Parties.”

BACKGROUND

On December 29, 2020, a filing was made in this docket – the December Notice – encompassing a proposed transaction under which CSX Transportation, Inc. (“CSXT”) would arrange for the transfer of control of TransKentucky to MBRT. As the Board observed, the December Notice was not consistent with respect to the entities who sought authorization to acquire control of TransKentucky.

Observing inconsistencies in the December Notice, and perceiving other concerning issues in the filing, the Board, served a decision on January 27, 2021 (the “January Order”), ordering that “the exemption in this docket will not become effective until further order of the Board.” It also ordered the Parties to “file a supplement addressing the issues described above by February 10, 2021.”

In response, the Parties (including MBRT) filed on February 10, 2021, a motion to dismiss the subject proceeding (the “Motion”), and requested expedited consideration of the same. The Motion addressed some of the Board’s information requests accurately. However, on further careful review of the facts and law and in consultation with new counsel, the Parties concluded that the Motion is not accurate in some respects, and that MB Rail is the only party seeking to control more than one railroad.

BOARD ACTION IS NEEDED

In the absence of STB authorization or dismissal of the proposed TransKentucky transaction, CSXT recently has informed MB Rail and MBRT that it was extending the date for closing to October 29, 2021, subject to further extensions if justified. Accordingly, the Parties

have determined to take action now in order to best preserve MBRT's prospects to acquire control of TransKentucky as they long had planned.

At this point, and given the pressing interest in concluding the TransKentucky transaction the Parties believe that it would help the Board to explain in greater (and consistent) detail the relationship among them, and to supply information that they believe may be relevant to obtaining the definitive Board action that CSXT rightfully requires. The Parties intend such information will give useful context to the present request for withdrawal of the December Notice and to the filing of two new notices of exemption (in FD 36413 (Sub-No. 1) (filed concurrently herewith) and FD 36530) (forthcoming). As such, the Parties offer the following:

MB RAIL

MB Rail (which happens also to be the official, licensed trade name of Midwest & Bluegrass Rail, LLC) is a railroad management and strategic services limited liability company. MB Rail does not own any common carrier railroads in the U.S. However, MB Rail has a contract to manage, and does manage (the MB Rail website uses the term "operate"), four U.S. short line railroads as follows:

- Vermillion Valley Railroad Co., Inc. ("VVRR")
- Camp Chase Rail, LLC ("CAMY")
- Youngstown & Southeastern Railroad, LLC ("YSRR")
- Chesapeake & Indiana Railroad Co., Inc. ("CKIN")³

³ VVRR, CAMY, YSRR and CKIN (collectively, the "MBR-IB Short Lines"), which do not interconnect, are all controlled by MB Rail IB, LLC ("MBR-IB") pursuant to authority obtained in *MB Rail IB, LLC—Acquis. & Continuance in Control Exemption—Chesapeake & Ind. R.R., et al.*, FD 36413 (STB served July 1, 2020) ("*MBR-IB – Control*"). MBR-IB does not have a controlling interest in any railroads other than the above-listed MBR-IB Short Lines. Furthermore, MBR-IB does not have a membership interest in, and it does not control, MB Rail. However, Beggs possesses a 9% membership stake in MBR-IB, and Miller and Shaver possess a 16.2% and 9% stake, respectively, in MBR-IB. Hence, the Motion's accurate statement (at 2)

Among other things, MB Rail: ensures that the MBR-IB Short Lines are properly maintained in the interest of MBR-IB; makes hiring and related personnel decisions for the railroads (actual operation of each of the railroads is entrusted to a general manager, who is an employee of the individual MBR-IB-controlled railroad); oversees MBR-IB Short Lines marketing, rail services pricing and contracts; and supplies various back-office functions (such as human resources, payroll, strategic planning, and accounting) – functioning, essentially, as a short line holding company typically would. Upon reflection, MB Rail acknowledges that the Motion (at 2) has understated MB Rail’s role in overseeing the MBR-IB Short Lines, by stating that Beggs, Miller and Shaver “provide only mid-level management services for” the MBR-IB railroads, “and will do the same for TransKentucky.”⁴

As such, applicable Board precedent appears to require that, despite not having any membership interest in MBR-IB, MB Rail’s contracted-for management oversight means that MB Rail has the ability to control, and does control, the MBR-IB Short Lines.⁵ As such,

that the Individuals are “minority owners.” (Technically, individually and collectively, the Individuals possess a minority membership interest in MBR-IB). The balance of MBR-IB membership interests are distributed amongst three other individuals and one limited liability company, each one of which also possesses a minority non-controlling interest in MBR-IB (the limited liability company membership is divided in three minority stakes, none of which are common to the other MBR-IB members). Moreover none of the MBR-IB members, *other than Beggs, Miller, and Shaver*, have any membership or ownership interest in MB Rail or MBRT. Finally, MB Rail has no membership interest in MBR-IB.

⁴ The quoted passage from the Motion inaccurately ascribes MB Rail’s short line management services to Beggs, Miller and Shaver, as individuals.

⁵ See 49 U.S.C. § 11323 (b); 49 C.F.R. § 1013 (governing Board review of control arrangements for one or more rail carriers by way of an independent voting trust, by which the trustee would lack an ownership interest in the carrier or carriers it is entrusted to manage); *West Branch Intermediate Holdings, LLC and Continental Rail LLC – Continuance in Control Exemption – New Mexico Central Railroad, LLC*, FD 36087 (STB served Feb. 2, 2017) (involving, in part, common management of multiple carriers by a short line management

MB Rail has been advised that, in retrospect, it should have joined MBR-IB in seeking authorization to control the MBR-IB Short Lines in *MBR-IB – Control*. As discussed below, MB Rail seeks to remedy this oversight in a concurrently-filed (and remedial) notice of exemption.

As indicated, MB Rail has an agreement with MBRT to manage TransKentucky at such time as MBRT assumes a controlling ownership stake in that railroad. MB Rail will take appropriate action in a separate notice of exemption to assume management control of TransKentucky in common with the MBR-IB Short Lines, as is also discussed below.

THE INDIVIDUALS

Beggs has a (non-controlling) 9% membership stake in MBR-IB; a (non-controlling) 34% membership stake in MB Rail; and a (non-controlling) 10% membership stake in MBRT. She does not directly or indirectly control any common carrier railroads – whether by ownership/membership, or under a railroad management contract.

Miller has a (non-controlling) 16.2% membership stake in MBR-IB; a (non-controlling) 33% membership stake in MB Rail; and a (non-controlling) 10% membership stake in MBRT. He does not directly or indirectly control any common carrier railroads – whether by ownership/membership, or under a railroad management contract.

Shaver has a (non-controlling) 9% membership stake in MBR-IB; a (non-controlling) 33% membership stake in MB Rail; and a (non-controlling) 10% membership stake in MBRT.

company distinct from the owner of those railroads); and *Michigan Central Railway LLC — Acquisition and Exemption — Lines of Norfolk Southern Railway Company*, FD 35063 (STB served Dec. 10, 2007), 6 (“The chief objective of a control analysis is to determine whether two companies are so closely intertwined as to be considered a single entity. The issue of control is fact-specific for each transaction.”) (internal citations omitted).

He does not directly or indirectly control any common carrier railroads – whether by ownership/membership, or under a railroad management contract.

The Individuals do not collectively manage any common carrier railroads apart from those managed through their membership venture in MB Rail. Also, the Individuals do not possess, individually or collectively, a direct or indirect controlling interest in any common carrier railroads, except as through MB Rail.

MBRT

MBRT has been established for the purpose of acquiring control of TransKentucky. Beggs, Miller and Shaver each possesses a separate and equal (and non-controlling) 10% membership stake in MBRT, as was more generally represented in the Motion. The remaining 70% membership stake in MBRT is held by a separate investment partner that does not currently possess a controlling interest in any common carrier railroads, but would secure an indirect controlling interest in its first railroad – TransKentucky – upon consummation of the transaction originally presented in the December Notice. Because MBRT and, in turn, MBRT's controlling member (who has asked not to be identified here) do not have a controlling interest in any common carriers today, neither requires control authority from the Board to acquire direct (in the case of MBRT) or indirect (in the case of MBRT's controlling member) control of TransKentucky, as the Motion (again at 2) correctly noted.

NEXT STEPS

In light of the above information, and upon further consideration of the situation, the Parties have concluded that the present FD 36475 exemption proceeding is not well-suited

for its intended purpose, given the occasionally inaccurate and conflicting information that is contained in the December Notice and subsequent Motion. Rather, the Parties have concluded that the better approach here would be to seek permission to withdraw the December Notice, and to start again afresh with respect to the TransKentucky transaction that MBRT is pursuing with MB Rail (and that MBRT and MB Rail hope soon will conclude – after the Board’s authorization). And so the Parties hereby request permission to withdraw the December Notice.

Before addressing the TransKentucky transaction, it now appears to MB Rail that it should have sought Board authorization to assume management control of the MBR-IB Short Lines simultaneously with MBR-IB; something that MB Rail believes could have been accomplished as part of the *MBR-IB – Control* proceeding, but was not. Indeed the Board itself detected the oversight when it remarked in its January Order (at 2) that, “the fact that [MB Rail] is seeking control authority here [in connection with the TransKentucky transaction] raises a question as to *why [MB Rail] was not an applicant when [MBR-IB] filed a verified notice of exemption to acquire the [MBR-IB Short Lines] last year*” (emphasis added). As bears upon the quoted passage, MB Rail has come to appreciate that this Board is keenly interested in assuring that the statutes and regulations it administers are carefully complied with, particularly when it comes to issues of common control of multiple common carriers, as this and other, recent proceedings readily demonstrate.

For that reason, MB Rail seeks to rectify matters by seeking authorization under a class exemption, FD 36413 (Sub-No. 1), to control (under its management agreement with MBR-IB) the four MBR-IB Short Lines. In so doing, MB Rail asks that the Board be fair (but also lenient) in allowing MB Rail to remedy its unintentional oversight in not having sought such control authority before, especially in view of MB Rail’s concerted and thorough efforts here

evidencing its resolve to start afresh with the Board. MB Rail respectfully submits that punitive Board action would result in a disproportionate harm to MBRT and its controlling member (neither of which requires Board authorization to acquire control of TransKentucky), and, by extension to MB Rail, if MBRT were to be deprived of its acquisition opportunity.

In addition, MB Rail will file in yet another docket (FD 36530) a notice of exemption to assume management control of TransKentucky. That exemption, which will be filed the day after the FD 36413 (Sub-No. 1) class exemption, would be expected to take effect the day after the effective date of the Board's remedial authorization for MB Rail's control of the MBR-IB Short Lines. Through this ordered process, MB Rail's authorization to control TransKentucky in common with the MBR-IB Short lines would be predicated upon authorization of MB Rail's management control of the MBR-IB Short Lines.

Neither MBRT nor MBRT's controlling member-investor entity (KGP Solutions, LLC) currently controls any carriers. Therefore, under 49 U.S.C. 11323, they do not require, and will not be requesting, authority to control TransKentucky. In fact, MBRT and its controlling member could assume control of TransKentucky immediately without the need for any Board proceeding, but for the plans to have MB Rail manage TransKentucky. If the Board were to be unable to accommodate the newly-filed and forthcoming class exemptions in a time frame acceptable to CSXT, then MBRT may place TransKentucky in a voting trust during the pendency of the Board's consideration.

Finally, as the foregoing plans indicate, the Individuals (Beggs, Miller and Shaver) have not joined in the newly-filed control class exemptions. They are excluded from those proceedings on the understanding that, in keeping with *OmniTRAX Holdings Combined, Inc.—Acquis. of Control Exemption—Ala. & Tenn. River Ry.*, FD 36032 (STB served July 14,

2016) (discussed in footnote 5 of the January Order), each of them is a non-controlling member in MB Rail and in MBRT. As such, the Individuals understand that they do not need authority to control the MBR-IB Short Lines or TransKentucky. Only MB Rail requires such authority. If, however, the Board determines that the Individuals are incorrect, and that they require such authorization as a group independent of MB Rail, then they are willing to be named as co-applicants in the FD 36413 (Sub-No. 1) and FD 36530 proceedings, and, if so directed, will promptly supplement each of the notices for that purpose.

CONCLUSION

WHEREFORE, the Parties request that this docket be updated to reflect a substitution of legal counsel, and, for the reasons supplied above, that the Parties be permitted to withdraw their class exemption filing in this proceeding

Respectfully submitted,

By: /s/ *R. A. Wimbish*

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ATTORNEYS FOR

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AVORY BEGGS, BRIAN MILLER, AND

DUSTIN SHAVER AND MB RAIL TTI, LLC

Dated: August 26, 2021

cc: all parties of record

VERIFICATION

I, Avory Beggs, verify under penalty of perjury that the foregoing is true and correct.

Further, I certify I am qualified and authorized to make this verification.

A handwritten signature in black ink, appearing to read 'Avory Beggs', is written over a horizontal line.

Avory Beggs

Title: *Mgr*

Midwest and Bluegrass Rail, LLC

Dated: 8/19/21