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SERVICE DATE – SEPTEMBER 29, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36460

MICHAEL WILLIAMS—CONTROL EXEMPTION—
S&S SHORTLINE LEASING, LLC

Docket No. FD 36461

S&S SHORTLINE LEASING, LLC—ACQUISITION EXEMPTION—CITY OF ELY AND
NEVADA NORTHERN RAILWAY FOUNDATION

Docket No. FD 36474¹

MICHAEL WILLIAMS—CONTROL EXEMPTION—
MCCLOUD RAILWAY COMPANY

Digest:² This decision rejects the verified notices of exemption filed in these dockets and directs the applicants to file petitions for exemption or full applications for the required authority.

Decided: September 29, 2021

On November 13, 2020, S&S Shortline Leasing, LLC (S&S), filed a verified notice of exemption (Acquisition Notice) under 49 C.F.R. § 1150.41 in Docket No. FD 36461 to acquire from the City of Ely, Nev. (the City), and the Nevada Northern Railway Foundation, Inc. (NNRF), approximately 127 miles of rail line extending from milepost 0.0 at or near Cobre in Elko County, Nev., to milepost 127.0 at or near McGill Junction in White Pine County, Nev. (the Line).³ Also on November 13, 2020, Michael Williams (Williams), a noncarrier individual, filed

¹ These proceedings are not consolidated. A single decision is being issued for administrative convenience.

² 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).

³ S&S previously was authorized to operate over the Line and an additional 0.9-mile section from milepost 127.0 to milepost 127.9. See S&S Shortline Leasing, LLC—Operation Exemption—City of Ely, Nev., FD 35284 (STB served Aug. 14, 2009). On November 13, 2020, Great Basin and Northern Railroad (Great Basin) filed a verified notice of exemption pursuant to

a verified notice of exemption (Control Notice) under 49 C.F.R. § 1180.2(d)(2) in Docket No. FD 36460 to continue in control of S&S.

By decision served on December 10, 2020, the Control Notice in Docket No. FD 36460 and the Acquisition Notice in Docket No. FD 36461 were held in abeyance, and their effective dates were postponed until further order of the Board. Williams—Control Exemption—S&S Shortline Leasing, LLC (December 10 Decision), FD 36460 et al. (STB served Dec. 10, 2020). The decision stated that the Control Notice raised issues related to Williams’ apparent failure to obtain Board authorization prior to assuming control of S&S along with BG & CM Railroad (BG & CM), Ozark Valley Railroad (Ozark), and McCloud Railway (McCloud). Accordingly, Williams was directed to provide, among other things, information regarding whether he is seeking after-the-fact authority for the unauthorized acquisition of S&S stock during or after 2009, a comprehensive list of all rail carriers owned or controlled by Williams, and information pertinent to that control. Id. at 3-4.

On December 29, 2020, Williams filed in Docket No. FD 36460 a clarification providing some of the requested information, and in Williams—Control Exemption—McCloud Railway, Docket No. FD 36474, a verified notice of exemption (McCloud Notice) pursuant to 49 C.F.R. § 1180.2(d) for after-the-fact authority to acquire control of McCloud.⁴ Due to several conflicting statements in the record, however, it remained unclear whether S&S previously had leased and operated over the Line.⁵ Additionally, while Williams provided a list of the

49 C.F.R. § 1150.41 to assume operations over the 0.9-mile line, which became effective on December 13, 2020. See Great Basin & N. R.R.—Change in Operators Exemption—City of Ely, FD 36459 (STB served Nov. 27, 2020).

⁴ Although Williams indicates in the McCloud Notice that he acquired the stock of McCloud when it was a rail carrier, (McCloud Notice 2), Williams describes the authorization he seeks as continuance in control. A continuance in control typically occurs when “a person already in control of an existing carrier or carriers creates 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).

⁵ S&S filed a verified notice of exemption in July 2009 to operate over the Line and the additional 0.9-mile segment for which Great Basin recently obtained authority to operate. In his December 29, 2020 supplement, Williams stated that he purchased the shares of S&S on or about July 12, 2011, and that at the time of his purchase of S&S, the only property interest S&S had in the Line was a lease to provide car storage. (Williams Suppl., V.S. Williams 2-3, 7, Dec. 29, 2020.) Williams stated that the car storage lease remains the only property interest S&S currently holds in the Line, and that S&S’s authority to operate the Line for common carrier purposes has therefore not been consummated. (Id., V.S. Williams 3.) This statement, however, contradicts the Acquisition Notice, which was verified by Williams and states “S&S currently operates the Line pursuant to S&S Shortline Leasing, LLC—Operation Exemption—City of Ely, FD 35284 (STB served Aug. 14, 2009).” (Acquisition Notice 3.) Williams’ statement also contradicts the verified notice of exemption filed by Great Basin in Docket No. FD 36459 and statements made by the parties in Docket No. FD 35284.

proceedings through which BG & CM and Ozark acquired various rail lines and became rail carriers, he failed to provide the information requested in the December 10 Decision regarding his acquisition of control of BG & CM and Ozark. Accordingly, by decision served on January 26, 2021, the Board requested that Williams explain the inconsistencies in the record with respect to S&S, explain whether BG & CM and/or Ozark became rail carriers before or after Williams controlled them, and provide the corresponding information previously requested in the December 10 Decision. Williams—Control Exemption—S&S Shortline Leasing, LLC (January 26 Decision), FD 36460 et al. (STB served Jan. 26, 2021).⁶

On February 16, 2021, Williams, S&S, and the City and NNRF filed supplemental comments. With respect to the history of S&S on the Line, Williams states that, despite representations to the contrary by the former owner of S&S in Docket No. FD 35284, S&S and the City never entered into a common carrier lease for the Line. (Williams Suppl. 2, Feb. 16, 2021, FD 36460.) S&S filed a verified correction to the Acquisition Notice, stating that, although the Board granted S&S operating authority in Docket No. FD 35284, “S&S never exercised this authority, in that it (a) never had a property interest to provide common carrier services and (b) in fact did not provide common carrier services.” (S&S Verified Correction 1, FD 36461.) The City and NNRF state that they originally leased an unspecified portion of the Line to S&S in 2009 for rail car storage, not operating rights. (City & NNRF Comments 2, FD 36460.) The City and NNRF state that, even though the lease was amended to include the mileposts on the Line, the purpose of the lease remained limited to rail car storage. (*Id.* at 3.) According to the City and NNRF, the inconsistencies observed by the Board between the pending exemption notices and those in 2009 are primarily the result of inaccurate and misleading statements in the 2009 notice of exemption filed by S&S’s previous owner. (*Id.* at 4.)

With respect to BG & CM and Ozark, Williams states that he incorporated both entities and that they received common carrier authority from the Board before they became common carrier railroads. (Williams Suppl. 3, Feb. 16, 2021, FD 36460.) According to Williams, they became common carriers on the dates the respective deeds were executed transferring rail assets to those entities; BG & CM on August 19, 2005, and Ozark on June 27, 2009. (*Id.*, V.S. Williams 6.) Williams states that he does not understand the Board’s “conditional information request”⁷ in the January 26 Decision to be applicable because neither BG & CM nor Ozark was a rail carrier at the time Williams incorporated them. (*Id.*, V.S. Williams 6-7.)

⁶ Because of the remaining uncertainty regarding S&S, BG & CM, and Ozark, the Board held the McCloud Notice in Docket No. FD 36474 in abeyance and postponed the effective date of the exemption until further order of the Board. January 26 Decision, FD 36460 et al., slip op. at 4. The Control Notice in Docket No. FD 36460 and the Acquisition Notice in Docket No. FD 36461 remained in abeyance.

⁷ “If BG & CM or Ozark (or both) were rail carriers at the time Williams acquired control of them, his December 29 clarification provides no responsive information as to these two entities, and he will again be directed to answer the five information requests stated in the [December 10 Decision] regarding BG & CM and Ozark.” January 26 Decision, FD 36460 et al., slip op. at 3.

DISCUSSION AND CONCLUSIONS

The Acquisition Notice was submitted under the class exemption procedures at 49 C.F.R. § 1150.41, which provide an expedited process for obtaining authority under 49 U.S.C. § 10902, and the Control and McCloud Notices were submitted under the class exemption procedures at 49 C.F.R. § 1180.2(d)(2), which provide an expedited process for obtaining control authority under 49 U.S.C. § 11323. These streamlined class exemption procedures are reserved for transactions involving routine, uncomplicated, and non-controversial matters. See, e.g., N.E. Interchange Ry.—Lease & Operation Exemption—Line in Croton-on-Hudson, N.Y., FD 34734 et al., slip op. at 4 (STB served Nov. 18, 2005); S. San Luis Valley R.R.—Acquis. & Operation Exemption—Iowa Pac. Holdings, LLC, FD 35586 et al., slip op. at 2 (STB served Feb. 10, 2012) (rejecting notice of exemption raising substantial questions about prior acquisitions); V & S Ry.—Aban. Exemption—in Kiowa Cnty., Colo., AB 603 (Sub-No. 3X), slip op. at 2 (STB served June 17, 2014).

The three notices will be rejected because it has become apparent that the matters are sufficiently complicated and non-routine, making them inappropriate for consideration under the streamlined class exemption procedures of 49 C.F.R. §§ 1150.41 and 1180.2(d). Although the filings from Williams, S&S, and the City and NNRF have helped to clarify the discrepancies in the record with respect to S&S, the inconsistency across many dockets regarding the Line requires a more thorough review of all of these transactions than is possible under the notice process.

Furthermore, the Board has informed Williams more than once of its concerns regarding his acquisition of control of carriers without having received Board authority to do so. December 10 Decision, FD 36460 et al., slip op. at 2 n.3; January 26 Decision, FD 36460 et al., slip op. at 3-4. Under § 11323, Board authority is required for acquisition of control of a rail carrier by a person that is not a rail carrier but that controls any number of rail carriers. 49 U.S.C. § 11323(a)(5). The record now indicates that the acquisition of BG & CM was Williams' first rail carrier acquisition and thus did not require Board authorization. However, it is of significant concern that Williams subsequently acquired control of two rail carriers, Ozark and McCloud, without seeking or obtaining the required Board authority under § 11323(a)(5).⁸ Although Williams now seeks after-the-fact authority for control of McCloud, he has made no such effort with respect to Ozark.

The circumstances here, particularly the unauthorized control of multiple railroads, require more scrutiny and development of a more complete record than afforded in the expedited class exemption process. Accordingly, the Acquisition, Control, and McCloud Notices will be rejected. Williams will be directed to file petitions for exemption or full applications to control Ozark and McCloud after the fact. Should S&S wish to acquire the Line or enter into any other

⁸ Even if the entities were not carriers at the time Williams acquired or incorporated them, once they became carriers, continuance in control authority was required. See, e.g., Watco Holdings, Inc.—Continuance in Control Exemption—Elwood Joliet & S. R.R., FD 36438 (STB served Oct. 14, 2020) (exemption to continue in control of a noncarrier subsidiary upon the subsidiary's becoming a rail carrier).

transaction that would require Board authority, S&S will be directed to file a petition for exemption or full application for such authority. Finally, should Williams wish to continue in control of S&S upon its becoming a rail carrier, Williams will be directed to file a petition for exemption or full application for authority to do so.

Finally, the Board admonishes counsel for Williams, S&S, and McCloud and cautions counsel to take greater care to avoid incorrect or incomplete representations of matters of fact to the Board. The many conflicting statements with respect to S&S were not limited to the 2009 proceeding or to the Great Basin notice of exemption alone. See supra note 5. Greater attention to the status of the other railroads owned or controlled by Williams (as originally listed in the Control Notice) could have obviated the need for further filings and the needless expenditure of Board resources in this proceeding. The Board strongly advises counsel to be meticulous and thorough in any future proceedings before the Board.

It is ordered:

1. The Control Notice in Docket No. FD 36460, the Acquisition Notice in Docket No. FD 36461, and the McCloud Notice in Docket No. FD 36474 are rejected.
2. Williams is directed to file a petition for exemption or full application to control Ozark after the fact.
3. Williams is directed to file a petition for exemption or full application to control McCloud after the fact.
4. Should S&S wish to acquire the Line or enter into any other transaction that would require Board authority, S&S is directed to file a petition for exemption or full application for such authority.
5. Should Williams wish to continue in control of S&S upon its becoming a rail carrier, Williams is directed to file a petition for exemption or full application for authority to do so.
6. This decision is effective on its service date.

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