

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35984

OHIO RIVER PARTNERS LLC—ACQUISITION AND OPERATION EXEMPTION—
HANNIBAL DEVELOPMENT, LLC

Docket No. FD 36152

OHIO RIVER PARTNERS SHAREHOLDER LLC—EXEMPTION FOR
INTRA-CORPORATE FAMILY TRANSACTION—OHIO RIVER PARTNERS, LLC

Digest:¹ This decision denies a petition to defer operating authority filed by Ohio Terminal Railroad Company (OTRC) in Docket No. FD 35984, denies OTRC's petition to partially revoke the exemption at issue in Docket No. FD 36152, clarifies certain aspects of these proceedings at the parties' request, and directs the parties to confirm whether they will participate in Board-sponsored mediation.

Decided: December 22, 2017

On September 5, 2017, Ohio Terminal Railroad Company (OTRC) filed a petition to defer operations by Ohio River Partners, LLC (ORP) on a rail line in Monroe County, Ohio, over which ORP was previously granted operating authority in Docket No. FD 35984. OTRC, which claims to have an exclusive easement under state law to operate over the same rail line, argues that ORP may not exercise its operating authority until that state property and contract law dispute is resolved and the parties have negotiated joint interchange and operating protocols. On November 2, 2017, OTRC also filed a petition to partially revoke the exemption in Docket No. FD 36152, which concerns ORP's proposed merger with and into its corporate parent Ohio River Partners Shareholder LLC (ORPS). In that petition, OTRC seeks conditions and clarification regarding ORPS's ability to exercise the operating authority previously granted to ORP.

This decision denies both petitions, but clarifies the scope of ORPS's operating authority under these proceedings. It also directs the parties to confirm whether they will participate in Board-sponsored mediation limited to the development of interchange and operating protocols for potential joint use of the line at issue.

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. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

BACKGROUND

The Acquisition/Operation Proceeding (Docket No. FD 35984)

On December 18, 2015, ORP, a noncarrier, filed a verified notice of exemption under 49 C.F.R. § 1150.31 to acquire from Hannibal Development, LLC (Hannibal Development) and to operate 12.2 miles of rail line known as the Omal Secondary Track (the Line). The Line extends from milepost 60.5 at or near Powhatan Point to milepost 72.2 at or near Hannibal, in Monroe County, Ohio.² See 80 Fed. Reg. 81,878-01 (Dec. 31, 2015).

OTRC opposed the acquisition and operation transaction by filing a petition to reject the exemption. In particular, OTRC claimed that it has both Board authority to operate over the Line³ and an exclusive operating easement under state law that contractually precludes any other carrier from operating over the Line. OTRC further explained that the scope of the easement was the subject of a pending mediation/arbitration proceeding between Hannibal Development (ORP's proposed transferor) and Hannibal Real Estate, LLC (the owner of the easement operated by OTRC). In addition, OTRC asserted that dual operations on the Line would not be feasible based on the Line's limited capacity and constrained interchange facilities with Norfolk Southern Railway Company (NSR), which has a connection with the Line at milepost 60.5.

On April 1, 2016, the Board denied OTRC's petition to reject ORP's notice of exemption. See Ohio River Partners LLC—Acquis. & Operation Exemption—Hannibal Dev., LLC (April 2016 Decision), FD 35984, slip op. at 3-4 (STB served Apr. 1, 2016). The Board explained that the parties' ongoing contractual dispute regarding the scope of OTRC's operating easement did not preclude the ORP exemption from going into effect because the Board's grant of operating authority is permissive only. See id. at 3. The Board stated,

in order to exercise that authority and commence operations, [a] carrier must still obtain the necessary rights under state property and/or contract law. Where, as here, there is a dispute about whether an entity can exercise its operating authority . . . , the dispute generally should be decided by a court, applying state law, and not by the Board.

² In a concurrently filed verified notice of exemption in Fortress Investment Group LLC—Continuance in Control Exemption—Ohio River Partners, LLC, Docket No. FD 35985, Fortress Investment Group LLC (Fortress) sought Board approval to continue in control of ORP and two other rail carriers currently controlled by other companies within the Fortress corporate family following consummation of the proposed transaction. See 80 Fed. Reg. 81,879 (Dec. 31, 2015). That exemption became effective on January 18, 2016.

³ See Ohio Terminal Ry.—Operation Exemption—Hannibal Real Estate, FD 35703 (STB served Jan. 11, 2013).

Id. (internal footnotes and citations omitted). Regarding the feasibility of dual operations on the Line, the Board noted that the parties were attempting to work out these issues. Id. at 4. To ensure that such issues were satisfactorily resolved, the Board ordered that, before ORP may commence any operations on the Line, NSR, ORP, and OTRC must: (1) negotiate and agree on interchange and operating protocols, and (2) jointly certify to the Board that these protocols are in place. Id. Finally, the Board stated that “[i]f there are issues that the parties cannot resolve on their own or other issues arise, any party may ask the Board to facilitate discussions or provide other relief.” Id.

On September 5, 2017, OTRC filed a petition to defer ORP’s operating authority on the Line. OTRC states that the parties were unable to resolve their contractual dispute and, thus, on August 29, 2017, OTRC instituted a declaratory judgment proceeding in Ohio state court. (OTRC Pet. at 2 & Ex. A, Sept. 5, 2017.) In that action, OTRC seeks a declaration that, under its easement and various other instruments, OTRC has the exclusive right to provide common carrier service to all locations on the Line. (Id. at Ex. A at 7.) In its petition here, OTRC also expresses concern that ORP intends to commence operations on the Line shortly, and states that, although the parties have begun negotiations concerning interchange and operating protocols, they have not yet reached any agreement. (Id. at 3.) Accordingly, OTRC asks that the Board defer ORP’s operating authority until the state property/contract issues have been resolved under Ohio law and the parties have been able to negotiate joint operational and interchange arrangements for use of the Line.

In response, ORP and its parent corporation, ORPS (collectively, the ORP Parties), submitted a letter advising the Board that, in accordance with the Board’s April 2016 Decision, ORPS will not commence operations until interchange and operating arrangements have been agreed upon by the parties. The ORP Parties also submitted a reply to the petition to defer. (See ORP Parties Reply, Sept. 22, 2017.) They claim that OTRC’s petition is in substance a request that the Board either stay ORP’s operating authority or revoke the exemption to the extent it permits ORP to operate the line, but that OTRC has failed to justify either request. (Id. at 2-10.) As such, the ORP Parties ask that the Board deny OTRC’s petition to defer. They further assert that, by filing a petition with the Board and a lawsuit in state court, OTRC has made clear that it has no intention of entering into any form of interchange and operating arrangement until the scope of its rights under the easement has been resolved by the Ohio court. (Id. at 12-13.) The ORP Parties therefore ask that the Board impose the terms set forth in a proposed operating and interchange agreement (which it filed under seal), and to permit the ORP Parties to commence operations over the Line immediately. (Id. at 10, 13-16.)

On October 4, 2017, OTRC filed a rebuttal opposing the ORP Parties’ request to impose an operational and interchange arrangement at this time. OTRC asserts that there are a number of unresolved issues in the ORP Parties’ proposed approach and that it constitutes an attempt to “take over” OTRC’s service on the Line. (OTRC Rebuttal, at 3-4.) OTRC further contends that the pending state-court property dispute must be resolved before ORP may commence rail operations, to confirm whether ORP possesses the rights necessary to operate on the Line. (Id. at 2-3.) OTRC also notes that, although the April 2016 Decision granted acquisition and operating

authority to ORP, it appears that the Line was actually purchased by ORPS, ORP's corporate parent.⁴ In addition, OTRC points out that supporting documentation in the ORP Parties' reply suggests that the Line may actually be operated by another Fortress-family entity, Central Maine & Quebec Railway US Inc., not by ORP. (*Id.* at 3 n.2.)

On October 16, 2017, the ORP Parties filed a responsive letter stating that contrary to OTRC's suggestion, the Board did not condition its grant of operating authority upon judicial resolution of the state property/contract lawsuit. Also, in response to OTRC's claim on rebuttal, the ORP Parties acknowledge that ORPS—not ORP—was in fact the acquiring entity. However, the ORP Parties state that they were concurrently filing a verified notice of exemption to vest both fee title to the Line and the regulatory authority (and common carrier obligation) to operate the Line in a single entity, ORPS.⁵

The Merger Proceeding (Docket No. FD 36152)

The ORP Parties initiated Docket No. 36152 by filing a verified notice of exemption under 49 C.F.R. § 1180.2(d)(3) for an intra-corporate family transaction, in which ORP would be merged with and into its parent, ORPS. Notice of the exemption was served and published in the Federal Register on November 1, 2017. See 82 Fed. Reg. 50,728.

On November 2, 2017, OTRC filed a petition seeking partial revocation of the intra-corporate family merger exemption. OTRC states that it does not oppose the exemption, provided that the Board imposes conditions specifying that: (1) ORPS, as the successor to ORP, will have only the conditional operating authority that ORP obtained in the Acquisition/Operation Proceeding; (2) ORPS will be substituted for ORP in that proceeding for all purposes; and (3) upon consummation of the intra-corporate family transaction, ORPS will be the only member of the Fortress corporate family that has any authorization to operate on the Line, and any transfer of that operating authority would need to be the subject of a separate proceeding. (See OTRC Pet. 3-4, Nov. 2, 2017.) Moreover, OTRC asks the Board to clarify that its prior orders in the Acquisition/Operation Proceeding will be applicable and binding on ORPS, effective with any merger of ORP with and into ORPS, and that ORPS is bound by the representations made by ORP in the Acquisition/Operation Proceeding. (*Id.* at 5.) OTRC also notes that there are open questions regarding the scope of the conditions imposed in the April 2016 Decision and asks the Board to clarify whether ORP may commence operations on the Line before there is a resolution of OTRC's state-court claim that it has an exclusive easement to use the Line. (*Id.* at 5-6.) Finally, OTRC indicates that, although it believes the parties should continue negotiations regarding operating and interchange protocols for potential dual use of the

⁴ Although acquisition authority was obtained in April 2016, the purchase of the Line was not completed until June 16, 2017. (See ORP Parties Reply at 5, Sept. 22, 2017.)

⁵ In the interest of compiling a more complete record, the Board will accept the supplemental filings. See City of Alexandria, Va.—Pet. for Declaratory Order, FD 35157, slip op. at 2 (STB served Nov. 6, 2008).

Line, the Board should refer the parties to mediation if such discussions reach an impasse. (Id. at 7.)

To provide sufficient time to consider the matters presented, in a decision served on November 13, 2017, the Board placed the exemption in Docket No. FD 36152 into abeyance pending further order of the Board.

On November 21, 2017, ORPS filed a reply arguing that OTRC's petition for partial revocation should be denied. Specifically, ORPS asserts that OTRC has not met the criteria for revocation of the intra-corporate family exemption, as revocation is not necessary to carry out any element of rail transportation policy or to make the terms and conditions of the April 2016 Decision applicable to ORPS. (See ORP Parties Reply 3-4, Nov. 21, 2017.) ORPS further asserts that the April 2016 Decision did not impose any condition requiring ORP to demonstrate that it possesses a sufficient property interest to operate over the Line. (Id. at 5-8.) Finally, ORPS asserts that the Board should promptly initiate mediation for the purpose of establishing operating and interchange protocols for the Line, and if that fails, impose the terms set forth in the proposed operating and interchange agreement filed by ORP in Docket No. FD 35984. (Id. at 9-11.)

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10502(d), the Board may revoke an exemption, in whole or in part, if the Board finds that regulation is necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101. See, e.g., Caldwell R.R. Comm'n—Exemption from 49 U.S.C. Subtitle IV, FD 32659 (Sub-No. 1), slip op. at 1-2 (STB served Nov. 26, 2014); Ind. Hi-Rail Corp.—Lease & Operation Exemption—Norfolk & W. Ry. Line Between Rochester & Argos, Ind., &—Exemption from 49 U.S.C. 10761, 10762, & 11144, FD 32162 et al., slip op. at 4 (STB served Jan. 30, 1998). The party seeking revocation has the burden of proof, and petitions to revoke must be based on reasonable, specific concerns. See Caldwell R.R. Comm'n, FD 32659, slip op. at 2; I&M Rail Link, LLC—Acquis. & Operation Exemption—Certain Lines of Soo Line R.R., FD 33326 et al. (STB served Apr. 2, 1997), aff'd sub nom. City of Ottumwa v. STB, 153 F.3d 879 (8th Cir. 1998).

OTRC's Petition to Defer Operating Authority

OTRC's petition to defer ORP's operating authority will be denied. To the extent the deferral petition seeks to stay or revoke the operating authority granted to ORP by the Board's April 2016 Decision, OTRC has not attempted to establish that it meets the Board's criteria for a stay⁶ or that revocation is necessary to carry out any aspect of the RTP. Moreover, OTRC has

⁶ See N.H. Cent. R.R., Inc.—Lease & Operation Exemption—Line of the N.H. Dep't of Transp., FD 35022, slip op. at 1 (STB served May 31, 2007) (citing Hilton v. Braunskill, 481 U.S. 770, 776 (1987)); Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

not supported its reason why the Board should defer or otherwise alter the operating authority previously granted to ORP in the April 2016 Decision.

First, OTRC expresses concern that ORP will soon commence operations on the Line. But ORPS has represented that it will not commence operations until the establishment of appropriate interchange and operating arrangements, as required by the Board's April 2016 Decision. (See ORPS Ltr., Sept. 7, 2017; see also ORP Parties Reply 5, Nov. 21, 2017.) Because the parties (including NSR) have neither agreed upon such arrangements nor certified to the Board that they have done so, ORP (or ORPS, upon consummation of the merger) is precluded from commencing operations; no Board enforcement action would thus be appropriate.

In addition, OTRC notes that the parties' contract dispute remains ongoing and is now pending before an Ohio state court.⁷ However, as the Board previously explained, the existence of such a dispute is not grounds for withholding a grant of operating authority, which is permissive only. See April 2016 Decision, slip op. at 3. As the Board already determined, ORP complied with the statutory standards for obtaining a grant of operating authority on the Line, and it is for the Ohio state court—not the Board—to determine whether ORP or ORPS has obtained a sufficient property interest under state law to exercise that operating authority.⁸ See Lackawanna Cty. R.R. Auth.—Acquis. Exemption—F&L Realty, Inc., FD 33905, slip op. at 6 (STB served Oct. 22, 2001). The Board will thus deny, as premature, ORPS's request that the Board adopt, and impose upon the parties, the terms of the ORP Parties' confidential proposed operating and interchange agreement.⁹ (See ORP Parties Reply 10, 13-16, Sept. 22, 2017.)

OTRC's Petition for Partial Revocation

The Board will also deny OTRC's petition for partial revocation to impose conditions on the intra-corporate family merger exemption in Docket No. FD 36152. OTRC does not assert, much less establish, that more detailed scrutiny of the proposed merger between ORP and its parent ORPS is necessary to carry out any element of the RTP, or that the ORP Parties are

⁷ Despite ORPS's ownership of the Line, OTRC claims that its easement over the Line is exclusive, thus preventing ORPS from operating. (OTRC Pet. 5, Nov. 2, 2017.)

⁸ While resolution of the state-court property dispute is not a formal condition of the April 2016 Decision granting ORP operating authority, if the Ohio state court determines that OTRC's easement over the Line is exclusive under state law, (see ORP Parties Reply 8 n.7, Nov. 21, 2017 (admitting that OTRC claims it has an "exclusive" right to operate on all portions of the Line—one that would override ORPS's rights as the holder of fee title)), ORP/ORPS will be unable to operate on the Line pursuant to the authority granted by the Board.

⁹ The Board also notes that the ORP Parties' proposed agreement does not appear to contemplate any agreement by NSR, which the Board required as part of its condition in the April 2016 Decision.

engaging in any conduct that frustrates the RTP.¹⁰ Rather, OTRC acknowledges that it does not oppose the proposed merger transaction, provided it receives certain assurances and clarification regarding the effects of the merger on the Acquisition/Operation Proceeding. (See OTRC Pet. 2-3, Nov. 2, 2017.)

The Board therefore denies OTRC's request for conditions, but will clarify the effects of the merger on the Acquisition/Operation proceeding. First, as ORPS acknowledges, upon consummation of the proposed merger, ORP's separate corporate existence will cease, and ORPS (as the surviving company) will, as a matter of law, succeed to all of the rights and obligations of ORP. (See ORP Parties Reply 3-4, Nov. 21, 2017.) This includes, among other things, stepping into the shoes of ORP for purposes of the Acquisition/Operation Proceeding and being bound by the Board's April 2016 Decision. Moreover, ORPS states that it "adopts and reaffirms the commitment previously made by ORP that it will not commence rail operations over the [] Line until appropriate interchange and operating protocols are established with OTRC and NS[R]." (Id. at 5.) Furthermore, the Board confirms that, upon consummation of the merger, ORPS will be the only Fortress entity possessing the Board authority, and obligation, to provide common carrier service on the Line.

In conclusion, OTRC has failed to establish any basis for revoking or rejecting the intra-corporate family merger exemption.¹¹ The Board will allow that exemption to become effective immediately.

¹⁰ See 49 U.S.C. § 10502(d). Cf. Entergy Ark. Inc. v. Union Pac. R.R., NOR 42104, slip op. at 16 (STB served Mar. 15, 2011).

¹¹ OTRC also questions whether Fortress needs separate Board authority to continue in control of ORPS when ORPS becomes a carrier in common with the other carriers in Fortress's corporate family. (OTRC Pet. 3 n.1, Nov. 2, 2017.) The Board concludes that it does not.

Under 49 C.F.R. § 1180.2(d)(2), a merger transaction is exempt from the requirements of 49 U.S.C. § 11323, et seq., if it does not involve a Class I carrier and the proposed acquirer seeks to continue in control of a new carrier whose rail lines do not connect, or are not part of a plan to connect, with other railroads in the same corporate family. Fortress already sought, and received, such an exemption to continue in control of ORP, once it became a Class III rail carrier by acquiring and operating the Line (a non-connecting line). See Fortress Inv. Group LLC—Continuance in Control Exemption—Ohio River Partners, LLC, FD 35985, slip op. at 1-2 (STB served Dec. 31, 2015). Pursuant to the exemption granted here under 49 C.F.R. § 1180.2(d)(3), the merger of ORP with and into ORPS will vest both fee title to the Line and operating rights over the Line in a single entity, which can become a Class III carrier upon consummation of its operating rights. That entity will have essentially the same rights and relationship vis-à-vis Fortress and the Line as ORP under the prior continuance-in-control exemption. Thus, Fortress is not seeking to control a new non-Class I carrier, and it does not need a separate continuance-in-control exemption under 49 C.F.R. § 1180.2(d).

Board-Sponsored Mediation

The Board reminds the parties it is available to assist in Board-sponsored mediation in the Acquisition/Operation Proceeding, Docket No. FD 35984, concerning the development of interchange and operating protocols for potential joint use of the Line. The Board “favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings.” 49 C.F.R. § 1109.1. Mediation can be particularly appropriate when disputes involve operational issues. See Cent. Ill. R.R.—Operation Exemption—Rail Line of Peoria, Ill., FD 34518, slip op. at 6-7 (STB served Feb. 23, 2005).

As noted above, although the Board cannot resolve the state-law property dispute, it has offered to “facilitate discussions” regarding the development of interchange and operating protocols for joint use of the Line. See April 2016 Decision, slip op. at 4. OTRC, while inclined initially to continue private negotiations, nonetheless appears amenable to Board-facilitated mediation under 49 C.F.R. Part 1109. (See OTRC Pet. 7, Nov. 2, 2017.) The ORP Parties do not believe that further private discussions will be productive and have explicitly requested that the Board “promptly initiate a mediation for the purpose of establishing interchange and operating protocols. . . .”¹² (ORP Parties Reply 11, Nov. 21, 2017.) Given these positions, mediation here may be useful in reaching an agreement that would facilitate the parties’ potential joint use of the Line and minimize future disruption to rail service in the event the state court rules that dual operations are permitted. Accordingly, the Board requests OTRC, ORP (or OPRS, upon consummation of the merger), and NSR to inform the Board if they are interested in participating in Board-sponsored mediation limited to the development of those protocols.

It is ordered:

1. OTRC’s petition to defer ORP’s operating authority on the Line is denied.
2. The ORP Parties’ request that the Board impose operating and interchange agreement terms is denied.
3. OTRC’s petition for partial revocation for imposition of conditions and for clarification is denied.
4. The exemption in Docket No. FD 36152 is effective as of December 22, 2017.
5. This decision is effective on its date of service.

By the Board, Board Members Begeman and Miller.

¹² NSR has not yet expressed any position on the mediation question.