

SERVICE DATE – LATE RELEASE MAY 31, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 55 (Sub-No. 643X)

CSX TRANSPORTATION, INC.—ABANDONMENT EXEMPTION—IN LAPORTE,
PORTER, AND STARKE COUNTIES, IND.

Docket No. FD 36076¹

CHESAPEAKE & INDIANA RAILROAD CO.—PETITION FOR DECLARATORY ORDER

Digest:² The Board denies a request to reopen a 2004 decision that approved the sale of a 32.97-mile rail line by CSXT Transportation, Inc., to the Town of North Judson, Ind. (the Town) under the Board's offer of financial assistance procedures. The Board also denies the request to institute a declaratory order proceeding to address the Town's actions.

Decided: May 30, 2017

BACKGROUND

By decision and notice of interim trail use or abandonment served on February 20, 2004, the Board granted a petition by CSX Transportation, Inc. (CSXT), for an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10903 to abandon an approximately 32.97-mile line of railroad (the Line). The Line extends from milepost CF 0.63, at Lacrosse, to milepost CF 15.23, at Wellsboro, and from milepost CI 212.55, at North Judson, to milepost CI 230.92, at Malden, in LaPorte, Porter and Starke Counties, Ind. It formed a part of a CSXT mainline known as the Chesapeake & Ohio Railway of Indiana that had connected Cincinnati, Ohio, with the Chicago area. The exemption was scheduled to become effective on

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

March 22, 2004, unless an offer of financial assistance (OFA) was submitted under 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27(c).

On March 1, 2004, the Town of North Judson (the Town) filed an OFA to purchase the Line. After the Board set the terms and conditions of the sale, the Town agreed to purchase the Line; accordingly, the Board authorized the Town to acquire the Line, and the petition for exemption was dismissed. CSX Transp., Inc.—Aban. Exemption—in LaPorte, Porter, & Starke Ctys., Ind. (May 2004 OFA Decision), AB 55 (Sub-No. 643X) (STB served May 14, 2004).

Subsequently, the Town consummated the OFA acquisition and selected the Chesapeake and Indiana Railroad Company (CKIN), a Class III short line railroad as its operator. The Town and CKIN negotiated an Operating Agreement (the 2004 Operating Agreement), which provided that CKIN would provide all originating and terminating common carrier rail service on the Line. The 2004 Operating Agreement also permitted another entity, the Hoosier Valley Railroad Museum (HVRM), to use the Line for passenger excursion operations.

According to CKIN, the arrangement continued “on a satisfactory basis” for 10 years, until 2014. (CKIN Pet. 4.) Co-Alliance LLP, the primary shipper on the Line, indicates that after the Town purchased the Line and CKIN began operating over it, freight rail transportation on the Line “increased rapidly,” and Co-Alliance’s freight traffic rose from 506 grain cars in 2005 to 3,282 cars in 2014, an increase of more than 600 percent. (Id., Ex. 2, Letter of Co-Alliance at 2.) Freight traffic on the Line further increased to 4,312 cars in 2015. (Id., Ex. 6, Town of North Judson Shortline R.R. Request for Proposals at 2.)

In the spring of 2015, the Town advised CKIN that it would not renew the 2004 Operating Agreement upon its expiration at the end of the year and that the Town would seek a replacement operator. After CKIN refused to terminate operations or seek discontinuance authority, the Town filed a petition for waiver and exemption, on April 15, 2015, of certain Board regulations and statutory provisions in connection with a planned filing of a third-party or “adverse” discontinuance application.³ (CKIN Pet. 5.) The parties ultimately agreed to mediate their dispute and entered into a “Mediation Agreement.” (Id.) According to CKIN, the “spirit (but not the wording) of the Mediation Agreement was that the Town would lease the [L]ine to Co-Alliance for a new 10-year term” and then Co-Alliance would contract with CKIN to remain as the operator of the Line.⁴ (Id.) However, after issuing a Request for Proposals (RFP) to solicit bids for the lease in June 2016, the Town selected Lake State Railway (LSRC) to be the Line’s new lessee. (CKIN Pet. 6.) CKIN argues that, while the RFP purported to require the

³ See Town of N. Judson, Ind.—Adverse Discontinuance—in LaPorte, Porter, & Starke Ctys., Ind., Docket No. AB 1232.

⁴ The Mediation Agreement and a supplement to that agreement extended the 2004 Operating Agreement until August 15, 2016. (CKIN Pet., Exs. 4 & 5.)

Town to consider the transportation requirements of Co-Alliance and other freight shippers located on the Line, the RFP process appeared to elevate the needs and desires of HVRM for access to the Line over the needs of freight customers. (Id.)

On November 14, 2016, CKIN submitted the combined petition at issue here, which seeks to reopen the May 2004 OFA Decision or, alternatively, to institute a declaratory order proceeding. Specifically, CKIN asks the Board to find, in Docket No. 55 (Sub-No. 643X), that the 2004 OFA acquisition of the Line by the Town was contrary to 49 U.S.C. § 10904(d)-(f), to the rail transportation policy (RTP) goals of 49 U.S.C. § 10101, and to Board policy, because the Town acquired the Line primarily for passenger excursion service. CKIN thus seeks a Board ruling voiding the Town's acquisition and requiring the Town to sell the subject line to CKIN under Board-supervised negotiations. Alternatively, CKIN requests, in Docket No. FD 36076, that the Board institute a declaratory order proceeding to determine whether the Town's ownership and administration of the Line violate the RTP and Board precedent. CKIN also requests that if LSRC seeks authority to operate over the Line under a class exemption, the Board should reject any such notice of exemption as controversial.

On December 27, 2016, the Town, HVRM, the State of Indiana Department of Transportation, and the Chicago & North Judson Railway Company (CNJR), a newly-formed, non-carrier affiliate of LSRC, each filed a reply in opposition to CKIN's combined petition to reopen and for declaratory order. On February 22, 2017, CKIN filed a motion to compel CNJR to produce responses to discovery requests submitted by CKIN; CNJR replied on March 14, 2017.

PRELIMINARY MATTERS

CKIN seeks waiver of 49 C.F.R. § 1115.3(d), which limits petitions to reopen to 20 pages, noting that its 24-page filing seeks both declaratory relief (for which there is no page limitation) and reopening and that, had it filed separate petitions, its reopening request would have been substantially under the 20-page limit. CKIN also seeks leave to file surreplies submitted January 13 and January 25, 2017 to allow it to respond to statements in submitted replies that it alleges are inaccurate.⁵ In addition, CKIN seeks leave to file a March 17, 2017 surreply to CNJR's reply to CKIN's motion to compel. The Board will grant CKIN's requests to file all of its surreplies, see, e.g., City of Alexandria, Va.—Petition for Declaratory Order, FD 35157, slip op. at 2 (STB served Nov. 6, 2008), and to exceed the 20-page limit for petitions to reopen in the interest of compiling a complete record.

⁵ In filings submitted on January 18 and January 25, 2017, the Town opposed CKIN's petitions for leave to file "replies to replies." CNJR expressed similar opposition in its April 6, 2017 filing.

DISCUSSION AND CONCLUSIONS

Petition to Reopen/Petition for Declaratory Order

CKIN asks the Board to reopen the May 2004 OFA Decision, void the Town's acquisition, and require the Town to sell the subject line to CKIN under Board-supervised negotiations. Alternatively, CKIN requests that the Board institute a declaratory order proceeding to determine whether the Town's ownership and administration of the Line violate the RTP and Board precedent.

A petition to reopen a Board action must state in detail the respects in which the petitioner alleges the proceeding involves material error, new evidence, or substantially changed circumstances.⁶ 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.4. The alleged grounds must be sufficient to convince the Board that they would lead it to materially alter its prior action. Canadian Nat'l Ry.—Control—EJ&E W. Co., FD 35087 (Sub-No. 8), slip op. at 4 (STB served Apr. 26, 2017). The Board also has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to eliminate a controversy or remove uncertainty. See Boston & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C.2d 675, 675 (1989). For the reasons discussed below, the Board finds that CKIN has failed to meet the Board's reopening standard and that a declaratory order proceeding is unwarranted here.

CKIN argues that new evidence and changed circumstances demonstrate that, instead of acquiring the Line for the continuation of freight rail service, the Town acquired the Line to allow operation of HVRM's passenger excursion services, and that freight rail service was only a secondary consideration. (CKIN Pet. 7-8, 10-13.) CKIN states that this was not apparent until the 2016 RFP process when, it asserts, the Town effectively ceded much of its decision-making power to HVRM. (CKIN Pet. 10.) CKIN relies in part on the new draft operating agreement, which it asserts was prepared by HVRM to provide that passenger rail service takes priority over freight service. (CKIN Pet., V.S. Felix 2-3.) CKIN notes that section five of the draft agreement states, "NOR [the freight operator] and Town acknowledge that the establishment of passenger excursion activity on the Rail Line is a stated purpose and goal . . . NOR agrees that it will not impede or prevent the creation of additional, special, or regular passenger excursion activity by Museum on any portion of the Rail Line." (CKIN Pet., Ex. 7 at 7.) Thus, CKIN argues that the Town did not disclose its true intentions in its OFA. (CKIN Pet. 13.)

⁶ The Board does not need to address the Town's argument that, due to the passage of time, a stricter reopening standard should apply, (Town Reply 5), because even under the statutory standard of "new evidence, changed circumstances, or material error," CKIN's petition to reopen is not supported, as the Board explains below.

In considering a challenge to an OFA on the ground that it was not for continued freight rail service, the Board looks at the totality of the evidence regarding the purpose of the OFA. Union Pac. R.R.—Aban. Exemption—in Rio Grande & Mineral Ctys., Colo., AB 33 (Sub-No. 132X), slip op. at 7 (STB served June 22, 2004). The Board has held that, “when disputed, a buyer must be able to demonstrate that its OFA is for continued rail service, including freight rail service.” Id. (citing Roaring Fork R.R. Holding Auth.—Aban. Exemption—in Garfield, Eagle, & Pitkin Ctys., Colo., AB 547X, slip op. at 4 (STB served May 21, 1999), aff’d sub nom. Kulmer v. STB, 236 F.3d 1255, 1257 (10th Cir. 2001)). Challengers of an OFA, however, also “bear a burden — to demonstrate that the offer is for some other purpose.” See Union Pac. R.R., AB 33 (Sub-No. 132X), slip op. at 7.

Although the OFA process was “designed for the purpose of continuing to provide freight rail service,” Roaring Fork, AB 547X, slip op. at 4, a line may be acquired under an OFA to provide both freight and passenger service. See Trinidad Ry.—Aban. Exemption—in Las Animas Cty., Colo., AB 573X, slip op. at 8 (STB served Aug. 13, 2001). Furthermore, even if the primary motivation for the OFA is not continued freight rail service, an OFA may be valid as long as there is an intent to provide continued freight rail service. See Burlington N. & Santa Fe Ry.—Aban. Exemption—in King Cty., Wash., AB 6 (Sub.-No. 380), slip op. at 7 (STB served Aug. 5, 1998), aff’d sub nom., Redmond-Issaquah R.R. Preservation Ass’n. v. STB, 223 F.3d 1057 (9th Cir. 2000).

Accordingly, CKIN’s allegation that the Town purchased the Line primarily to provide passenger rail service, even if true, does not mean that the OFA was improperly granted. Instead, the relevant consideration is whether there was also an intent to provide freight rail service. The Town has clearly demonstrated that it has met that obligation here. In 2005, shortly after the Town acquired the rail line, originating and terminating freight traffic consisted of 506 carloads. (Town Reply 4.) By 2014, such traffic had risen to 3,282 carloads; and, even between 2014 and 2015, when the Town was alleged to have strongly favored passenger rail service over freight rail service, the Town states that originating and terminating traffic rose from 3,282 carloads to 4,312 carloads. (Id.) Further, as noted by HVRM in its reply, in 2016 it “operated limited passenger service on only 31 or so days and operated approximately 73 trains on those 31 or so days.” (HVRM Reply 3.) CKIN provides no evidence to support its claim that the Town has interfered with its freight service, and the evidence in the record—showing that freight traffic has significantly increased and that passenger service is infrequent—supports the contrary conclusion that there has been no interference.

Despite these facts, CKIN argues that, starting in 2014, various documents and statements by the Town indicate that its true intention in acquiring the Line was for HVRM to provide passenger excursion service. (CKIN Pet. 11-13.) However, CKIN’s interpretation of recent statements by the Town and provisions of the new draft operating agreement, which have been taken in isolation, is outweighed by the undisputed fact that following the OFA, freight traffic on the Line grew more than eightfold between 2005 (506 cars) and 2015 (4,312 cars). In

sum, CKIN raises no new evidence or changed circumstances to justify revisiting the Board's OFA determination over a decade after its consummation.

Moreover, the Town is correct that reopening the OFA pursuant to § 1322 would not allow the Board to void the OFA acquisition and, as part of undoing the OFA, require the Town to sell the rail line to CKIN. (Town Reply 8-10.) Rather, the only statutory mechanism for seeking a forced sale of the Line is under the feeder line statute, 49 U.S.C. § 10907, where Congress has established the criteria that must be met to force the sale of a rail line.

Nor has CKIN demonstrated that there is any controversy or uncertainty warranting a declaratory order proceeding addressing the Town's actions. CKIN claims that allowing HVRM, a train operator who it asserts does not meet Federal Railroad Administration safety rules, to operate over track that is part of the nation's freight rail network, violates the RTP provisions at 49 U.S.C. § 10101(3), (8), and (11). (CKIN Pet. 13-14.) CKIN also argues, among other things, that allowing HVRM to have a role in the selection of the new contract operator, and allowing the Town to take revenue-sharing funds provided by CKIN to be used to subsidize HVRM operations, is contrary to 49 U.S.C. § 10101(3) and (9).⁷ (Id. at 14-15.)

As the Town correctly points out, however, the RTP does not create an independent basis for Board action in the absence of a violation of a substantive provision in the Interstate Commerce Act. See Chesapeake & Ohio Ry. v. United States, 704 F.3d 373, 376 (7th Cir. 1983); Louisville & Jefferson Cty. Riverport Auth. & CSX Transp., Inc.—Constr. & Operation Exemption—in Jefferson Cty., Ky., 4 I.C.C.2d 749, 754 (1988); H.R. Conf. Rep. No. 1430, 96th Cong. 2d Sess. 80 (1980). Thus, there is no basis for the Board to institute a declaratory order proceeding solely to address alleged violations of the RTP.

CKIN also argues that the Town has violated the Board's State of Maine precedent,⁸ because allowing HVRM—an entity unregulated by the Board—to have a significant role in the day-to-day operations of the Line and the RFP drafting and selection process interferes with CKIN's ability to conduct freight operations. (CKIN Pet. 9, 13.) According to CKIN, this contravenes the State of Maine principle that an "entity that acquires a common carrier rail line will not require agency authority for the line's acquisition and will not be subject to agency

⁷ Pursuant to 49 U.S.C § 10101, "in regulating the railroad industry, it is the policy of the United States Government . . . (3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board; . . . (8) to operate transportation facilities and equipment without detriment to the public health and safety; (9) to encourage honest and efficient management of railroads; and . . . (11) to encourage fair wages and safe and suitable working conditions in the railroad industry"

⁸ Maine, Dep't of Transp.—Acquis. & Operation Exemption—Maine Cent. R.R. (State of Maine), 8 I.C.C.2d 835 (1991).

jurisdiction provided that (1) there is an agency licensed rail common carrier providing service over the line, and (2) the owner lacks the ability to impede or interfere with the carrier's operations." (Id. at 15.)

State of Maine generally applies to situations in which a state agency acquires rail property, but not the associated common carrier obligation, which is retained by the selling carrier. See Mass. Dep't of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35312, slip op. at 6 (STB served May 3, 2010). Here, in contrast, the Town acquired both the rail property and the common carrier obligation, which means it has the responsibility to resume or continue rail operations if the selected rail operator fails to provide service on the rail line. Thus, State of Maine is inapplicable.⁹

Motion to Compel

On February 22, 2017, CKIN filed a motion to compel CNJR to produce responses to CKIN's discovery requests for: (1) any final or draft copy of "The Agreement for Lease of a Rail Line," (Lease Agreement) referenced in CNJR's reply statement and related communications; (2) communications pertaining to rail service for customers on the Line; and (3) communications pertaining to an Operating Protocols Agreement between CNJR and HVRM. (CKIN Mot. to Compel 3-4.) That motion will be denied. In a Board proceeding, any evidence subject to discovery must be relevant to the subject matter of that proceeding. 49 C.F.R. § 1114.21(a)(1). "The requirement of relevance means that the information might be able to affect the outcome of a proceeding." Waterloo Ry.—Adverse Aban.—Lines of Bangor & Aroostook R.R. & Van Buren Bridge Co. in Aroostook Cty., Me., AB 124 (Sub-No. 2) et al., slip op. at 2 (STB served Nov. 14, 2003). Here, discovery is unnecessary because nothing CKIN requests would affect the Board's conclusion that: (1) CKIN has not shown that there is a legal basis for forcing the resale of the Line to CKIN through reopening of the OFA, (2) statements about future operations would not change the fact that there is no evidence of actual interference with the provision of freight service, and (3) there is no dispute or uncertainty that needs to be resolved through a declaratory order because violation of the RTP is not an independent basis for Board action and this case does not implicate State of Maine.

⁹ Because State of Maine does not apply here, CKIN's argument that HVRM has too much control of operations on the Line fails.

Replacement Rail Operator

In its November 2016 filing, CKIN also states that, should the rail carrier selected by the Town to replace CKIN as its operator seek authority by class exemption, the Board should reject that notice of exemption as controversial. (CKIN Pet. 3.) Because there is no pending request for operating authority or exemption by a replacement operator here, CKIN's request will be denied as premature.

It is ordered:

1. CKIN's request for waiver of 49 C.F.R. § 1115.3(d) is granted.
2. CKIN's requests for leave to file its January 13, 2017, January 25, 2017, and March 17, 2017 surreplies are granted.
3. CKIN's petition to reopen is denied.
4. CKIN's petition to institute a declaratory order proceeding is denied.
5. CKIN's motion to compel is denied.
6. CKIN's request that the Board reject a future class exemption request sought by the replacement rail operator on the Line is denied as premature.
7. This decision is effective on its date of service.

By the Board, Board Members Begeman, Elliott, and Miller.