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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36199

OREGON INTERNATIONAL PORT OF COOS BAY AND COOS BAY RAIL LINE, INC.—
INTRA-CORPORATE FAMILY TRANSACTION EXEMPTION

Docket No. FD 36228

COOS BAY RAIL LINE, INC.—CHANGE IN OPERATORS EXEMPTION—COOS BAY
RAILROAD OPERATING COMPANY, LLC D/B/A COOS BAY RAIL LINK

Decided: October 26, 2018

On May 31, 2018, Oregon International Port of Coos Bay (the Port) and Coos Bay Rail Line, Inc. (Coos Rail) jointly filed a verified notice of exemption in Docket No. FD 36199 (FD 36199 Notice) under 49 C.F.R. § 1180.2(d)(3) for an intra-corporate family transaction. As described in the notice, the transaction for which the two parties seek approval entails the Port, a rail carrier subject to Board jurisdiction, leasing a rail line to Coos Rail, a newly created noncarrier subsidiary of the Port. The parties explain that the purpose of the transaction is to effectuate a transition in operations from the rail line's current operator, Coos Bay Railroad Operating Company, LLC d/b/a Coos Bay Rail Link (CBRL), which is not affiliated with the Port, to Coos Rail. The Port and Coos Rail state that the rail line in question is comprised of roughly 133 route miles, extending from milepost 652.114 at Danebo, Or., to milepost 763.13 at Cordes, Or., and from milepost 761.13 at Cordes to milepost 785.5 at Coquille, Or. (collectively, the Line). According to the Port and Coos Rail, CBRL's parent company "advised the Port that it no longer wishes to operate the [L]ine, and the Port has sent CBRL a letter inviting them to cure breach of contract issues." (FD 36199 Notice 2.) Notice of the exemption was served and published in the Federal Register on June 15, 2018 (83 Fed. Reg. 28,064).

On June 19, 2018, CBRL filed a petition to reject the FD 36199 Notice and stay the effective date of the exemption. CBRL argued that the Board should reject the FD 36199 Notice on the grounds that the transaction is controversial and that the FD 36199 Notice contains materially false and misleading information. CBRL stated that, contrary to the statements in the FD 36199 Notice, CBRL wished to remain as the operator of the Line and that the parties had a significant contractual dispute for which CBRL had initiated arbitration. On June 26, 2018, the Port and Coos Rail responded to CBRL's petition. On June 29, 2018, the Board imposed a housekeeping stay of the effective date to fully consider the arguments presented.

On September 5, 2018, the Port and Coos Rail filed a letter requesting that the Board lift the stay, allow the FD 36199 Notice to take effect, and provide any necessary guidance

concerning the proposed transaction, so that Coos Rail can begin operations on the Line by November 1, 2018. The Port and Coos Rail also indicate that the Port and CBRL have been engaged in discussions concerning future operations on the Line but that unresolved issues remain concerning the contract between the Port and CBRL.

On September 21, 2018, Coos Rail filed a verified notice in Docket No. FD 36228 (FD 36228 Notice), for a change in operators exemption under 49 C.F.R. § 1150.31(a)(3), to assume operations over the Line from CBRL.¹ Coos Rail asserts that “the Port and CBRL have reached an agreement under which CBRL has consented to transfer its common carrier rights and obligations on the Line to Coos Rail.” (FD 36228 Notice 2.) According to Coos Rail, CBRL will depart the Line and will cease to be a federally recognized railroad common carrier on the Line. (*Id.*) Further, Coos Rail asserts that it is a “sister company and corporate affiliate to the Port,” and “has agreed to acquire from CBRL the common carrier rights and obligations that CBRL will relinquish.” (*Id.*)

On September 25, 2018, CBRL filed a letter in both proceedings to clarify its position and to withdraw its petition to stay the FD 36119 Notice. CBRL states that, while it is willing to vacate the Line by October 31, 2018, there is no transaction occurring between CBRL and the Port—the Port is not purchasing CBRL or its assets. According to CBRL, contrary to the FD 36228 Notice, “CBRL has not advised Coos Rail and the Port that ‘it does not object to [Coos Rail’s] assumption of operations over the Line and that it will cooperate in the planned transition from [CBRL] to Coos Rail.’”

On September 28, 2018, the Port, Coos Rail, and CBRL jointly filed a letter (September 28 Letter) in both proceedings to clarify that the FD 36228 Notice involves “the conveyance to Coos Rail of operating rights over [the Line]...by the [Port]” and “the termination of [CBRL’s] operating rights over the Line by the Port and the cessation of [CBRL’s] operations over it.” (Footnote omitted.) Additionally, the Port and Coos Rail request that the intra-corporate family transaction exemption that is the subject of Docket No. FD 36199 should be allowed to take effect to authorize the Port’s continuance in control of Coos Rail.

DISCUSSION AND CONCLUSIONS

The Board’s class exemption procedures provide an expedited means of obtaining Board authority for certain classes of transactions. Notices of exemption are intended to be used for routine and non-controversial cases. See SteelRiver Infrastructure Partners LP—Control Exemption—Patriot Rail Corp., FD 35622, slip op. at 2 (STB served June 15, 2012). A notice that raises unresolved issues or questions that require considerable scrutiny may be rejected. Tri-City R.R.—Lease & Operation Exemption—N. Pac. Dev., LLC, FD 36170, slip op. at 1 (STB served Mar. 21, 2018).

¹ On September 24, 2018, Coos Rail filed an errata to the FD 36228 Notice.

The FD 36199 Notice, the FD 36228 Notice, and the subsequent filings in both dockets raise significant questions about the underlying transaction and the authority sought from the Board, and therefore the notices of exemption will be rejected.

As filed, the notices appear to be inconsistent with each other, and the subsequent filings fail to sufficiently clarify matters. In the FD 36199 Notice, the Port and Coos Rail seek to utilize the intra-corporate family transaction exemption under 49 C.F.R. § 1180.2(d)(3) to have the Port lease the Line to Coos Rail. In the FD 36228 Notice, Coos Rail seeks to utilize the change in operators exemption under 49 C.F.R. § 1150.31(a)(3) to transfer operating authority from CBRL to Coos Rail. However, there is no explanation as to why Coos Rail would need to acquire operating authority through both exemption procedures.

It appears that the inconsistency may stem from a confusion regarding differences between the Board's class exemptions in 49 C.F.R. § 1180.2(d). In the September 28 Letter, the Port and Coos Rail urge that "the *intra-corporate family transaction* exemption that is the subject of Docket No. FD 36199 should be allowed to take effect to authorize the Port's *continuance in control* of Coos Rail . . . upon Coos Rail's commencement of common carrier operations in place of [CBRL] . . ." (September 28 Letter 2 (emphasis added).) But contrary to this characterization, intra-corporate family transactions and continuance in control transactions are governed by different class exemptions under 49 C.F.R. § 1180.2(d). Here, the FD 36199 Notice was filed under 49 C.F.R. § 1180.2(d)(3) as an intra-corporate family transaction exemption, not under 49 C.F.R. § 1180.2(d)(2) as a continuance in control exemption.²

The parties further confuse the exemptions requested by characterizing the FD 36228 Notice as involving the "conveyance to Coos Rail of operating rights over [the Line] . . . *by the Line's owner, [the Port].*" (September 28 Letter 1 (emphasis added).) However, the FD 36228 Notice itself states that "Coos Rail . . . has agreed to acquire *from CBRL* the common carrier rights and obligations that CBRL will relinquish." (FD 36228 Notice 2 (footnote omitted, emphasis added).)³

Therefore, while it appears that the parties now seek Board authority for a change in operators from CBRL to Coos Rail, and for the Port's continuance in control of Coos Rail, there is too much uncertainty regarding the nature of these transactions (based on the current record) to allow these notices to take effect. However, if the parties still intend for Coos Rail to replace CBRL as the operator by having Coos Rail obtain common carrier rights, currently held by CBRL, Coos Rail may file another notice of exemption for a change in operators under 49 C.F.R.

² This distinction between intra-corporate family transactions under § 1180.2(d)(3) and continuance in control transactions under § 1180.2(d)(2) is not immaterial, as there are different criteria for approval under each class exemption.

³ The notices also contain conflicting statements with respect to the corporate relationship between the Port and Coos Rail. In the FD 36199 Notice (at 2-3), Coos Rail is described as a subsidiary corporation under the control of the Port. In contrast, in the FD 36228 Notice (at 2), Coos Rail is described as a sister company and corporate affiliate to the Port.

§ 1150.31(a)(3) that corrects the inconsistencies noted above. If Coos Rail would be under the control of the Port, that notice would require a related verified notice of exemption under 49 C.F.R. § 1180.2(d)(2) for the Port's continuance in control of Coos Rail upon Coos Rail's becoming a carrier, given that the Port is already a carrier. Such a notice should also correct any inconsistencies noted above.

For these reasons, the notices of exemption will be rejected. The parties may submit new verified notices of exemption to request authority for the proposed transaction.

It is ordered:

1. The notice of exemption in FD 36199 is rejected.
2. The notice of exemption in FD 36228 is rejected.
3. This decision is effective on its date of service.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.