

CLARK HILL

248007

Eric M. Hocky

T 215.640.8523

F 215.640.8501

Email: ehocky@clarkhill.com

ENTERED
Office of Proceedings
June 24, 2019
Part of
Public Record

June 19, 2019

Clark Hill PLC
One Commerce Square
2005 Market Street
Suite 1000
Philadelphia, PA 19103
T 215.640.8500
F 215.640.8501

clarkhill.com



VIA FEDEX

Cynthia T. Brown
Chief, Section of Administration - Office of
Proceedings
Surface Transportation Board
395 E Street SW
Washington, DC 20024

Re: STB Docket No. FD 36323
Arkansas-Oklahoma Railroad Company -
Acquisition and Operation Exemption -
State of Oklahoma

Dear Ms. Brown:

Enclosed for filing is the original of a Petition for Exemption filed on behalf of Arkansas-Oklahoma Railroad Company. Also enclosed is a check in the amount of \$7800 representing the filing fee therefor.

Please let us know if there are any questions regarding this filing.

Respectfully,

CLARK HILL PLC


Eric M. Hocky

FILED
June 24, 2019
SURFACE
TRANSPORTATION BOARD

FILED
June 24, 2019
SURFACE
TRANSPORTATION BOARD

EMH/e
Enclosures



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. FD 36323

**ARKANSAS-OKLAHOMA RAILROAD COMPANY
- ACQUISITION AND OPERATION EXEMPTION -
STATE OF OKLAHOMA**

**VERIFIED PETITION FOR EXEMPTION
UNDER 49 U.S.C. §10902 AND §10502**

ERIC M. HOCKY
CLARK HILL PLC
One Commerce Square
2005 Market Street, Suite 1000
Philadelphia, PA 19103
(215) 640-8500
ehocky@clarkhill.com

Dated: June 19, 2019

Attorneys for
Arkansas-Oklahoma Railroad Company

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. FD 36323

**ARKANSAS-OKLAHOMA RAILROAD COMPANY
- ACQUISITION AND OPERATION EXEMPTION -
STATE OF OKLAHOMA**



PETITION FOR EXEMPTION

Arkansas-Oklahoma Railroad Company (“AOK”), a Class III railroad, hereby petitions for an exemption under 49 U.S.C. §10502 from the provisions of 49 U.S.C. §10902 to authorize (retroactively) AOK’s acquisition from the State of Oklahoma (the “State”) of the line of railroad between MP 295.36 at Howe, OK, and MP 364.96 at McAlester, OK (the “Line”). AOK previously leased the Line from the State. A map of the Line is attached as Exhibit A.

In support of its request for exemption, AOK represents as follows:

Background of Acquisition

The Line is approximately 69.60 miles long and is located in southeast Oklahoma between Howe and McAlester, in Pittsburg, Latimer and Le Flore Counties. In 1996, AOK assumed the Missouri Pacific Railroad (“MP”) lease of the Line from the State. *Arkansas-Oklahoma Railroad Company – Lease and Trackage Rights Exemption – Missouri Pacific Railroad Company and the State of Oklahoma*, STB Finance Docket No. 32873 (served March 6, 1996).¹ The MP lease included a purchase option under which MP could acquire the Line from the State under prescribed terms.

¹ AOK also obtained incidental trackage rights for interchange purposes over two segments of MP’s Shawnee Branch totaling approximately 8.54 miles.

AOK exercised the purchase option and acquired the Line from the State in April 2016. Because the purchase option was included in the previously approved lease, and because AOK was already authorized to operate the Line, AOK inadvertently did not file for separate authority to purchase (and operate) the Line from the State. AOK continued to operate the Line just as it had for the 20 years prior to the acquisition, and there was no interruption in service. AOK now believes that it should have filed for authority before completing the purchase from the State.

The transaction would qualify for the class exemption at 49 CFR 1150.41, *et seq.* for an acquisition by an existing Class III carrier; however, AOK has elected to file a petition for an individual exemption pursuant to 49 USC 10502 and 49 CFR 1121 because it seeks retroactive effect for the exemption as set forth more fully below.

Acquisition and Operation of the Line Should Be Exempted

The acquisition and operation of the Line by AOK, an existing Class III carrier, would require authorization pursuant to 49 U.S.C. §10902 unless the exemption requested herein is granted. The Board is directed by 49 U.S.C. §10502 to grant an exemption if it finds that (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. §10101, and (2) either the transaction is limited in scope or regulation is not needed to protect shippers from the abuse of market power.

The Board first adopted a class exemption for acquisitions or operations by Class III rail carriers under 49 USC §10902 in 1996. *Class Exemption for Acquisition or Operation of Class III Rail Carriers under 49 U.S.C. 10902*, STB Ex Parte No. 529, 1 STB 95 (served June 21, 1996) (“10902 Class Exemption”).² In *10902 Class Exemption*, the Board noted that under 49 USC §10902(c), it is required to issue a certificate authorizing acquisitions by Class III carriers

² The current regulations are codified at 49 CFR 1150.41 *et seq.*

“unless the Board finds that such activities are inconsistent with the public interest and necessity.” *10902 Class Exemption*, 1 STB at 95. The Board went on to discuss the exemption requirements under Section 10502 and determined that detailed scrutiny of acquisitions by Class III carriers is not necessary to carry out the rail transportation policy of 49 USC §10101, and that the exemption would promote the goals of that policy as set out 49 USC §10101(2), (4), (5), (7) and (9). *10902 Class Exemption*, 1 STB at 103. Moreover, the Board found that such acquisitions will be limited in scope because the purchasing carrier’s operation will merely supplant the selling carrier’s operation, and because purchases by Class III carriers do not have the impact of acquisitions by larger carriers. *Id.* The Board also found that competition and transportation options for shipping public will typically not be lessened by such transactions, and that generally shippers should see improved service. As such regulation of such transactions is not necessary to protect shippers from abuse of market power. *Id.*

The purchase of the Line by AOK is consistent with all of the factors analyzed by the Board in *10902 Class Exemption*. AOK was previously authorized to lease and operate the Line, and the transaction merely changes the ownership of the Line from the State to AOK. Such a transaction does not require detailed scrutiny to carry out the rail policies of 49 U.S.C. §10101, and is in keeping with the Board’s overall policy of removing unnecessary regulatory barriers from carriers. It is especially true in this situation that detailed scrutiny is not required given that AOK has been the operator of the Line since 1996 and there will be no change in service for shippers.

Additionally, the scope of the exemption requested is limited and will have no direct impact on shippers. The Line is less than 70-miles long and serves one corner of the State of Oklahoma. And, AOK is merely changing its status from lessee-operator to owner-operator and

has continued and will continue to provide the same uninterrupted service to all shippers on the Line. Further, it is clear that shippers do not need to be protected from abuse of market power. As noted above, AOK has been the serving carrier for over 20 years, and there will be no changes for or adverse effects on shippers as a result of the transaction.

Additional Information

Although not required under the Board's regulations for individual petitions for exemption for acquisition and operations, AOK hereby provides the following additional information that would be required under 49 C.F.R. 1150.43 if the acquisition and operation exemption were sought pursuant to the Board's class exemption:

(a) The full name and address of Applicant are: Arkansas-Oklahoma Railroad Company, 116 W. Main Street, Wilburton, OK 74578.

(b) The name, address and telephone number of the representative of AOK who should receive correspondence are: Eric M. Hocky, Clark Hill PLC, One Commerce Square, 2005 Market Street, Suite 1000, Philadelphia, PA 19103; (215) 640-8500.

(c) AOK, MP and the State entered into a First Addendum of Track Lease and Operating Agreement on February 1, 1996. The original Track Lease and Operating Agreement dated May 29, 1986 between MP's predecessor and the State included an option to purchase. AOK exercised the option in September, 2015, and the purchase was evidenced by the delivery of deeds by the State to AOK in April 2016.

(d) AOK has been the operator of the Line since March, 1996.

(e) Brief Summary of the Proposed Transaction:

AOK originally leased the Line from the State of Oklahoma, and began operating the Line in March, 1996. *Arkansas-Oklahoma Railroad Company – Lease and Trackage Rights*

Exemption – Missouri Pacific Railroad Company and the State of Oklahoma, STB Finance Docket No. 32873 (served March 6, 1996). AOK also acquired incidental trackage rights for interchange purposes over a line of Missouri Pacific Railroad Company (now Union Pacific Railroad Company) between MP 364.96 and MP 370.5, and between MP 566.00 and MP 563.00.

The lease included a purchase option which AOK exercised in September, 2015. AOK acquired the Line from the State of Oklahoma by deed dated April 20, 2016. AOK now believes that a notice of exemption should have been filed prior to the acquisition, but inadvertently it was not. AOK is filing this Petition for Exemption to retroactively authorize its acquisition of the Line. Because AOK was previously operating the Line under the lease, there was no change in the operations or prejudice to shippers (or other railroads or interested parties) as a result of the acquisition and inadvertent failure to file. The acquisition gives AOK permanent ownership and control of the Line which will help AOK with long term financing of improvements to, and continued service over, the Line.

Because of the inadvertent error in not filing when the purchase was consummated, AOK is requesting that the Board retroactively authorize the acquisition as of April 20, 2016.

- (1) The name and address of the entity transferring the Line: State of Oklahoma, by and through its Department of Transportation, 200 NE 21st Street, Oklahoma City, OK 73105. The State of Oklahoma is not a railroad.
- (2) The acquisition closed on April 20, 2016.
- (3) The mileposts of the Line are between MP 295.36 at Howe, OK, and MP 364.96 at McAlester, OK.

(4) The total route miles to be acquired and operated are approximately 69.60 miles.

(f) Attached as Exhibit A to this Notice of Exemption is a map of the Lines.

(g) AOK certifies that its projected freight revenues as a result of the transaction will exceed \$5,000,000, but that it will not result in the creation of a Class II or Class I rail carrier.

(h) AOK certifies that the acquisition does not impose or include an interchange commitment.

Labor Notice Certification

Under 49 CFR 1121.4(h), only Class II carriers seeking an exemption for an acquisition of rail lines are required to certify to the Board that notice has been posted at the workplace of employees working on the Line. Accordingly, AOK, as a Class III carrier is not required to do so.³

³ Even if there were any certification or posting requirements with respect to notices to employees, the Board has waived such requirements in similar circumstances. Here the acquisition merely changes AOK's status from lessee-operator to the owner-operator of the Line, and AOK has continued to be the sole common carrier operator of the Line. The State of Oklahoma is not a railroad and has never had any employees working on the Line, and neither the predecessor operator MP nor its successor Union Pacific Railroad has had any employees working on the Line since 1996. Further, there have been no operational changes, and no employees of AOK have been affected. *See Allegheny Valley Railroad Company – Acquisition Exemption – Lines of CSX Transportation, Inc.*, STB Docket No. FD 36282 (served May 14, 2019) (acquisition of a previously leased line); *Reading Blue Mountain & Northern Railroad Company – Acquisition and Operation and Exemption – Locust Valley Coal Company d/b/a Locust Valley Line*, STB Docket No. FD 36033 (served June 7, 2016) (acquisition of a previously operated line). *See also North Carolina & Virginia Railroad Company, LLC, Chesapeake & Albemarle Railroad Division – Lease Amendment and Operation Exemption including Interchange Commitment – Norfolk & Southern Railway Company*, STB Docket No. FD 36252 (served December 14, 2018) (waiving the requirement where existing operator was entering into a superseding and replacement lease). Similarly, if the Board determines that there are any certification and notice requirements applicable here, the Board should waive such requirements.

Labor Protection

AOK is a Class III carrier, and pursuant to 49 U.S.C. §10902(d), approval of this transaction may not be subjected to labor protection conditions.

Environmental and Historic Reports

This is an acquisition of rail lines for continued rail operations that will not result in changes in carrier operations that will exceed the thresholds established in 49 C.F.R. §1105.7(e)(4) or (5). Further Board approval is required for AOK to discontinue or abandon service, or to dispose of or alter properties subject to the Board's jurisdiction that are 50 years old or older. Accordingly, no environmental or historic documentation is required. *See* 49 C.F.R. §1105.6(c)(2); 49 C.F.R. §1105.8(b)(1).

Request for Retroactive Effect

Although the Board generally avoids granting retroactive authority, it has done so under appropriate circumstances when the failure to seek approval was unintentional or inadvertent, or the result of a mistaken belief that approval of the transaction was not required. *R.J. Corman Railroad Property, LLC – Acquisition Exemption – NC Railroad, Inc.*, STB Docket No. FD 35363 (served June 29, 2011), slip op. at 5; *Horsehead Corporation – Petition for Acquisition and Operation Exemption – Chestnut Ridge Railway Company*, STB Finance Docket No. 34481 (served March 12, 2004), slip op. at 2; *Brotherhood of Maintenance of Way Employees, et al. v. Soo Line Railroad Company, et al.*, STB Finance Docket No. 32964 (served December 22, 1998), slip op. at 6, fn. 16.

In this instance, AOK's failure to file for authority prior to the purchase of the Line was inadvertent. It had been operating under the MP lease pursuant to Board authority for 20 years, and believed that it was merely exercising purchase rights contained in the lease and continuing

to operate the Line. Shippers and the public have not been adversely affected because AOK has continued to provide common carrier service over the Line. Based on the inadvertent failure to file and the lack of harm to any shippers or the public, AOK requests that the Board grant the exemption requested herein retroactive to the date of AOK's purchase of the Line.⁴

Conclusion

For the foregoing reasons, AOK requests that the Board, under 49 U.S.C. §10502, exempt its acquisition and operation of the Line from regulation under 49 U.S.C. §10902, retroactively to April 20, 2016.

Respectfully submitted,



ERIC M. HOCKY
CLARK HILL PLC
2005 Market Street, Suite 1000
Philadelphia, PA 19103
(215) 640-8500
ehocky@clarkhill.com

Dated: June 19, 2019

Attorneys for
Arkansas-Oklahoma Railroad Company
Company

⁴ If the Board determines not to grant the acquisition authority retroactively to April, 2016, then AOK requests that the Board at least acknowledge that it will not pursue an enforcement action for the failure to seek prior authority for the purchase. *See MCM Rail Services LLC – Petition for Retroactive Exemption – In Sparrows Point, MD*, STB Docket No. 35707 (served June 11, 2013), slip op. at 2, fn. 5; *The New Brunswick Railway Company – Continuance in Control Exemption – Maine Northern Railway Company*, STB Docket No. FD 35520 (served September 26, 2011), slip op. at 3, fn. 2.

Verification

I hereby verify on behalf of Arkansas-Oklahoma Railroad Company, under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verification.

Executed on June 19, 2019.


Heather Watson

General Manager

EXHIBIT A

MAP

