

SERVICE DATE – DECEMBER 2, 2020

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36448

CANADIAN PACIFIC RAILWAY COMPANY
—CONTROL EXEMPTION—
DETROIT RIVER TUNNEL COMPANY

Digest:¹ This decision grants Canadian Pacific Railway Company authority to control indirectly the Detroit River Tunnel Company.

Decided: December 1, 2020

On October 16, 2020, Canadian Pacific Railway Company (CPRC),² a Class I carrier, filed a petition under 49 U.S.C. § 10502 for exemption from the prior approval requirements of 49 U.S.C. §§ 11323-24 to allow CPRC and its wholly owned noncarrier subsidiary, DRTP Holdings ULC, “to acquire certain partnership interests” from Borealis Transportation Infrastructure Trust (BTIT)³ in the Detroit River Tunnel Partnership (the Partnership), which indirectly owns the Detroit River Tunnel a/k/a the Michigan Central Railway Tunnel (Tunnel), and “to continue in control of the Tunnel.” (Pet. 1.)⁴ The Board will grant CPRC’s petition for exemption, subject to standard labor protective conditions.

BACKGROUND

Detroit River Tunnel Company (DRTC), which is indirectly owned by the Partnership,⁵ owns the Tunnel, a two-bore rail tunnel that connects Windsor, Ont., and Detroit, Mich. DRTC’s rail line extends 3.24 miles, between milepost 228.08 in Detroit and milepost 224.84 in

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. See Pol’y Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² CPRC is the Canadian rail operating subsidiary of Canadian Pacific Railway Ltd. CPRC and its U.S. rail operating subsidiaries do business as Canadian Pacific (CP).

³ BTIT is an indirect subsidiary of OMERS Administration Corporation. (Pet. 2.)

⁴ CPRC filed its petition as a continuance-in-control exemption. It appears, however, that the transaction involves CPRC acquiring BTIT’s 83.5% ownership interest, and as such, it has been captioned as a control exemption.

⁵ CPRC states that the Partnership owns the Detroit River Tunnel Holding Corporation, which owns DRTC. (Pet. 2, n.1.)

Windsor, of which approximately 1.79 miles are located within the United States. (Pet. 1-2.) Pursuant to a 2001 Operating, Management, and Maintenance Agreement (OMM Agreement) and a 2009 Amended and Restated Partnership Agreement (Partnership Agreement) between CPRC and BTIT, CPRC currently exercises operational control over the Tunnel. (*Id.* at 3.) Under the OMM Agreement, CPRC maintains the Tunnel and dispatches and controls Tunnel rail operations.⁶ (*Id.*) CPRC is also responsible for ensuring that other railroads can use the Tunnel pursuant to each railroad's Tunnel User Agreement.⁷ (See Pet., Ex. 3, OMM Agreement, Article 2.4.) CPRC currently owns 16.5% of the ownership interests in the Partnership; BTIT owns the remaining 83.5%. (Pet. 2.)

Under the proposed transaction, CPRC's acquisition of BTIT's 83.5% ownership interest in the Partnership would result in CPRC, directly and via DRTP Holdings ULC, holding 100% of the ownership interests in the Tunnel. (Pet. 4.) CPRC states that it would continue to dispatch, operate, and maintain the Tunnel, as the Partnership Agreement and OMM Agreement would remain in effect. (*Id.* at 3.) CPRC notes that other railroads would continue to maintain their access to the Tunnel. CPRC thus states that the transaction would not have an adverse effect on service levels and that no significant operational changes are planned. (*Id.* at 3-4.)

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 11323(a)(3), the acquisition of control of a rail carrier by any number of rail carriers requires prior Board approval. Under § 10502(a), however, the Board must exempt a transaction or service from regulation if it finds that: (1) regulation is not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101; and (2) either the transaction or service is limited in scope, or regulation is not needed to protect shippers from the abuse of market power.

⁶ In 2001, the Board exempted a control transaction under which CPRC held 50% of ownership interests in the newly created Partnership as well as "increased operational control of the Tunnel." See Borealis Infrastructure Trust Mgmt. Inc.—Acquis. Exemption—Detroit River Tunnel Co., FD 33984 et al., slip op. at 7 (STB served Dec. 19, 2001). BTIT also acquired the remaining 50% of ownership interests in the Partnership from Canadian National Railway Company (CN). *Id.* at 3, 5 (finding that BTIT did not require Board authorization to acquire its 50% share in the Partnership). CPRC states that, in 2009, BTIT acquired an additional 33.5% ownership interest in the Partnership from CPRC, increasing its ownership to its current 83.5% share and reducing CPRC's ownership interest to 16.5%, and that the OMM Agreement, under which CPRC dispatches trains and controls operations, continued in effect. (Pet. 2-3.)

⁷ CPRC states that operations in the Tunnel, including CPRC's, are pursuant to DRTC-granted trackage rights. See, e.g., Canadian Pac. R.R.—Trackage Rights Exemption—Detroit River Tunnel Co., FD 34006 (STB served Mar. 16, 2001). CPRC notes that CP traffic currently accounts for approximately 98% of all Tunnel traffic and that, currently, CSX Transportation, Inc. (CSXT), is the only carrier with an active Tunnel User Agreement. CPRC further notes that CN's occasional use of the Tunnel has been pursuant to detour agreements and that CN primarily moves traffic via a nearby Paul M. Tellier Tunnel. (Pet. 3, nn.6 & 8.)

In this case, an exemption from the prior approval requirements of §§ 11323-24 is consistent with the standards of § 10502. Detailed scrutiny of the proposed transaction through an application for review and approval under §§ 11323-24 is not necessary here to carry out the RTP. Approval of the transaction would result in CPRC increasing its ownership share of the Partnership with no lessening of competition or change in dispatch and operations of the Tunnel. An exemption would promote the RTP by: minimizing the need for federal regulatory control over the transaction, § 10101(2); ensuring the development and continuation of a sound rail transportation system that would continue to meet the needs of the public, § 10101(4); fostering sound economic conditions in transportation, § 10101(5); encouraging efficient management, § 10101(9); and providing for the expeditious resolution of this proceeding, § 10101(15). Other aspects of the RTP would not be adversely affected.

Regulation of the control transaction is not needed to protect shippers from an abuse of market power.⁸ Nothing in the record indicates that any shipper would lose an existing rail service option as a result of the proposed transaction. According to CPRC, it would continue to dispatch, operate, and maintain the Tunnel, as it has since 2001. CPRC also states that, pursuant to the terms of the OMM Agreement, other railroads would continue to be able to use the Tunnel pursuant to Tunnel User Agreements. Currently, CP traffic accounts for approximately 98% of all Tunnel traffic and CSXT is the only carrier with an active Tunnel User Agreement. The transaction thus would not result in any shipper losing access to rail service or foreclose any transportation options currently available to shippers. Moreover, no shipper (or any other entity) has objected to the control transaction.

Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a carrier of its statutory obligation to protect the interests of employees. Accordingly, as a condition to granting this exemption, the Board will impose the standard employee protective conditions in New York Dock Railway—Control—Brooklyn Eastern District Terminal, 360 I.C.C. 60, aff'd New York Dock Railway v. United States, 609 F.2d 83 (2d Cir. 1979).

The control transaction is exempt from environmental reporting requirements under 49 C.F.R. § 1105.6(c)(1)(i) because it will not result in any significant change in carrier operations. Similarly, the transaction is exempt from the historic reporting requirements under 49 C.F.R. § 1105.8(b)(3), because it will not substantially change the level of maintenance of railroad properties.

CPRC requests authority to control the Tunnel by December 15, 2020, so that the parties can close the transaction before the end of the year. The exemption will be effective December 15, 2020, and petitions to stay will be due by December 10, 2020. Petitions to reopen will be due by December 22, 2020.

⁸ Given this finding, the Board need not determine whether the transaction is limited in scope. See 49 U.S.C. § 10502(a).

It is ordered:

1. Under 49 U.S.C. § 10502, the Board exempts from the prior approval requirements of 49 U.S.C. §§ 11323-25 the control transaction described above, subject to the employee protective conditions in New York Dock Railway—Control—Brooklyn Eastern District Terminal, 360 I.C.C 60, aff'd New York Dock Railway v. United States, 609 F.2d 83 (2d Cir. 1979).

2. Notice of the exemption will be published in the Federal Register.

3. The exemption will become effective on December 15, 2020. Petitions for stay must be filed by December 10, 2020. Petitions to reopen must be filed by December 22, 2020.

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