

SERVICE DATE – SEPTEMBER 19, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36323

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

Digest:¹ The Board grants Arkansas-Oklahoma Railroad Company the authority to acquire and operate approximately 69.60 miles of rail line that it acquired in 2016 but does not make the authority retroactive.

Decided: September 18, 2019

On June 24, 2019, the Arkansas-Oklahoma Railroad Company (AOK), a Class III rail carrier, filed a petition under 49 U.S.C. § 10502 seeking an exemption from the prior approval requirements of 49 U.S.C. § 10902 for the authority to acquire from the State of Oklahoma (the State) and operate approximately 69.60 miles of rail line between milepost 295.36 in Howe, Okla., and milepost 364.96 in McAlester, Okla. (the Line). Because AOK acquired the Line in April 2016, it asks that the requested exemption be granted with retroactive effect. For the reasons discussed below, the Board will grant AOK’s petition for an exemption to acquire and operate on the Line but will deny the request to make the exemption retroactive.

BACKGROUND

In 1996, AOK assumed the lease of Missouri Pacific Railroad Company (Missouri Pacific) and began operating over the Line, which was owned at that time by the State. Ark.-Okla. R.R.—Lease & Trackage Rights Exemption—Mo. Pac. R.R., FD 32873 (STB served Mar. 6, 1996).² The lease assumed by AOK included a purchase option, which AOK exercised in September 2015, and AOK acquired the Line from the State in April 2016. (AOK Pet. 5.) AOK states that, because the purchase option was included in the Board-authorized lease, and because AOK was already authorized to operate on the Line, AOK “inadvertently did not file for separate authority to purchase (and operate) the Line from the State.” (*Id.* at 2.) AOK adds that

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

² The transaction also included incidental trackage rights for interchange purposes over Missouri Pacific’s Shawnee Branch rail line between milepost 364.96 and milepost 370.5 and between milepost 566.00 and milepost 563.00, a total distance of 8.54 miles. Ark.-Okla. R.R., FD 32873, slip op. at 1.

it “continued to operate the Line just as it had for the 20 years prior to the acquisition, and there was no interruption in service.” (*Id.*) However, AOK acknowledges “that it should have filed for authority before completing the purchase [of the Line] from the State.” (*Id.*)

AOK states that although its acquisition of the Line would qualify for a class exemption under 49 C.F.R. § 1150.41, it elected to file a petition for an individual exemption under 49 U.S.C. § 10502 and 49 C.F.R. part 1121 because it seeks retroactive effect for the exemption. (*Id.*) Alternatively, if an exemption is not granted with retroactive effect, AOK seeks an affirmative statement from the Board “that it will not pursue an enforcement action for the failure to seek prior authority for the purchase.” (*Id.* at 8 n.4. (citing MCM Rail Servs. LLC—Pet. for Retroactive Exemption—in Sparrows Point, Md., FD 35707 et al., slip op. at 2 n.5 (STB served June 11, 2013), and N.B. Ry.—Continuance in Control Exemption—Me. N. Ry., FD 35520 et al., slip op. at 3 n.2 (STB served Sept. 26, 2011)).)

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10902, a Class III rail carrier may not acquire a rail line without the prior approval of the Board. However, under 49 U.S.C. § 10502(a), the Board must exempt a transaction or service from regulation upon finding that: (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not needed to protect shippers from the abuse of market power.

Here, an exemption from the prior approval requirements of § 10902 is consistent with § 10502(a). Detailed scrutiny of this transaction is not necessary to carry out the rail transportation policy. An exemption from the application process would promote a fair and expeditious regulatory decision-making process, minimize the need for Federal regulatory control, reduce regulatory barriers to entry, and result in the expeditious handling of this proceeding. *See* 49 U.S.C. § 10101(2), (7), (15). Other aspects of the rail transportation policy would not be adversely affected.

Regulation of this transaction is not needed to protect shippers from the abuse of market power. There would be no loss of rail competition and no adverse change in the competitive balance in the transportation market, as AOK has been providing service over the Line since 1996. Nor would there be a change in the level of service to any shippers because they would continue to receive the same service from AOK. Given this market power finding, the Board need not determine whether the proposed transaction is limited in scope.

Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Section 10902(d), however, precludes the Board from imposing labor protection for Class III rail carriers receiving authority under § 10902. Accordingly, the Board may not impose labor protective conditions here because AOK is a Class III carrier.

Under 49 C.F.R. § 1105.6(c)(1), this action, which will not result in significant changes in carrier operations, is categorically excluded from environmental review. Similarly, under

49 C.F.R. § 1105.8(b)(1), no historic report is required because the subject transaction is for continued rail service, AOK has indicated no plans to alter railroad properties 50 years old or older, and any abandonment would be subject to Board jurisdiction.

As stated above, AOK seeks an exemption with retroactive effect, arguing that its failure to obtain prior approval or an exemption when it acquired the Line was inadvertent and that no shippers were harmed. Although the Board on occasion has granted authority retroactively,³ it generally disfavors retroactive grants of authority⁴ and the Board declines to do so here.

It is ordered:

1. Under 49 U.S.C. § 10502, the Board exempts from the prior approval requirements of 49 U.S.C. § 10902 AOK's acquisition of the Line from the State.

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

3. The exemption will be effective October 19, 2019. Petitions for stay must be filed by September 27, 2019. Petitions to reopen must be filed by October 9, 2019.

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

³ See, e.g., Grand Elk R.R.—Acquis. of Incidental Trackage Rights Exemption—Norfolk S. Ry., FD 35187 (Sub-No. 1) et al., slip op. at 4 (STB served Nov. 20, 2017) (after having previously denied a request for retroactive authority, reopening the proceeding to make exemption retroactive in light of changed circumstances, including a state court decision that declined to rule on a contractual issue because Board previously only granted prospective authority).

⁴ See, e.g., N.B. Ry., FD 35520 et al., slip op. at 3 n.2 (declining a request for retroactive authority and stating that “[t]he Board generally disfavors retroactive grants of authority”). See also Turtle Creek Indus. R.R.—Acquis. & Operation Exemption—Consol. Rail Corp., FD 35678, slip op. at 1 n.1 (STB served Oct. 26, 2012) (clarifying that the exemption would be effective prospectively despite the party's request for retroactive authority).