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E-FILED

233314

Cynthia Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, SW
Washington, DC 20423

ENTERED
Office of Proceedings
November 8, 2012
Part of
Public Record

Re: Finance Docket No. 35685, Rail Switching Services, Inc. --
Operation Exemption -- Pemiscot County Port Authority

Dear Ms. Brown:

Given the late stage of this proceeding, BNSF Railway Company ("BNSF") will only briefly address some of the false and misleading statements set forth in the Verified Notice of Exemption filed by Rail Switching Services, Inc. ("RSS") on October 15, 2012 ("Notice"), and the Reply of Pioneer Railcorp and Rail Switching Services, Inc. ("Reply") and the Reply of Pioneer Railcorp and Rail Switching Services, Inc. to Supplement to Petition to Reject and Petition to Stay Exemptions ("Reply to Supplement") both filed by RSS on November 5, 2012. While BNSF views this dispute as one largely between RSS and the Pemiscot County Port Authority ("PCPA"), BNSF feels compelled to respond to the erroneous assertions made by RSS regarding BNSF's ability to serve customers on the PCPA rail line.

In the Reply, RSS claims that BNSF has no authority from the Surface Transportation Board ("Board") to operate over the PCPA line to directly service customers and asserts that "only RSS is entitled to provide service between PCPA line shippers and BNSF." Reply at 4, footnote 17. Essentially, RSS argues that, because BNSF does not have Board authority to operate over the PCPA line, the Board must grant it authority to operate over the PCPA line



Cynthia Brown
November 8, 2012
Page 2

otherwise customers on that line be left without rail service. RSS's contention is erroneous for at least three reasons.

First, as RSS well knows, BNSF and PCPA entered into an Industry Track Agreement on November 11, 2003 ("ITA"). The ITA, which predates the RSS-PCPA agreements, grants BNSF the right to provide common and contract carriage operations over the PCPA line.¹ Accordingly, as BNSF has an existing, valid agreement that grants BNSF the right to operate and serve customers on the PCPA line, RSS's assertion that it is the only party entitled to provide service to the PCPA line is false.

Second, the Rail Line Operating Agreement ("Agreement"), attached to the Notice, grants RSS the right to operate as a "non-common carrier contract switcher" over the PCPA tracks. Section 4 of the Agreement. Consequently, RSS can provide contract carrier service between the BNSF interchange and any customers located on the PCPA tracks provided that the customer agrees to utilize RSS's service and enters into a transportation contract with RSS. It is BNSF's understanding that no customers on the PCPA line have sought out or agreed to use RSS for contract carrier service. RSS argues that the new customer on the PCPA line, Marquis Marine Terminal, LLC ("Marquis") seeks RSS's service from the BNSF interchange. Notice at 4. But as PCPA points out in its November 1, 2012 filing, Marquis has no desire to utilize the services of RSS. Rather, that customer seeks direct service from BNSF.

Third, as RSS concedes, PCPA is also a common carrier on the PCPA tracks and can provide service between the BNSF interchange tracks and any customers located along the PCPA tracks.

Contrary to RSS contention, RSS is not the only carrier with both the ability and contractual right to provide service over the PCPA tracks. Currently, BNSF and PCPA have the right to provide

¹ The PCPA facilities are located adjacent the BNSF mainline and in 2003 no other rail carrier serviced this territory. Consequently, the ITA is not subject to the Board's licensing authority. *Texas & Pacific Railway Co. v. Gulf, Colorado & Santa Fe Railway Co.*, 270 U.S. 266, 278 (1926).



Cynthia Brown
November 8, 2012
Page 3

common and contract carrier service over the PCPA tracks and RSS has the right to provide contract carrier service over those tracks.

BNSF also feels compelled to address the false and misleading assertions in the Notice. In the Reply, RSS erroneously claims that there is "nothing false or misleading" about the Notice. Reply at 3. In the Notice, RSS first claims that it is seeking authority from the Board to provide rail service "as a contract operator" for PCPA. Notice at 3. On the very next page RSS again claims that it "is now filing as a contract operator for PCPA." Notice at 4. RSS, however, then proceeds to assert that its proposed operation "is for the purpose of facilitating common carrier continued rail operations." Notice at 6. To further enhance the confusion and mislead the reader, RSS claims that contract carriers "need authority from the Board when they intend to provide service to shippers...." Reply to Supplement at 5. RSS cites no authority for this proposition because there is none. As the Board well knows, it only has jurisdiction over rail transportation provided by a "rail carrier" (49 U.S.C. § 10501(a)(1), and a "rail carrier" is defined as "a person providing common carrier railroad transportation for compensation...." 49 U.S.C. §10102(5).

RSS next contends that it was forced to file "as a contract operator" once it learned that PCPA was common carrier by railroad and its rail line was not private. Notice at 4. The Board does not have jurisdiction over contract carriage regardless of whether those operations are provided over private tracks or tracks owned by a common carrier. *Cf. Texas v. United States*, 703 F.2d 409, 417 (5th Cir. 1984); *Consolidated Rail Corp. – Petition For Declaratory Order*, 1 I.C.C.2d 284 (1984).

RSS argues that the dispute between RSS and PCPA is merely a contractual dispute that should be decided by a court. Reply at 11. The Board, however, must enforce its regulations and protect the integrity of its procedures. Clearly, a number of statements made by RSS in the Notice, the Reply and the Reply to Supplement are false and misleading. Consequently the Notice should be rejected.



Cynthia Brown
November 8, 2012
Page 4

RSS is attempting to use the good offices of the Board to obtain authority for services it has no contractual right to provide and which no customer wants. BNSF has the requisite authority to serve Marquis directly and it intends to so. Interjecting RSS operations into this service will only raise the cost and make the operations more inefficient.

Sincerely,

A handwritten signature in black ink that reads "Karl Morell". The signature is written in a cursive style with a large, sweeping "K" and "M".

Karl Morell
Of Counsel

cc: All parties of record