

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34484

JAMES RIFFIN D/B/A THE NORTHERN CENTRAL RAILROAD
— ACQUISITION AND OPERATION EXEMPTION —
IN YORK COUNTY, PA, AND BALTIMORE COUNTY, MD

Decided: April 20, 2004

By verified notice filed on March 8, 2004, as amended by a letter filed on March 22, 2004, and facsimile received on March 25, 2004, and served and published in the Federal Register on April 7, 2004 (69 FR 18420), James Riffin d/b/a The North Central Railroad (Mr. Riffin or NCR) has invoked the Board's class exemption procedures under 49 CFR 1150.31 for authority to acquire and operate: (a) approximately 20.9 miles of rail line (Conrail's former Line Code 1224) between milepost 35.1 (at the Maryland/Pennsylvania line), and milepost 56 (Grantly), in York County, PA; (b) approximately 2.0 miles of abandoned rail line (Conrail's former Line Code 1224) between milepost 14.2 (Cockeysville) and milepost 16.2 (Ashland), in Baltimore County, MD (Cockeysville/Ashland line); and (c) approximately 0.9 miles of abandoned rail line (Conrail's former line Code 1224) between milepost 24.3 (Blue Mount) and milepost 25.2 (Blue Mount Quarry), in Baltimore County, MD (Blue Mount/Blue Mount Quarry line). NCR states that it will interchange with the Genessee and Wyoming Railroad at or near milepost 56, Grantly, York County, PA. NCR asserts that the Cockeysville/Ashland and Blue Mount/Blue Mount Quarry lines are part of an abandoned right-of-way (ROW) it proposes to acquire and operate and that the land has reverted back to the original owners, from whom it will acquire the ROW. Under the terms of the class exemption procedures, the exemption has become effective.

By petition filed on April 2, 2004, the State of Maryland requests that the Board revoke the exemption. Maryland asserts that the exemption is void ab initio because NCR's notice creates the impression that NCR will purchase or otherwise acquire an interest in the Cockeysville/Ashland and Blue Mount/Blue Mount Quarry lines, both of which Maryland states that it owns and does not intend to convey to NCR. Pointing to specific statements in the notice that it claims are misleading, Maryland also contends that NCR's failure to demonstrate or establish that it could legally obtain title to the lines in Maryland is a material misrepresentation. NCR replied on April 8, 2004 (April 8th reply), claiming that the notice of exemption was not misleading because it can obtain legal title to the Cockeysville/Ashland and Blue Mount/Blue Mount Quarry lines through state condemnation procedures no matter who owns the ROWs.

In addition, Maryland asserts that NCR is using the Board's preemptive jurisdiction to circumvent state law. Maryland claims that NCR has obstructed the efforts of the Maryland Department of the Environment (MDE) to conduct indoor air quality sampling in an office building Mr. Riffin operates. MDE has filed suit in the Circuit Court for Baltimore County (Case No. 03-C-03-013144), which NCR has moved to dismiss on the ground that 49 U.S.C. 10501 preempts all state environmental laws. Also, according to Maryland's petition, at a second site in Baltimore County, NCR is preparing to clear, grade and fill the 100-year floodplain of Beaver Dam Run and has not obtained the required permit under the Maryland Waterway Construction Act, MD. CODE ANN., ENV'T ART. section 5-501 et seq., asserting that all state environmental laws are preempted by the Board's jurisdiction. In a letter filed on April 14, 2004 (April 14th letter), and a supplemental petition filed on April 15, 2004 (April 15th supplement), Maryland states that NCR has begun construction at the second site. MDE issued a Site Complaint, served on Mr. Riffin on April 13, 2004, that requires him to immediately cease and desist all construction and grading activities in the 100-year floodplain and waterway. In its supplemental filing, Maryland also requests that pending resolution of the petition to revoke, the Board issue a cease and desist order preventing NCR from taking any other action "under color of [railroad] authority."

On April 19, 2004, NCR filed a reply to Maryland's request for expedited handling and Maryland's motion for a cease and desist order, as well as a motion to impose sanctions on Maryland and its counsel. NCR does not oppose Maryland's expedited handling request, but does oppose the motion for a cease and desist order that would stop it from holding itself out as a rail carrier subject to the Board's jurisdiction. In its reply, NCR maintains that it has an "absolute right" under Maryland law to acquire the 2.9 miles of ROW in Maryland. Moreover, NCR asserts that the land for which Maryland issued a Site Complaint is not part of the 2.9 miles of ROW and that any construction on that site is not for a rail line. Therefore, NCR takes the position that a cease and desist order directed at activities on property that is not the subject of NCR's notice of exemption should be addressed in a Maryland court of law and not by the Board.

Because use of the class exemption procedures to effect the transaction at issue here would not be appropriate under the circumstances presented, the Board will revoke the exemption.

DISCUSSION AND CONCLUSION

Under the licensing provisions of 49 U.S.C. 10901, a noncarrier, such as NCR, may acquire and operate a rail line only if the Board makes an express finding that the proposal is not inconsistent with the "public convenience and necessity." That means that the Board must examine and weigh the public interest. Under 49 U.S.C. 10502 and 49 CFR 1121, however, a party may request an exemption from the formal application procedures of section 10901, on the

grounds that full regulatory scrutiny is not necessary to carry out the rail transportation policy and that either the exemption is limited in scope or regulation is not needed to protect shippers from an abuse of market power.

There are some situations in which approval would be so routine and uncontroversial that there is an expedited “class exemption” procedure allowing parties to obtain Board authorization subject only to an after-the-fact Board review if objections are received. Thus, under 49 CFR 1150.31, a noncarrier can obtain approval to acquire and operate a line of railroad within 7 days. That authority can later be revoked under 49 U.S.C. 10502(d) or treated as void ab initio if the exemption notice is found to have contained false or misleading information. See Class Exemption — Acq. & Oper. of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810, 812 (1985), aff’d Illinois Commerce Comm’n v. ICC, 817 F.2d 145 (D.C. Cir. 1987). Moreover, the class exemption process is not appropriate for controversial cases in which a more detailed record is required than is produced through a notice of class exemption. See Riverview Trenton Railroad Company — Acquisition and Operation Exemption — Crown Enterprises, Inc., STB Finance Docket No. 33980 (STB served Feb. 15, 2002).

While NCR claims that it can overcome impediments to its ownership of property at issue in this proceeding, Maryland has raised sufficient concerns here, not only regarding NCR’s ability to obtain title to property, but also regarding NCR’s proposal in general, to make it inappropriate for NCR to use the expedited class exemption procedures in this case. Given that there are substantial factual and legal issues raised and that the Board has a responsibility to protect the integrity of its processes,¹ under the particular circumstances presented here, the Board will revoke the notice of exemption. Should NCR choose to pursue its proposal, it should provide more detailed information, in the form of a petition for an individual exemption under 49 U.S.C. 10502 and 49 CFR 1121, or a full application under 49 U.S.C. 10901 and 49 CFR 1150, as those procedures are designed to elicit a more complete record. Because the Board is revoking the exemption, Maryland’s request for a cease and desist order is moot.

MOTION FOR SANCTIONS

NCR asserts that Maryland and its counsel should be sanctioned for the following reasons: (1) they did not support their petition to revoke under 49 CFR 1121.3(c); (2) they omitted certain facts regarding the ROW, thereby demonstrating a knowing lack of candor and fairness under 49 CFR 1102.2(c); (3) their April 14th letter was addressed to Chairman Nober

¹ See, e.g., The Land Conservancy of Seattle and King County — Acquisition and Operation Exemption — The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 33389 (STB served Sept. 26, 1997); see also ICC v. American Trucking Ass’ns, 467 U.S. 354, 364-65 (1984) (agency has inherent authority to protect its statutory processes from abuse).

and thus was a prohibited ex parte communication and/or a private communication with Chairman Nober; and (4) the statements in the letter, according to NCR, are untrue and thus defamatory per se which is a violation of law, and thus a violation under 49 CFR 1103.21.

NCR has not provided sufficient support for its motion for sanctions. Whether Maryland's petition lacks supporting information goes to the strength of the claim but is not a ground for imposing sanctions. The facts that NCR asserts Maryland omitted are on the record in NCR's April 8th reply, and NCR has not demonstrated that Maryland or its counsel knowingly withheld necessary information regarding the ROW. The April 14th letter was not an ex parte or private communication with Chairman Nober because Mr. Riffin was sent a copy. Moreover, the content of the April 14th letter was contained in Maryland's April 15th supplement, which was filed with the Secretary and served on all parties. Nor has NCR demonstrated that, at the time the April 14th letter was sent and April 15th supplement was filed, Maryland or its counsel knowingly made any false or defamatory statements. Therefore, NCR's motion for sanctions will be denied.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The exemption in this proceeding is revoked.
2. NCR's motion for sanctions is denied.
3. This decision is effective on its date of service.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary