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SERVICE DATE – LATE RELEASE SEPTEMBER 15, 2009

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35245

JAMES RIFFIN—PETITION FOR DECLARATORY ORDER

Decided: September 15, 2009

In May 2009, James Riffin filed a petition for a declaratory order, asking the Board to declare (1) that he became a rail carrier in 2006 when the Board authorized him to be substituted for his corporate affiliate in the purchase of a rail line in Allegany County, MD (the Allegany line), and (2) that his proposed operation of a 400-foot segment of track in Baltimore County known as the Veneer Mfg. Co. Spur (Veneer Spur) would constitute the operation of an “extended” or “additional” line of railroad under 49 U.S.C. 10902(a).¹ Allegany County, Maryland Transit Administration (MTA), and Norfolk Southern Railway (NSR) oppose Riffin’s petition.

We find that, although Riffin obtained authority to acquire and operate the Allegany line, he is not a rail carrier because he lacks the ability to provide rail service on that line. We also find that, because Riffin is not a rail carrier and does not operate any rail line, his proposal here to operate the Veneer Spur does not qualify as the operation of an “extended” or “additional” line of railroad.

BACKGROUND

Allegany Line

In August 2005, CSXT Transportation, Inc. (CSXT) filed a notice of exemption to abandon the Allegany line, an 8.54-mile inactive rail line in Allegany County in the western part

¹ Riffin simultaneously filed an application under 49 U.S.C. 10902 to acquire and operate the Veneer Spur. Because section 10902 empowers the Board to authorize a “rail carrier” to acquire an extended or additional line of railroad, the Board held Riffin’s application in abeyance pending a final determination in this proceeding on whether Riffin is, in fact, a rail carrier. See James Riffin—Acquisition and Operation—Veneer Spur—In Baltimore County, MD, STB Finance Docket No. 35246 (STB served May 29, 2009).

of Maryland. An entity identifying itself as “WMS, L.L.C.” (WMS)² sought to purchase the Allegany line under the offer of financial assistance (OFA) procedures of 49 U.S.C. 10904. WMS and CSXT successfully negotiated terms and conditions for the sale of the line. On December 14, 2005, the Board authorized WMS to acquire and operate the Allegany line and ordered that the abandonment exemption proceeding be dismissed effective as of the date the sale was consummated.

In June 2006, before the sale was consummated, WMS sought permission to substitute Riffin as the purchaser. WMS stated that Riffin owned 98% of WMS and was thus its corporate affiliate.³ While the substitution motion was pending, Riffin, who had previously paid CSXT a portion of the purchase price, wired the balance to CSXT. In July 2006, seeking to avoid incurring additional ownership, maintenance, and inspection costs for the Allegany line, CSXT consummated the transaction by deeding the line to “WMS, L.L.C., a Maryland limited liability company.” In August 2006, the Board granted WMS permission to substitute Riffin as the purchaser of the line. CSX Transportation, Inc.—Abandonment Exemption—In Allegany County, MD, STB Docket No. AB-55 (Sub-No. 659X) (STB served Aug. 16, 2006) (August 2006 Decision).

In January 2008, Riffin sought a Board order compelling CSXT to reissue the deed to the Allegany line to him in his own name. Riffin asserted that there had been an inadvertent mistake in the OFA filings concerning the name of the party making the OFA, and that the party’s actual name was “Western Maryland Services, L.L.C.” rather than “WMS L.L.C.”⁴ CSXT opposed the motion, arguing that, because Riffin owned 98% of WMS, he could cause WMS to deed the property to himself.

² WMS described itself as “a Maryland limited liability company established by Gerald Altizer and chartered in West Virginia for the purpose of acquiring, preserving, and operating light-density rail lines in Maryland and contiguous areas in Pennsylvania and West Virginia.”

³ WMS stated that its founder, Gerald Altizer, and another individual each had a 1% ownership interest in WMS.

⁴ Elsewhere, Riffin has given a different version of events, stating that he deliberately filed the OFA under the pseudonym WMS to conceal his involvement from Maryland state regulators, who he suspected would object to any attempt by him to acquire the Allegany line. Motion for Administrative Stay at 4, James Riffin—Petition for Declaratory Order, STB Finance Docket No. 34997 (filed Dec. 17, 2007). In the text, we recount the version that Riffin has given in this proceeding but make no findings regarding the accuracy of either version, because doing so is not necessary to resolve this case. We note, however, that this inconsistency undermines Riffin’s credibility with the Board.

In April 2008, the Board denied Riffin’s motion to compel, explaining that, once the Board had approved WMS’s purchase and operation of the line, no additional Board approval was required for the parties to consummate the line’s transfer, and that any disputes about the validity of the purchase agreement or the transfer of the deed involved questions of state contract and property law.⁵ CSX Transportation, Inc.—Abandonment Exemption—In Allegany County, MD, STB Docket No. AB-55 (Sub-No. 659X) (STB served Apr. 24, 2008) (Allegany County), appeal docketed sub nom. Riffin v. STB, No. 08-1208 (D.C. Cir. May 29, 2008).

Veneer Spur

On February 16, 2009, Riffin leased from non-carrier Mark Downs, Inc. the track material and underlying real estate associated with the Veneer Spur and the land adjacent to the spur track. Historically, the spur—which is located in Cockeyville, MD, approximately 150 miles from the Allegany line—was connected to the national rail network via a rail line known as the Cockeyville Industrial Track (CIT), which generally runs north from Baltimore. In 1990, MTA acquired the CIT from Consolidated Rail Corporation (Conrail) to operate a light-rail transit service. Conrail retained a perpetual, exclusive freight operating easement over the CIT; NSR acquired those operating rights in 1999.

Although the Veneer Spur historically was operated as private spur track serving only one shipper, Riffin states that he proposes to operate the spur as a line of railroad available for use by the general public.⁶ He further states that he plans to provide rail transload service to a

⁵ According to NSR, public records of the Maryland Secretary of State’s office show that WMS forfeited its existence for “failure to file property return for 2007.”

⁶ In his application, Riffin asserts that he “owns and operates a rail carrier maintenance-of-way facility/rail car maintenance and repair shop, which is adjacent to, and will be served by, the [Veneer Spur].” Application at 3, STB Finance Docket No. 35246, James Riffin—Acquisition and Operation—Veneer Spur—In Baltimore County, MD. In an earlier filing, Riffin stated that his purported maintenance-of-way (MOW) facility is located several hundred feet north of the CIT, is separated from the CIT by a substantial creek, and would need the construction of 600 feet of track to connect to the Veneer Spur. Memorandum of Law at 8, attached to Verified Notice of Exemption, STB Docket No. 35221, James Riffin—Acquisition and Operation Exemption—Veneer Spur—In Baltimore County, MD. Riffin’s description of his purported MOW facility in his earlier filing is consistent with the Board’s previous finding that that property is no longer connected to the CIT. Maryland Transit Administration—Petition for Declaratory Order, STB Finance Docket No. 34975, slip op. at 2 n.2 (STB served Sept. 17, 2008). The absence of any such connection, combined with Riffin’s failure to show it would be commercially practicable to transport his MOW equipment back and forth (150 miles each way) between the Cockeyville “storage” site and the Allegany line demonstrates that the Cockeyville property is not part of, or integral to, transportation by rail carrier. See James Riffin—Petition

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number of local shippers at the eastern end of the spur and to interchange with NSR at the western end. He asserts that the movement of railcars from the western end of the Veneer Spur to the eastern end would be part of a “line haul.” He estimates that over 200 cars would move over the line per year, shipping commodities such as clay, coal tar, cement, natural stone, railroad ties, rails, steel, chemicals, salt, wood products, and rail cars. Riffin asks the Board to find that his proposed operation of the Veneer Spur would constitute operation of an additional line of railroad.

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. 554(e) and 49 U.S.C. 721, the Board, in its discretion, may issue a declaratory order to terminate a controversy or remove uncertainty. Here, the law is clear and there is no need to institute a declaratory order proceeding to receive further information with respect to the issues Riffin raises. As next discussed, we find that Riffin is not a common carrier⁷ and that Riffin’s proposed operation of the Veneer Spur would not constitute the operation of an “additional” line of railroad.

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for Declaratory Order, STB Finance Docket No. 34997, slip op. at 1, 5 (STB served May 2, 2008) (Riffin Preemption Order), appeal docketed sub nom. Riffin v. STB, No. 08-1190 (D.C. Cir. May 14, 2008) (rejecting Riffin’s claim that federal preemption covered the Cockeysville property, which is “disconnected” from the Allegany line and at a separate location in Maryland.); Suffolk & Southern Rail Road, LLC—Lease and Operation Exemption—Sills Road Realty, LLC, STB Finance Docket No. 35036, slip op. at 3 (STB served Aug. 27, 2008) (rail carrier’s proposed transloading activities in one state not entitled to federal preemption given lack of evidence that the facility was connected to carrier’s existing operations, located hundreds of miles away); cf. James Riffin d/b/a The Northern Central Railroad—Acquisition and Operation Exemption—In York County, PA, STB Finance Docket No. 34552, slip op. at 6 (STB served Feb. 23, 2005) (revoking authorization to acquire rail line because it appeared that Riffin was “attempting to use the cover of Board authority allowing rail operations in Pennsylvania to shield seemingly independent operations and construction [at his purported MOW facility] in Maryland from legitimate processes of state law”).

⁷ In James Riffin d/b/a the Raritan Valley Connecting Railroad—Acquisition and Operation Exemption—On Raritan Valley Connecting Track, STB Finance Docket No. 34963 (STB served Dec. 20, 2006), the Board characterized Riffin as a Class III rail carrier because his assertion of carrier status was not questioned by the parties in that case. In Riffin Preemption Order, the Board assumed Riffin to be a rail carrier, as he contended, without resolving the issue, for the purposes of clarifying the preemption issues presented.

Allegany Line

Riffin contends that he became a rail carrier at the time of the Board's August 2006 Decision, when the Board authorized him to be substituted for WMS as the purchaser of the Allegany line. He states that, prior to and following August 2006, he has communicated with a number of shippers, purchased rail cars, interviewed prospective employees, prepared tariffs, and made efforts to repair and maintain the line. He asserts that he has Board authority to operate the Allegany line and that he has been holding himself out as a common carrier and offering to provide transportation by rail to the public since August 2006.

Respondents argue that Riffin is not a rail carrier. They assert that Riffin has done no more than obtain Board permission to acquire the Allegany line. They maintain that, because no deed for the line was issued to Riffin or recorded in the Allegany County land records, Riffin never consummated the transaction or obtained legal ownership of the line, nor did he obtain any other rights to use the line. According to respondents, Riffin holds, at most, an unrecorded deed from CSXT to WMS. Respondents further assert that Riffin has neither begun to operate a railroad on the Allegany line nor made a bona fide effort to restore the line to a condition that would permit him to do so. Consequently, they argue that Riffin cannot legitimately hold himself out as a rail carrier providing rail transportation for compensation as he lacks both the legal authority and physical ability to provide rail service if requested.

With certain exceptions not relevant here,⁸ a "rail carrier" is "a person providing common carrier railroad transportation for compensation." 49 U.S.C. 10102(5). At a minimum, under agency precedent, for an entity to qualify as a rail carrier, it must (1) hold itself out as a common carrier for hire, and (2) have the ability to carry for hire.⁹

⁸ The term "rail carrier" does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation. 49 U.S.C. 10102(5).

⁹ Hanson Natural Resources Co.—Non-Common Carrier Status—Petition for Declaratory Order, Finance Docket No. 32248, slip op. at 16 (ICC served Dec. 5, 1994) (Hanson) ("The principal test is whether there is a bona fide holding out coupled with the ability to carry for hire."); Southern Pacific Transportation Co.—Abandonment Exemption—In Los Angeles County, CA, 8 I.C.C.2d 495, 506 (1992) (same); see also Association of P&C Dock Longshoremen v. Pittsburgh and Conneaut Dock Company, 8 I.C.C.2d 280, 290 (1992) (stating that to be a rail carrier, entity must both conduct rail operations and hold out that service to the public); H&M International Transportation, Inc.—Petition for Declaratory Order, STB Finance Docket No. 34277, slip op. at 3 (STB served Nov. 12, 2003) (finding that company was not a rail carrier because, among other things, it provided no rail service to the public for compensation). Court decisions are consistent with Board precedent. Simmons v. ICC, 871 F.2d 702, 711 (7th Cir. 1989) (new company that acquired rail line became rail carrier when it commenced operations on the acquired track); see also Rexroth Hydraudyne B.V. v. Ocean World Lines, Inc.,

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Here, we need not determine whether Riffin has held himself out as a common carrier for hire because we find that Riffin lacks the ability to provide common carrier rail service for hire. Riffin himself concedes that CSXT issued the deed in the name of WMS, that he has been attempting since 2006 to obtain a deed to the property in his own name, and that the issue remains in litigation in the Maryland state courts. Riffin’s admitted failure to obtain title to the line undercuts his claim to be a rail carrier. Riffin does not appear to be capable of providing service over the Allegany line at this time as he does not own the line or have any other suitable legal interest in it that gives him the ability to exercise the authority the Board has granted. Riffin claims that whether legal title has passed is irrelevant because he has Board authority to operate the line.¹⁰ But that authorization is permissive, not mandatory, and did not give him a legal property interest in the line.¹¹ Riffin would have to acquire some suitable legal interest that would give him the ability to exercise his authority and hold himself out as a common carrier before he could qualify as a rail carrier.

Riffin contends that, unlike other rail line acquisitions, acquisitions through OFAs are not permissive. He states that if an OFA to buy a line for fair market value is made, then the Board will compel the owner to transfer the line to the offeror. But the Board assumes this sort of active role only when, pursuant to a timely request, it sets the terms and conditions for the sale—not when, as here, the parties reach a voluntary agreement for the sale of the line. Disputes over the validity or enforcement of such voluntary contracts raise issues of state law best left to state courts. Allegany County, slip op. at 3.¹²

Riffin claims that Board and court precedent support a finding that he has common carrier status. Riffin argues that, under General Railway, he became a rail carrier as soon as he

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547 F.3d 351, 356-57, 363-64 (2nd Cir. 2008) (holding that freight forwarder that conducted no rail operations of its own was not a rail carrier); Nevada v. Department of Energy, 457 F.3d 78, 86 (D.C. Cir. 2006) (quoting Hanson test).

¹⁰ Petition for Declaratory Order at 9.

¹¹ See, e.g., Lackawanna County Railroad Authority—Acquisition Exemption—F&L Realty, Inc., STB Finance Docket No. 33905 (STB served Oct. 22, 2001); General Railway Corporation, d/b/a Iowa Northwestern Railroad—Exemption for Acquisition of Railroad Line—In Osceola and Dickinson Counties, IA, STB Finance Docket No. 34867 (STB served June 15, 2007) (General Railway).

¹² As Riffin points out, a Board regulation provides that, upon being notified of a default on an OFA agreement, “the Board will take appropriate action.” 49 CFR 1152.27(k). Appropriate action in case of a default may include allowing the abandonment to go forward. But where there is a disagreement over what the contract required, the state courts are the appropriate forum.

was authorized to acquire the line. He relies on a statement in that decision that a noncarrier “had become a rail carrier after having obtained authority to operate the line.” General Railway, slip op. at 2. But there the noncarrier had become a rail carrier not merely because it had obtained Board authorization to operate, but because, in addition, it had exercised that authorization by actually providing service on the line. Here, Riffin has never done so, and indeed lacks the ability to do so because he has never acquired title to, or other suitable legal interest in, the property.

Relying on American Orient Express Railway Company v. STB, 484 F.3d 554 (D.C. Cir. 2007) (American Orient), Riffin suggests that he could become a rail carrier without owning any tracks. Although Riffin is correct that he need not own tracks to become a carrier, he misses the point of American Orient. That case involved the rail carrier status of a company, American Orient, that provided recreational travel aboard vintage railcars. Because American Orient owned neither locomotives nor any rail lines, it contracted with Amtrak to move its railcars and with third parties for the right to operate over their railroad tracks. The court affirmed the Board’s determination that American Orient was a rail carrier because it provided railroad transportation. American Orient is distinguishable because there the company entered into agreements with other parties that enabled it to actually provide rail service, which it did. In contrast, Riffin has provided no rail service, nor is he capable of doing so.

Veneer Spur

Riffin also asks the Board to determine that his proposed operation of the Veneer Spur would constitute operation of an additional line of railroad.¹³ He maintains that his proposed transloading operations would constitute the operation of an additional line of railroad, as this new trackage would extend his existing operations into new territory and permit him to serve new shippers. Respondents argue among other things that, if Riffin cannot establish that he is a rail carrier on the Allegany line, the Board cannot find that he is “extending” his operations onto the Veneer Spur. We agree with respondents. Under 49 U.S.C. 10902, the Board may authorize a “rail carrier” to “acquire or operate an extended or additional rail line.” Because Riffin is not a rail carrier, however, we cannot find that his proposal to operate the Veneer Spur would qualify as the operation of an extended or additional rail line.

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

¹³ As indicated at n.1, Riffin is not currently authorized to operate over the Veneer Spur and his application to acquire and operate the spur under 49 U.S.C. 10902 has been held in abeyance pending our resolution of this declaratory order petition. We will address that application in a separate decision.

It is ordered:

1. Petitioner's request to institute a declaratory order proceeding is denied.
2. Petitioner's request that he be declared to be a common carrier is denied.
3. Petitioner's request that we declare that his proposal to operate the Vener Spur would qualify as the operation of an additional line of railroad is denied.
4. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Nottingham, and Commissioner Mulvey.

Anne K. Quinlan
Acting Secretary