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SERVICE DATE – AUGUST 31, 2010

SURFACE TRANSPORTATION BOARD

DECISION

CORRECTED DECISION*

Docket No. FD 35296

ANTHONY MACRIE—CONTINUANCE IN CONTROL EXEMPTION—NEW JERSEY
SEASHORE LINES, INC.

Docket No. FD 35297

NEW JERSEY SEASHORE LINES, INC.—OPERATION EXEMPTION—CLAYTON
COMPANIES, INC.

Decided: August 11, 2010

This decision addresses the issues raised by the parties in these proceedings and clarifies the rights and obligations of New Jersey Seashore Lines, Inc. (NJSL) and Clayton Sand Company (Clayton)— the prospective operator and the noncarrier owner, respectively, of the track at issue.

BACKGROUND

On September 10, 2009, in Anthony Macrie—Continuance in Control Exemption—N.J. Seashore Lines, Inc., FD 35296, Anthony Macrie (Macrie), a noncarrier individual, filed a verified notice of exemption pursuant to 49 C.F.R. § 1180.2(d)(2) to continue in control of Cape May Seashore Lines, Inc., an existing Class III carrier, and its corporate affiliate NJSL, upon NJSL's becoming a Class III carrier. Concurrently, NJSL filed a verified notice of exemption pursuant to 49 C.F.R. § 1150.31 in New Jersey Seashore Lines, Inc.—Operation Exemption—Clayton Companies, Inc., FD 35297, to operate over a 13-mile abandoned rail line in New Jersey.¹ According to NJSL, after Consolidated Rail Corporation (Conrail) abandoned the line,

* This decision corrects the decision served on August 16, 2010. In that decision, footnote 4 stated that “if NJSL materially breached the lease, Clayton would still first have to obtain adverse abandonment authority from the Board before Clayton could evict NJSL.” Instead, the footnote should have stated that Clayton would have to obtain adverse discontinuance authority. Footnote 4 herein is corrected to reflect that change. The August 16, 2010 decision remains unchanged in all other respects.

¹ The abandoned line extends between milepost 66.0 at Lakehurst, Borough of Lakehurst, Ocean County, N.J. and milepost 79.0 at Woodmansie, Woodland Township, Burlington County, N.J.

Clayton, a shipper, acquired it from Conrail in 1985 for use as private industry track. Clayton has now engaged NJSL to operate the previously abandoned line as a common carrier for 10 years, replacing Ashland Railway, Inc. (Ashland), which had operated it as private track under contract.

By decision served September 25, 2009, the Board accepted the notices in these dockets, but held their publication in the Federal Register and their effectiveness in abeyance pending further action by the Board. Because Clayton had not sought acquisition authority, the Board expressed concerns about a situation where the owner of a rail line held no license from the agency and therefore fell outside the scope of the Board's authority. That meant that the Board had no direct way to assure that rail customers that used the line would receive adequate service. The operator of the line, NJSL, held a license and was subject to Board authority. NJSL, however, did not own the line, and had little or no control over it. NJSL therefore had only a limited ability to ensure continued rail service for the line's customers. Accordingly, the Board indicated that it would not act further unless and until Clayton also sought authority from the Board or NJSL provided an explanation as to why Clayton need not seek such authority.

On October 14, 2009, NJSL and Macrie filed a joint pleading in response, arguing that there was no need for Clayton to seek Board authority as it had never held itself out to provide rail service for compensation and had no intent to do so in the future. On October 22, 2009, James Riffin (Riffin) filed (1) a notice of intent to participate as a party of record, and (2) comments in which he specified a number of findings he wanted the Board to make in connection with the notices. In response, on October 30, 2009, NJSL and Macrie jointly filed a motion to strike the Riffin filing and a reply to that filing.² The Board found the explanation in the NJSL's and Macrie's October 14, 2009 joint response to be sufficient to permit service and publication of the notices, which the Board did on December 11, 2009. The exemption became effective on December 25, 2009.

DISCUSSION AND CONCLUSIONS

At the time the Board served and published the notices in these proceedings, we deferred resolution of a number of issues raised by the parties. We will address those issues here.

The first issue before us is whether Clayton, the track's owner and lessor, must seek and obtain Board acquisition authority and assume a residual common carrier obligation to perform service in the event of NJSL's absence. Based on Wisconsin Central Ltd. v. STB, 112 F.3d 881 (7th Cir. 1997), we find that Clayton need not seek such authority, as it would not acquire a residual common carrier obligation.

² Inasmuch as we find that a number of the issues raised by Riffin warrant discussion, and in the interest of compiling a more complete record in this matter, we will deny NJSL's and Macrie's joint motion to strike and accept and consider Riffin's filing. In fairness, we will also accept and consider NJSL's and Macrie's joint reply.

In Wisconsin Central, the line at issue was first abandoned, then sold, and the property was later leased to an operator who provided for-hire service. However, the operation was not profitable, and the operator sought discontinuance authority from the Board's predecessor, the Interstate Commerce Commission (ICC). Although the ICC granted discontinuance authority, it stated that the underlying owner-lessor would need to seek abandonment authority before the line could be sold or removed from the interstate rail network. See id. at 884. On appeal, the court reversed the ICC's decision, stating that "the mere act of leasing the line [to the operator] was insufficient to confer any common carrier obligation on [the underlying owner]." Id. at 883. The underlying owner in Wisconsin Central was not required to seek abandonment authority; for the same reasons, we conclude that Clayton need not seek acquisition authority here. There is no evidence on this record that Clayton has done anything more than merely lease its property to NJSL for the provision of rail freight service.

That said, Clayton's lease of its property for common carrier freight rail service does impose some obligations on Clayton with respect to the leased property. Clayton cannot: (1) exercise control over NJSL's operations such that Clayton must become a common carrier itself, thus implicating the Board's jurisdiction, or (2) interfere with NJSL's ability to meet its common carrier obligation to its shippers.

In the line of cases that began with Maine, Department of Transportation—Acquisition & Operation Exemption—Maine Central Railroad, et al., 8 I.C.C.2d 835 (1991), we have permitted an owner to acquire only the assets of a rail line, without acquiring a common carrier obligation over the line, under certain circumstances based on an analysis of the owner's degree of control and potential for interference with the rail carrier operating over the line. For example, in Maine, Department of Transportation—Maine Central Railroad, the State of Maine, acting through its Department of Transportation (MDOT), sought to acquire only the physical assets of an active rail line. There, the carrier selling the rail line to MDOT planned to continue providing common carriage through an agreement with MDOT that granted a permanent unconditional easement to the operator (i.e., the carrier selling the line). The ICC did *not* impose a common carrier obligation on MDOT under those circumstances because, in part, the underlying agreement ensured that the operator had "both the full right and necessary access to maintain, operate and renew the line." Id. at 837 (footnote omitted). Cf. Orange County Transp. Auth.—Acquis. Exemption—the Atchison, Topeka & Santa Fe Ry., 10 I.C.C.2d 78 (1994) (finding that a carrier selling a line did not retain a sufficient ability to serve freight shippers to justify divesting the agency of authority over the acquisition); S. Pac. Transp. Co.—Aban. Exemption—Los Angeles County, Cal., 8 I.C.C.2d 495 (1992) (finding that the agreement at issue did not allow the acquiring operator enough freedom from interference to divest the agency of authority over the transfer of certain lines).

In this case, the Board can examine the relationship between Clayton and NJSL because the operating agreement between those entities is in the record. In similar situations in the future, operators should include with their filing copies of their lease or operating agreement with the owner to resolve expeditiously any concerns the Board may have.

In examining this agreement, we find that it does not provide Clayton with control over NJSL that would impute a common carrier obligation to Clayton or allow Clayton to interfere with NJSL's freight operations. The agreement states that "[t]he Owner grants NJSL the exclusive and unlimited right to access and operate over the Line as a common carrier"³ Moreover, other provisions of the agreement reflect that general statement. For instance, Clayton does not have the right to remove NJSL from the line (except after a material breach and failure to cure such a breach)⁴; and while Clayton can grant long-term property interests to third parties (for example, outdoor advertising or installation of fiber optic cables), those property interests cannot interfere with the NJSL's operation of the line.⁵ In sum, we conclude that, on the basis of the parties' agreement, Clayton does not exercise control over NJSL's operations and cannot otherwise interfere with NJSL's ability to meet its common carrier obligation to its shippers.

In his comments, Riffin asks the Board to find that the property at issue is a line of railroad rather than private track. Riffin is also concerned about NJSL's statement in another Board proceeding suggesting that NJSL will not cooperate with Riffin should he acquire a nearby line. Riffin asks the Board to instruct NJSL that it must deal with all shippers and carriers, including Riffin, indiscriminately.⁶

Riffin's first request is based on his suggestion that the property remains a line of railroad rather than private track because the previous owner, Conrail, never consummated the abandonment authority granted to it in Conrail Abandonment in Burlington & Ocean Counties, N.J., AB 167 (Sub-No. 741N) (ICC served Mar. 11, 1985). Riffin further asserts that it is "unknown" whether Ashland transported rail cars for shippers other than Clayton and held itself out as a common carrier over the track.⁷ Riffin has offered no evidence for his suggestions and

³ Macrie & NJSL Reply Ex. C, ¶ 1, Oct. 14, 2009.

⁴ Even if NJSL materially breached the lease, Clayton would still first have to obtain adverse discontinuance authority from the Board before Clayton could evict NJSL.

⁵ Id. ¶ 4.D.

⁶ We address and resolve above three other issues raised by Riffin: Clayton's need to seek acquisition authority (none), Clayton's common carrier obligation (none), and Clayton's rights as a carrier (Clayton is not a carrier). We will not address any other issues raised by Riffin and not specifically mentioned here, as they represent an inappropriate attempt by Riffin to transform this case into a declaratory order proceeding to address a variety of matters that need not be resolved here, but that Riffin suggests may be relevant to other proceedings in which he is involved.

⁷ Riffin's Notice of Intent to Participate as a Party of R. & Comments 4.

questions about whether the track was fully abandoned by Conrail⁸ or was private track at the time the notices were filed in this proceeding. Without such evidence, we have no basis to reject the verified notice of exemption filed by the parties.

Riffin's request that we caution NJSL to cooperate with him is now moot. Riffin and his associate, Eric Strohmeier, attempted to purchase a portion of a line in Jersey City, N.J. adjacent to NJSL's property. Riffin and Strohmeier invoked the offer of financial assistance (OFA) forced sale provisions of 49 U.S.C. § 10904 when the line's owner, Conrail, sought authority to abandon the line in Consolidated Rail Corp.—Abandonment Exemption—In Hudson County, N.J., AB 167 (1190X). The Board, however, exempted the line from the OFA provisions of § 10904 in Consolidated Rail Corp.—Abandonment Exemption—In Hudson County, N.J., AB 167 (1190X) (STB served May 17, 2010). Riffin, therefore, did not acquire the line.

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

It is ordered:

1. The NJSL and Macrie motion to strike is denied.
2. Our prior decision is clarified to the extent set forth in this decision.
3. NJSL is directed to serve a copy of this decision on Clayton within 5 days of the service date of this decision and to certify to the Board that it has done so.
4. This decision is effective on its date of service.

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

⁸ In 1997, the Board added a notice of consummation requirement. Pursuant to 49 C.F.R. § 1152.29(e)(2) and 49 C.F.R. § 1152.50(e), the filing of a consummation notice has been deemed conclusive evidence of consummation of an abandonment. In 1985, when the Board granted Conrail abandonment authority, no such rule was in effect. At that time, consummation was determined through an analysis of various indicia of the carrier's objective intent. As noted above, Riffin has presented no evidence that Conrail did not consummate the abandonment of this track.