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SERVICE DATE – JUNE 13, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35120

PRO-GO CORP.—OPERATION EXEMPTION—IN SUFFOLK COUNTY, NY

STB Finance Docket No. 35126

PRO-GO CORP.—OPERATION EXEMPTION—IN SUFFOLK COUNTY, NY

Decided: June 12, 2008

BACKGROUND

On February 28, 2008, Pro-Go Corp. (Pro-Go) filed a verified notice under the class exemption at 49 CFR 1150.31 in STB Finance Docket No. 35120 to operate over a set of three railroad tracks totaling about 1 mile in length—described as extending between approximately mileposts 50 and 52 on the Long Island Railroad (LIRR) in Holtsville, Suffolk County, NY. By decision served on March 13, 2008 (March 2008 Decision), the notice was rejected because Pro-Go failed to submit sufficient information for the Board to determine whether the proposed transaction qualified for the class exemption. Specifically, the rejection decision explained that the notice was unclear as to: (1) the relationship between Pro-Go, Prima Asphalt Concrete, Inc. (Prima) (the owner of a portion of the line), and other area shippers; (2) whether Pro-Go had been providing for-hire rail service since 1988 without authority; (3) whether Prima held common carrier authority; (4) the agreement giving rise to, and the impetus for, the operation exemption; and (5) the specific location of the line. The rejection was without prejudice to Pro-Go refiling a new notice or other request for authority providing evidence in response to the Board's questions.

On April 2, 2008, Pro-Go simultaneously filed a petition in STB Finance Docket No. 35120 for reconsideration of the March 2008 Decision and a new verified notice of exemption in STB Finance Docket No. 35126 seeking the identical authority as before. Pro-Go's filings contain additional information in response to the specific questions raised in the March 2008 Decision. Subsequently, by decision served on April 16, 2008, a housekeeping stay was imposed on the Federal Register publication date of the notice and the effective date of the exemption in STB Finance Docket No. 35126, to allow the Board to consider the issues raised in the petition for reconsideration in STB Finance Docket No. 35120.

DISCUSSION AND CONCLUSIONS

Pursuant to 49 CFR 1115.3, a petition for reconsideration must demonstrate that the prior decision involved material error or is materially affected because of new evidence or changed circumstances. Petitioner argues that the Board's decision in STB Finance Docket No. 35120 warrants reconsideration because of new evidence. However, evidence does not qualify as "new evidence" if it could have been placed before the Board in the original proceeding. Town of Springfield v. Surface Transp. Bd., 412 F.3d 187, 189 (D.C. Cir. 2005). Here, the only additional evidence petitioner provides is that requested by the Board to clarify the notice filed in STB Finance Docket No. 35120. However, because this information was available in February 2008 when the notice of exemption was filed, that information is not "new evidence." Thus, Pro-Go has not demonstrated grounds for reconsidering the prior decision, and its petition for such relief will be denied.

Turning now to the new notice of exemption, we will evaluate Pro-Go's responses to the questions posed to it in the March 2008 Decision. Pro-Go explains that William Fehr and Ronald Fehr own both Prima and Pro-Go, making them sister corporations. Pro-Go further claims that, since 1988, it has not provided any for-hire transportation; rather, it has only offloaded stone, propane, and other materials delivered by a rail common carrier¹ for Prima without compensation. Pro-Go adds that its past activities were permitted over the Prima-owned track in accordance with a 1988 non-exclusive license agreement, and Pro-Go states that it now wishes to operate as a for-hire common carrier over the track and that the same agreement would allow it to do so. Also, as requested in the March 2008 Decision, Pro-Go has provided a legal description of the track on which it seeks to operate and a new map.² Lastly, Pro-Go cites Midtown TDR Ventures LLC—Acquisition Exemption—American Premier Underwriters, Inc., The Owasco River Railway, Inc., and American Financial Group, Inc., STB Finance Docket No. 34953 (STB served Feb. 12, 2008) (Midtown), to support its argument that Prima (which has no Board authority) does not have to seek authorization from the Board in connection with Pro-Go's filing because Prima allegedly falls under the so-called "State of Maine" exception created by Maine, DOT—Acquisition Exemption—Maine Central R. Co., 8 I.C.C.2d 835 (1991) (State of Maine).

Our evaluation of all of the information that has been provided leads us to conclude that, with respect to Pro-Go, the issues raised in the Board's prior decisions related to its operation exemption have been resolved. Thus, we will accept the notice filed in STB Finance Docket No. 35126.

¹ In 1988, the railroad was the LIRR. Today, the freight common carrier is the New York & Atlantic Railway.

² Based on additional information supplied by Pro-Go, the legal description of the line would now read: a rail line between its western connection to the Long Island Railroad (LIRR) located 3100 feet east of County Road 19 (Patchogue/Holbrook Road) and its eastern connection to the LIRR located 675 feet west of County Road 97 (Nicolls Road). We find this description to be adequate.

As to Prima, however, we reject Pro-Go's claim that, on the basis of State of Maine and Midtown, Prima does not need Board authorization for this transaction. In State of Maine, our predecessor, the Interstate Commerce Commission (ICC), held that agency authority is not required for the transfer of physical assets if no common carrier rights or obligations will be transferred and the transaction will prevent the new owner of the assets from interfering with the operator's ability to carry out its common carrier obligation. Importantly, the transferor of the line there maintained a permanent exclusive easement to operate over the line that gave it both the full right and necessary access to maintain, operate and renew the line; in other words, the transferor in State of Maine was found to have "both the intent and unconditional ability to assume and exercise its common carrier rights and obligations." State of Maine, 8 I.C.C.2d at 837.³ In Midtown, the Board found that a buyer did not assume a common carrier obligation because the line it acquired was already subject to a lengthy lease and trackage rights agreement that gave exclusive control to a transportation authority and two freight carriers, and because the seller never had any common carrier obligation to begin with, but had been simply a noncarrier fee owner of the property.

Here, the only evidence Pro-Go submits in support of its State of Maine argument is the parties' 1988 license agreement. But that agreement between Pro-Go and Prima is not analogous to the agreements in cases such as State of Maine or Midtown. First, the 1988 license agreement is non-exclusive. Second, the agreement is not permanent but is cancelable upon 60 days' written notice in the event of sale of the property by the licensor or by mutual agreement of the parties. And the requirement of mutual agreement to dissolve the license agreement is of little importance here because the entities have the same owners; in fact, the representative's signature for Prima on the license agreement appears to be identical to the representative's signature for Pro-Go.

In sum, the parties' agreement does not ensure Pro-Go's unconditional ability to carry out its common carrier obligation or that there will be no interference by Prima with that obligation. Consequently, we conclude that Prima does not fall under the State of Maine exception. For this reason, and because the transaction will make this track a regulated line of railroad, Prima must seek acquisition authority from the Board. Publication of Pro-Go's notice in STB Finance Docket No. 35126 and effectiveness of this exemption will be delayed until Prima seeks and obtains the necessary authority. In the meantime, the stay in STB Finance Docket No. 35126, imposed in the April 16, 2008 decision, will remain in effect.

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

It is ordered:

1. Pro-Go's petition for reconsideration in STB Finance Docket No. 35120 is denied.

³ In State of Maine, the ICC emphasized that this determination must be made on a case-by-case basis, and that the transaction should be submitted to the agency in advance with a copy of the agreement. State of Maine, 8 I.C.C.2d at 838.

2. The stay imposed in STB Finance Docket No. 35126 will remain in effect pending the filing of a request for acquisition authority by Prima and further order of the Board.

3. This decision is effective on its service date.

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

Anne K. Quinlan
Acting Secretary