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SERVICE DATE – DECEMBER 6, 2010

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35360

SAN FRANCISCO BAY RAILROAD-MARE ISLAND PETITION FOR EMERGENCY SERVICE ORDER AND PETITION FOR DECLARATORY ORDER—LENNAR MARE ISLAND, LLC

Decided: December 3, 2010

Digest: San Francisco Bay Railroad-Mare Island (S.F.-M.I. R.R.) has requested that the Board declare that S.F.-M.I. R.R.'s license from the Board to operate over an 8-mile section of rail track in Vallejo, Cal., gives S.F.-M.I. R.R. the right to operate over the track. In the alternative, S.F.-M.I. R.R. requested to provide emergency service over that track. As a result of a decision, also served today, in a related proceeding, S.F.-M.I. R.R. does not have a license from the Board to operate over the track at issue. Therefore, the Board will not issue the requested declaration. Moreover, S.F.-M.I. R.R. has not demonstrated that emergency service is needed, so the Board is denying the request for emergency service authority as well.¹

BACKGROUND

Mare Island is the southern tip of a peninsula jutting into San Pablo Bay, as the northernmost part of San Francisco Bay is called. Directly to the east of Mare Island is the City of Vallejo, Cal. (Vallejo), across a narrow channel called the Mare Island Strait. For more than 150 years the U.S. Navy maintained a base on Mare Island. Among the facilities the Navy operated on the Island was the Mare Island Shipyard. In order to support its activities on the Island, the Navy installed and operated railroad track. The track crosses Mare Island Strait on a causeway that connects the Island to Vallejo. The Navy closed the base in 1996. In anticipation of acquiring and redeveloping the base for civilian use, Vallejo appointed Lennar Mare Island, LLC (LMI) the master developer in 1997. In 2002, the U.S. Government sold Mare Island to Vallejo. The same day, Vallejo conveyed to LMI a 653-acre portion of Mare Island that included the former Navy trackage. The massive redevelopment project on Mare Island is ongoing.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

Prior to the selling of Mare Island to Vallejo, the U.S. Navy granted permission to California Northern Railroad (California Northern) to provide switching services at shipyard facilities on Mare Island. California Northern did not obtain authority from this agency to operate over the track. California Northern provided switching service between the Island and the Vallejo Branch of the Southern Pacific Railroad, now the Vallejo Branch of the Union Pacific Railroad, at Flosden Acres in Vallejo, Cal. until March 2008 when it ceased operations.

On September 28, 2009, San Francisco Bay Railroad-Mare Island (S.F.-M.I. R.R.), a noncarrier, filed a verified notice of exemption under 49 C.F.R. § 1150.31 to operate as a line of railroad approximately a total of 8 miles of track beginning on Mare Island and running across the Mare Island causeway to Flosden junction in Vallejo, Cal.² The Board published the notice of exemption on October 14, 2009, and the exemption became effective on October 28, 2009. S.F. Bay R.R.-Mare Island—Operation Exemption—Cal. N. R.R., FD 35304 (STB served Oct. 14, 2009).

On March 15, 2010, S.F.-M.I. R.R. filed a request to provide, on an emergency basis, the same service authorized in FD 35304 to shippers on Mare Island. S.F.-M.I. R.R. also requested a Board order declaring that, as a common carrier, S.F.-M.I. R.R. has the right and obligation to provide service over the track and that, in the absence of an agreement with LMI, the Board may impose the terms for S.F.-M.I. R.R.'s operations. On August 26, 2010, S.F.-M.I. R.R. filed a supplemental submission due to "a significant change in the demand for service from potential rail shippers located on Mare Island." On September 2, 2010, LMI filed a response. Vallejo filed a reply on September 15, 2010, seeking to clarify statements made by S.F.-M.I. R.R. in its supplemental submission.³

On March 22, 2010, Vallejo and LMI replied separately in opposition to the emergency service request. On March 25, 2010, S.F.-M.I. R.R. filed a request for leave to file a reply to those pleadings, accompanied by the reply.⁴ LMI filed a reply to the declaratory order request on April 5, 2010.

² On the same day, Mr. David Gavrich filed a notice of exemption to continue in control of S.F.-M.I. R.R. upon S.F.-M.I. R.R.'s becoming a Class III rail carrier. See David Gavrich—Continuance in Control Exemption—S.F. Bay R.R.-Mare Island, FD 35303 (STB served Oct. 14, 2009).

³ Vallejo claimed that S.F.-M.I. R.R. mischaracterized 3 items, and clarified that (1) S.F.-M.I. R.R. is wholly independent from Vallejo; (2) Vallejo did not direct or require S.F.-M.I. R.R. to file a notice of exemption in FD 35304; and (3) the agreement between Vallejo and S.F.-M.I. R.R. permits, but does not require S.F.-M.I. R.R. to operate over Vallejo's track. Vallejo's Reply, Sept. 15, 2010.

⁴ Although replies to replies are not permitted, so that we can better understand S.F.-M.I. R.R.'s unique positions in this case, the Board will consider S.F.-M.I. R.R.'s submission.

DISCUSSION AND CONCLUSIONS

S.F.-M.I. R.R. has requested (1) authority under 49 U.S.C. § 11123 to provide emergency service to shippers on Mare Island, and (2) an order declaring that, as a common carrier, S.F.-M.I. R.R. has the right and obligation to provide service over the track and that, in the absence of an agreement with LMI, the Board may impose the terms for S.F.-M.I. R.R.'s operations. The request for emergency service will be denied because the record does not show that an emergency exists. We also will not issue the requested declaratory order.

Emergency service. The Board may issue an emergency service order when there exists “an emergency situation of such magnitude as to have substantial adverse effects on shippers, or on rail service in a region of the United States, or that a rail carrier . . . cannot transport the traffic offered to it in a manner that properly serves the public.” 49 U.S.C. § 11123(a). Emergency or alternative service orders are designed to remedy “a substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent carrier.” 49 C.F.R. § 1146.1(a). Such orders are issued to preserve rail service where an existing carrier is providing poor or no service and shippers need immediate, alternative service.

The record fails to show any need by Mare Island shippers or receivers for common carrier rail service on an emergency basis. Currently, the only shipper on Mare Island receiving rail service is Alstom Transportation Services, Inc., which is being served by S.F.-M.I. R.R. in private carriage, a service that is not subject to the Board's jurisdiction (and that is not opposed by LMI). S.F.-M.I. R.R. asserts that other shippers on Mare Island, including XKT Engineering, Inc., (XKT) and several contractors and sub-contractors moving contaminated soil as part of LMI's redevelopment of Mare Island, also need rail service, which they are not getting because LMI will not allow S.F.-M.I. R.R. access to Mare Island. To the contrary, however, the record shows that LMI has contacted a different switching operator—T&O Railroad Company, doing business as Mare Island Rail Service (MIRS)—to provide service to businesses on Mare Island. The evidence indicates that MIRS is ready and willing to haul shipments off the island and deliver cars to S.F.-M.I. R.R., but S.F.-M.I. R.R. is unwilling to agree to that arrangement out of concern for how it might impact this case. Further, LMI provides testimony that it and MIRS have facilitated rail access for XKT. S.F.-M.I. R.R. has not demonstrated, through shipper testimony or otherwise, that Mare Island businesses have a need for rail service that LMI's chosen provider, MIRS, cannot meet. Granting S.F.-M.I. R.R. the emergency service authority it seeks would merely subvert LMI's choice of switching operators.

In sum, because the elements necessary for emergency service under 49 U.S.C. § 11123 are not present here, S.F.-M.I. R.R.'s request for emergency service authority is denied.⁵

Declaratory order. S.F.-M.I. R.R. asks the Board to declare that it has the right and obligation to provide service over the track and that the Board may impose the terms for those operations. In a separate decision served today, however, the Board has found S.F.-M.I. R.R.'s

⁵ In view of our decision that the standards for emergency service have not been met, the Board need not reach the remaining issues raised by the petitioner in its petition.

notice of exemption in FD 35304 to operate the line materially misleading by omission, and thus void ab initio.⁶ As a result, S.F.-M.I. R.R. has no operating authority over the line.

The Board notes, moreover, that even if S.F.-M.I. R.R. had such authority, it would not be entitled to the requested declaration, because the recipient must secure an agreement with the underlying owner before it can begin service. See Iowa, Chi. & E. R.R.—Acquis. & Operation Exemption—Lines of I&M Rail Link, LLC, FD 34177, slip op. at 15 (STB served July 22, 2002); Lackawanna Cnty. R.R. Auth.—Acquis. Exemption—F&I Realty, Inc., FD 33905 et al., slip op. at 6 (STB served Oct. 22, 2001). Here, the record is clear that S.F.-M.I. R.R. has neither any legal property interest nor contractual rights to operate over this track. Thus, even if S.F.-M.I. R.R. were to hold operating authority from the Board, S.F.-M.I. R.R. would not have the ability to exercise it.

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

It is ordered:

1. S.F.-M.I. R.R.'s request for leave to file a reply to a reply is granted and its March 25, 2010 filing will be accepted and considered.
2. S.F.-M.I. R.R.'s petition for emergency service authority and petition for a declaratory order are denied.
3. This decision is effective on its date of service.

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

⁶ S.F. Bay R.R.-Mare Island—Operation Exemption—Cal. N. R.R., FD 35304 (STB served December 6, 2010). In that decision, we also find Mr. Gavrich's related continuance in control exemption in FD 35303 moot.