

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35376

SWANSON RAIL TRANSFER LP—OPERATION EXEMPTION—OLIVE INVESTORS

Decided: May 28, 2010

On May 12, 2010, Swanson Rail Transfer LP (Swanson), a noncarrier, filed a notice of exemption under 49 C.F.R. § 1150.31 to operate over approximately 1,805 feet of track located in the City of Philadelphia, Pa. According to Swanson, Olive Investors (Olive), the current owner of the track and its affiliate, purchased the track from Consolidated Rail Corporation (Conrail) and has leased the track to Swanson. Attached to Swanson's notice is a permit from the Pennsylvania Department of Environmental Protection that allows Swanson to construct and operate a waste transfer facility on the property that will accept construction and demolition material and municipal solid waste by truck. Swanson will then transport this traffic by rail to an interchange with Conrail.

Where a notice raises too many unanswered questions, the Board will reject it. See FPN-USA, Inc.—Operation Exemption—Tijuana-Tecate Shortline, FD 35155, slip op. at 3 (STB served Aug. 8, 2008); Pro-Go Corp.—Operation Exemption—in Suffolk County, N.Y., FD 35120 (STB served Mar. 13, 2008). Moreover, where a notice fails to satisfy the Board's rules as incomplete, that is also a basis for rejection. Wash. & Idaho Ry.—Lease & Operation Exemption—BNSF Ry., FD 35370 (STB served Apr. 23, 2010). As subsequently discussed, Swanson's notice is deficient on both grounds.

The notice raises a number of issues that have not been adequately addressed. Specifically, the notice is ambiguous as to how and when Olive came into possession of the track at issue. The status of the track at the time Olive acquired it is also unexplained. Swanson does not disclose whether Olive acquired an active rail line and, if so, when Olive obtained acquisition authority; in the alternative, Swanson does not disclose whether Conrail abandoned the track prior to Olive's acquisition. Further, the notice states that Olive will be a "residual common carrier," but provides no evidence or explanation in support of that assertion. If the resolution of these issues is too complex to be handled by a notice of exemption, Swanson should consider filing a petition for exemption or a full application. See 49 U.S.C. §§ 10901-02; 49 U.S.C. § 10502.

The notice is also deficient because it is incomplete. Pursuant to 49 C.F.R. § 1150.33, a notice must contain, inter alia: the full name and address of the applicant; the mileposts of the subject property, including any branch lines; and a map that clearly indicates the area to be served, including origins, termini, stations, cities, counties, and states. Here, the notice is lacking

many of these elements. First, the notice contains only the contact information for the applicant's counsel and not the applicant's full name and address. While contact information appears in the appendix on a letter regarding Swanson's Pennsylvania construction permit, it is unclear as to whether that address is Swanson's business address. Second, the notice states that the track at issue has no mileposts and instead references "the property line of Conrail at Pattison Avenue in Philadelphia, PA adjacent to and east of both the Conrail main line and Rt. 95 to the Rt. 76 overpass." Although the Board has in the past accepted a description of a line in lieu of mileposts where none exist, that description must give reference points, such as street intersections and distances from those points. Third, the map of the property included with the filing is insufficient to allow the Board to determine the location of the track, because the map is small and unclear. Consequently, the notice fails to meet the requirements under 49 C.F.R. § 1150.33.

Finally, pursuant to 49 C.F.R. § 1150.32(e), when a transaction will result in the creation of a Class III railroad that will have a projected annual revenue of more than \$5 million, certain advance notice to labor must be provided. A carrier qualifies as a Class III if its annual revenues are \$20 million or less as measured in 1991 dollars. 49 C.F.R. § 1201. Here, Swanson has certified that its projected revenues will qualify it as a Class III carrier but does not indicate whether its revenues will exceed \$5 million and whether the requirement to give advance notice to labor is triggered. Therefore, Swanson's certification must address whether Swanson's annual revenues will exceed the \$5 million threshold.

While the notice will be rejected, this decision does not preclude Swanson from filing a new notice of exemption that provides clear and adequate information and meets the relevant criteria, or from filing a petition for exemption or a full application if the authority it seeks will raise controversial or complex issues.

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

It is ordered:

1. The notice of exemption is rejected without prejudice to refiling.
2. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.