

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35120

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

Decided: March 13, 2008

On February 28, 2008, Pro-Go Corp. (Pro-Go) filed a verified notice of exemption (the Notice) under 49 CFR 1150.31 to operate a rail line—a set of three tracks totaling about 1 mile in length—extending between approximately mileposts 50 and 52 on the Long Island Railroad (LIRR) in Holtsville, Suffolk County, NY. In the notice, Pro-Go states that shipper Prima Asphalt Concrete, Inc. (Prima), allowed it to use the line beginning in 1988 to receive shipments of stone for Prima and other shippers. Pro-Go adds that, “until recently,” it also received shipments of propane gas, bentonite clay, and other industrial products over the rail line. Pro-Go states that it plans to “restart” movements on the rail line as soon as its requested exemption is granted.

The notice of exemption will be rejected. Pro-Go fails to submit sufficient information for the Board to determine whether the proposed transaction qualifies for the class exemption at 49 CFR 1150.31, et seq.

First, subsection 1150.33(c) requires that the notice contain “[a] statement that an agreement describing the creation of a class III railroad has been reached or details about when an agreement will be reached.” The notice states that Pro-Go was established in 1988. That year, the notice says, Pro-Go acquired from Max Fehr, father of the president of Prima Asphalt Concrete, Inc. (Prima), a one-acre parcel upon which some railroad track existed and upon which, subsequently, an additional piece of railroad track was constructed. Also, apparently later in 1988, Pro-Go obtained a “license” from Prima, “which allowed Pro-Go to use the entire set of railroad tracks over which Pro-Go receives stone shipments for Prima, Tilcon Stone and others.” Prima, the notice indicates, acquired five acres of real estate from Max Fehr in approximately 1963 bordering the LIRR and built a railroad track between milepost 50 and milepost 52 of the LIRR. Additional trackage was constructed in 1963 and 1964, and a second track was constructed in 1972.

The facts recited in the notice raise questions which the notice does not answer. Is the agreement that is required to be identified under section 1150.33(c) the 1988 conveyance from Max Fehr, the 1988 “license” from Prima, both, or something else? Does Pro-Go have a corporate relationship with Prima, Tilcon Stone, or any of the other shippers located on the trackage? Has Pro-Go been conducting for-hire service without authority since 1988? Why is Pro-Go seeking Board authority for its operations now? The Board needs this information to be

able to determine what the proposed transaction is and whether this transaction properly qualifies for the class exemption, or whether an individual petition for exemption or a formal application will be needed in order to properly address the issues raised by this transaction.

Second, subsection 1150.33(e)(1) requires that the notice contain a brief summary of the transaction, including “. . . the name and address of the railroad transferring the subject property.” Pursuant to the notice, Pro-Go would be acquiring authority to operate over the track in question. Because for-hire operations are to be conducted over the track, and perhaps are already being conducted, the owner of the rail line generally requires authority from the Board pursuant to 49 U.S.C. 10901. The notice does not indicate whether Prima, the owner of a portion of the line over which Pro-Go would conduct its operations, has common carrier authority from this agency. Moreover, although Pro-Go seeks authority only to operate the line, in some places the notice refers to the transaction as an acquisition of assets or an acquisition of the line. Pro-Go must clarify Prima’s status and spell out exactly what is transpiring in the transaction for which it has invoked the class exemption.

Finally, subsections 1150.33(e)(3) and (4) require the notice to include the mileposts of the subject property (including any branch lines) and the total route miles, respectively; and subsection 1150.33(f) requires a map clearly indicating the area to be served. Taken together, the line description and map provided in the notice do not provide sufficiently clear information regarding the location and extent of the line. In any new filing, Pro-Go must provide a better description of the location and extent of the line at issue. Is the only trackage involved (which Pro-Go describes as approximately 1 mile in length) the two parallel tracks totaling approximately 4000 feet and the third track totaling approximately 650 feet that Pro-Go has mentioned in its notice? The trackage is said to be between LIRR mileposts 50 and 52 but it is unclear whether those are the actual beginning and ending mileposts of the line in question, and the map appended to the notice does not clearly show any parallel tracks, the location of a distinct third track, or any milepost locations.

For all of these reasons, Pro-Go’s notice will be rejected. The rejection is without prejudice to Pro-Go refiling a new notice of exemption or some other request for authority which provides clear and adequate information as described herein.

It is ordered:

1. The notice of exemption is rejected without prejudice to refiling consistent with this decision.

2. This decision will be effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Anne K. Quinlan
Acting Secretary