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SERVICE DATE – OCTOBER 20, 2011

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35527

ERIC STROHMEYER AND JAMES RIFFIN—ACQUISITION AND OPERATION  
APPLICATION—VALSTIR INDUSTRIAL TRACK IN MIDDLESEX AND  
UNION COUNTIES, N.J.

Digest:<sup>1</sup> The Board rejects the application as inherently defective and incomplete because it seeks to limit the requested certificate of public convenience and necessity in such a way as to exclude the transportation of toxic inhalation hazard shipments from the applicants' common carrier responsibilities.

Decided: October 18, 2011

On September 1, 2011, Eric Strohmeyer and James Riffin filed an application under 49 U.S.C. § 10901 to acquire and operate approximately 800 feet of industrial track in Plainfield, Union County, N.J. and Dunellen, Middlesex County, N.J., which is currently owned by Valstir LLC, a noncarrier (Valstir Industrial Track). Strohmeyer and Riffin claim that they intend to provide rail service as a common carrier by hauling freight between an interchange point with Consolidated Rail Corporation (Conrail) at the western end of the Valstir Industrial Track and four industrial/commercial properties adjacent to the track. Strohmeyer and Riffin also propose to establish a transload facility and provide transload service to noncontiguous local shippers.

On September 8, 2011, Conrail filed a letter reply urging the Board to reject the application or hold its acceptance in abeyance. As a basis for its position, Conrail claims that Strohmeyer and Riffin omit a significant amount of the information required by Board regulations for § 10901 applications, including traffic projection studies, an operating plan, information about the operating experience and record of the proposed operator, expected operating economies, information about acquisition and operational costs, and details about the manner in which Strohmeyer and Riffin propose to finance the track's acquisition and operation. The letter reply asserts that while Strohmeyer and Riffin have sought a temporary waiver of their obligation to submit this information to the Board, the application is defective as a matter of law unless and until such information is provided.

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<sup>1</sup> 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).

We reject the application.<sup>2</sup> While Conrail correctly notes that Strohmeyer and Riffin omit a significant amount of the material information required under 49 C.F.R. pt. 1150 subpart A—Applications Under 49 U.S.C. 10901, their application must be rejected because it contains an even more basic defect: Strohmeyer and Riffin expressly condition their request to acquire and operate the Valstir Industrial Track on receiving a common carrier obligation that would be limited by excluding any obligation to transport a shipment designated as a toxic inhalation hazard (TIH). As the Board recently explained, freight “[r]ailroads have not only a right but a statutory common carrier obligation to transport hazardous materials ‘where the appropriate agencies have promulgated comprehensive safety regulations.’”<sup>3</sup> A number of federal agencies have promulgated extensive regulations governing the transportation of hazardous materials by rail.<sup>4</sup> Because freight rail carriers possess this statutory obligation to transport hazardous materials (including TIH), § 10901 applications that seek to limit the requested certificate of public convenience and necessity in such a way as to exclude the transportation of TIH from the applicant’s common carrier responsibilities are inherently defective, and therefore incomplete.

Strohmeyer and Riffin seek to justify their request by asserting that they are unable to accommodate the transport of TIH shipments because the associated insurance premiums are cost prohibitive. Applicants for common carrier authority, however, “cannot lawfully make fulfilling their statutory obligations contingent upon whether they think it is ‘worth it’ to do so. Rather, a carrier must adhere to its statutory obligations even if it suffers hardship in so doing.”<sup>5</sup> The only appropriate mechanisms a railroad may employ to excuse itself, either permanently or temporarily, from its common carrier obligations on a line of railroad are abandonment, discontinuance, or embargo.<sup>6</sup> Any attempt to narrow the scope of these common carrier obligations preemptively in a § 10901 application is at odds with these precepts. Accordingly, the application filed by Strohmeyer and Riffin to acquire and operate the Valstir Industrial Track is hereby rejected on the grounds that it is inherently defective and incomplete.

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<sup>2</sup> In accordance with 49 C.F.R. § 1150.10(f), the Board either publishes a notice summary of a § 10901 application in the Federal Register or rejects the application if it is incomplete.

<sup>3</sup> BNSF Ry.—Petition for Declaratory Order, FD 35164, slip op. at 6 (STB served Dec. 2, 2010) (quoting Union Pac. R.R.—Petition for Declaratory Order, FD 35219, slip op. at 3-4 (STB served June 11, 2009)).

<sup>4</sup> Id. These include the Department of Transportation, the Federal Railroad Administration, the Transportation Security Administration, and the Nuclear Regulatory Commission. Id. at 6 n.14.

<sup>5</sup> Pejepscot Indus. Park, Inc.—Petition for Declaratory Order, 6 S.T.B. 886, 898 (2003) (citing Decatur County Comm’rs v. STB, 308 F.3d 710, 715 (7th Cir. 2002) (“A railroad may not refuse to provide services merely because to do so would be inconvenient or unprofitable.”)), reconsideration granted in part, 7 S.T.B. 220 (2003).

<sup>6</sup> Id. This assumes that service for a particular commodity has not been exempted from regulation under 49 U.S.C. § 10502.

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

It is ordered:

1. The application of Strohmeier and Riffin to acquire and operate the Valstir Industrial Track is rejected, for the reasons discussed above.

2. This decision is effective on its service date.

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