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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36063

JERSEY MARINE RAIL, LLC—PETITION FOR DECLARATORY ORDER

Digest:[1] The Board concludes that Jersey Marine Rail, LLC needs operating authority, but not construction authority, to carry out a proposed plan to rehabilitate certain track and operate over that track as a common carrier. The Board also grants the petitioner the necessary operating authority.

Decided: January 30, 2017

On August 31, 2016, Jersey Marine Rail, LLC (JMR), a noncarrier, filed a petition for declaratory order asking the Board to find that it is exempt from the provisions of 49 U.S.C. § 10901 to rehabilitate and restore rail service over a total of six tracks, including three tracks in a holding yard and three former spur tracks, all located within the City of Linden, N.J. JMR states that the total length of the six tracks is approximately 5,000 feet and that no construction of additional track is planned. In addition, JMR states that it seeks to become a Class III rail common carrier to operate over the tracks.

As discussed below, the Board concludes that the proposed transaction, as described by JMR, would require JMR to obtain Board authority to operate over the tracks as a common carrier, but that JMR would not need construction authority under § 10901 to perform the contemplated track rehabilitation work. For the reasons discussed below, the Board will grant an exemption for the required operating authority in this decision.

BACKGROUND

The tracks and land at issue, along with a similar proposal from JMR, have been the subject of two previous proceedings before the Board. In Jersey Marine Rail, LLC—Operation Exemption—Lines of R.R. Owned by Consol. Rail Corp. in the City of Linden, N.J., FD 36047, JMR filed a notice of exemption under 49 C.F.R. § 1150.31 proposing to rehabilitate tracks and restore rail service over three segments of track, all in Linden. The Board, by decision served on July 21, 2016, rejected that notice because: 1) there were questions as to whether JMR would be able to acquire the property needed for its operations and 2) JMR's notice described possible

[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).

plans for track construction activities that might have required prior approval from the Board under § 10901 and an environmental review under the National Environmental Policy Act.

On August 15, 2016, JMR filed a new notice of exemption under 49 C.F.R. § 1150.31 in Jersey Marine Rail, LLC, FD 36058. The transaction proposed there only included property in which JMR already has an interest. (See JMR Notice 1, Aug. 15, 2016.) However, following conversation with Board staff, JMR withdrew its notice in order to proceed by petition.

JMR then filed the petition for declaratory order in this proceeding. Although JMR did not file a petition for an individual exemption, it included evidence setting out why an individual exemption under § 10502 should be granted.

According to JMR's petition, it leases the existing tracks and land upon which it proposes to restore service and operate for a term, with extensions, totaling 50 years.[2] (Pet. 2.) JMR states that the six tracks consist of a three-track holding yard and three former industrial spur tracks, all of which should be currently categorized as ancillary industrial spur or side track excepted from Board licensing under 49 U.S.C. § 10906.[3] Of the three yard tracks, JMR states that two tracks are located within the portion of the leasehold that was purchased from Consolidated Rail Corporation (Conrail) and were within Conrail's Sound Shore Line right-of-way. (Id. at 1-2.) The third yard track is adjacent to, and to the east of, the other two yard tracks on Conrail's former right-of-way. The three former industrial spur tracks run from the yard and across the property toward the Arthur Kill (a tidal strait) in Linden. Conrail's Sound Shore Line, north of JMR's leasehold, remains active, serving an adjacent customer seven hundred feet to the north of JMR's leasehold. JMR states that its operations would average 10 cars per day, six days per week and that it would interchange with Conrail to connect with the national rail system. (Id. at 3,6.) JMR states that it plans to rehabilitate all six tracks and the switches that connect them to each other and to Conrail's Sound Shore Line. JMR attached a map showing the tracks to be rehabilitated. (Pet., Ex. A.)[4]

JMR states that all six tracks were previously served by a common carrier and have been out of service for up to 30 years. JMR describes its proposal as a rehabilitation of existing tracks, including removing all rails and ties, removing and cleaning existing ballast, replacing

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[2] JMR's notice in Docket No. FD 36058 states more precisely that the property is leased by Linden Marine, LLC (LM) and that the leasehold interest has been assigned to JMR. However, JMR does not state from whom LM leased the property.

[3] Ancillary industrial spur or side track is within the Board's jurisdiction, 49 U.S.C. § 10501(b), but under § 10906, Board authorization is not required for construction, acquisition, operation, abandonment, or discontinuance of such track.

[4] On September 6, 2016, JMR submitted a corrected map.

ballast, installing new ties, and using existing rails to the extent possible. (Id. at 6.) According to JMR, the tracks formerly served a chemical plant, and the area is a "brownfield site" in which contaminated areas have been capped by its former owner. It states that an environmental review by the Board is not necessary because the Union County Board of Freeholders prepared an environmental assessment of the area. JMR also submits letters obtained by a prior owner from the New Jersey Department of Environmental Protection setting conditions for land use and indicating that no further action is required. (Pet., Ex. C, D, and E.)

JMR states that it wishes to proceed with these rehabilitation plans as quickly as possible, and requests expedited consideration of its petition, because potential shippers have expressed interest in utilizing JMR's services by the spring of 2017. (Id. at 3, 14.) JMR asserts that it would initially serve a marine/rail transload facility, which would be located adjacent to its property. (Id. at 3). JMR states it would benefit those shippers who would otherwise be dependent largely on truck service by offering an additional form of modal competition. (Id. at 13.) In support of its proposed plans, JMR submits the verified statement of Ronald Klempner, the principal of JMR. (Pet., Ex. B.) Mr. Klempner states that Union County adopted a plan in June 2007 that called for rehabilitation and development of rail facilities serving Tremley Point (the area of Linden where these tracks are located). (Pet., Ex. F.)

Conrail filed comments on September 6, 2016. Conrail states that it neither supports nor opposes the petition, but it advises that there has been no arrangement or agreement between it and JMR concerning an interchange. Conrail states it has concerns about the feasibility of interchange and how such interchange would affect its operations. Conrail also contends that JMR's petition is premature in that it is unclear whether JMR's proposed rail operations depend on securing additional property beyond its leasehold.

On September 9, 2016, JMR replied to Conrail's comments, arguing that the current absence of an interchange agreement with Conrail is immaterial because, under 49 U.S.C. § 10742, Conrail will be required to interchange traffic with JMR. In addition, JMR states that the petition, in conjunction with a corrected map it filed, make clear that the leasehold already includes all the land needed to carry out its plans.

On September 19, 2016, the City of Linden, through its mayor Derek Armstead, submitted a letter in support of JMR's proposal. A letter of support for the project was also filed on October 27, 2016, by Congressman Donald M. Payne, Jr., representing the 10th District of New Jersey.

DISCUSSION AND CONCLUSIONS

Declaratory Order. The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321[5] to issue a declaratory order to eliminate a controversy or remove uncertainty. Here, JMR asks the Board to find that its proposal to rehabilitate tracks and restore rail service and to operate as a Class III rail carrier would be exempt from the provisions of 49 U.S.C. § 10901. The Board has broad discretion in determining whether to issue a declaratory order. See Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C. 2d 675 (1989). The Board finds that it is appropriate to resolve what, if any, regulatory approval is required for JMR to proceed with its plan.

This case presents the Board with a novel issue, requiring the application of two different lines of precedent. JMR would be a new carrier. Therefore, even though JMR is seeking to operate what now is ancillary § 10906 spur track (over which the Board has jurisdiction but not entry and exit licensing authority under 49 U.S.C. §§ 10901 and 10903), and not to construct and operate a new line of railroad (over which the Board has both jurisdiction and licensing authority), JMR must still obtain Board authority to operate because it would become a new carrier and the tracks at issue would constitute its entire operation. See Effingham R.R.—Pet. for Declaratory Order—Constr. at Effingham, Ill., 2 S.T.B. 606, 609-10 (1997), aff'd sub nom. United Transp. Union-Ill. Legislative Bd. v. STB, 183 F.3d 606 (7th Cir. 1999); New Eng. Transrail, LLC—Constr., Acquis., & Operation Exemption—in Wilmington & Woburn, Mass. (NE Transrail), FD 34797 (STB served July 10, 2007). In Effingham, Effingham Railroad Company (ERRC) proposed to construct 9,835 feet of new track and operate over that track and 206 feet of a "switch track," arguing that its proposal involved ancillary track excepted from Board licensing under §10906. The Board found that ERRC intended to be a rail carrier operating in a territory it had not served before, Effingham, 2 S.T.B. at 610, and required ERRC to seek construction and operation authority under 49 U.S.C. § 10901 for what would otherwise be § 10906 track.[6]

Although here JMR is proposing to operate as a new carrier, JMR states that it will not construct any new track, but would only rehabilitate existing track already under the Board's jurisdiction. That raises the second line of precedent that is relevant here: that a rail carrier can

[5] The Surface Transportation Board Reauthorization Act of 2015, Pub. L. No. 114-110, recodified certain provisions of title 49, United States Code, redesignating 49 U.S.C. § 721 as § 1321.

[6] The Board applied Effingham to reach the same result in NE Transrail, which involved a proposal to acquire 1,300 feet of existing track, construct 6,200 feet of new track, and operate as a rail carrier over the track. NE Transrail, slip op. at 11.

make improvements or relocate an existing line without seeking Board approval under §10901. See, e.g., Swanson Rail Transfer, LP—Declaratory Order—Swanson Rail Yard Terminal, FD 35424 (STB served June 14, 2011) (holding that upgrading or relocating an existing line does not require Board authorization); Mo. Cent. R.R.—Acquis. & Operation Exemption—Lines of Union Pac. R.R., FD 33508 et al. (STB served Sept. 14, 1999), aff'd sub nom. Lee's Summit v. STB, 231 F.3d 39, 42-43 n. 3 (D.C. Cir. 2000) (holding that a new owner of a rail line that has not been abandoned may repair, replace rehabilitate, or rebuild the line without Board authority); Union Pac. R.R.—Pet. for Declaratory Order—Rehabilitation of Mo.-Kan.-Tex. R.R. Between Jude & Ogden Junction, Tex., (Jude), 3 S.T.B. 646, 651 (1998) (holding that a railroad's rehabilitation and reactivation of track does not require approval under § 10901). JMR relies in particular on Swanson, which involved an existing carrier, to support its argument that construction licensing authority is not necessary for a carrier to improve existing lines, relocate facilities, and construct ancillary spur.

The facts of this case do not squarely match either Effingham or Swanson. Here, JMR is not an existing carrier, as in Swanson, but is seeking to become a new carrier. JMR also is seeking to rehabilitate existing Board-jurisdictional track – not build a new rail line that did not exist before, as in Effingham. While JMR anticipates "extensive rehabilitation work" and construction of switches, JMR's petition states that no new track will be constructed. (Pet. 2,6,8; V.S. Klempner 2-3.)

Based on these facts, the Board concludes that JMR would require operating authority to operate over the tracks as a common carrier, pursuant to Effingham. However, JMR would not require construction authority because no new line would be built. That conclusion is consistent with the principle, reflected in cases like Swanson, that existing Board-jurisdictional track, whether rail line or excepted ancillary track, may be repaired and rehabilitated without construction authority from the Board, as such work does not amount to construction of a new line requiring prior approval under § 10901. The fact that JMR seeks to become a rail carrier for the first time is not a distinction that justifies departing from the established general principle that repair and rehabilitation of existing Board-jurisdictional track does not require construction authority. Indeed, finding that construction authority is required here would needlessly broaden Effingham, where, as noted above, the new carrier proposed to build new Board-jurisdictional rail line that did not previously exist. Because rehabilitation of track is not construction under § 10901, the Board declines to expand Effingham to require construction authority for projects that involve *only* rehabilitation of existing Board-jurisdictional track.

In response to Conrail's concern about JMR's possible need for property outside its leasehold, JMR's corrected map and reply explain that its proposed operations would all take place on its leasehold. Further, once the Board grants the necessary authority for JMR to become a rail carrier, Conrail will be required to interchange traffic with JMR under 49 U.S.C. § 10742. Accordingly, the absence of an interchange agreement is not material to our decision here. NE Transrail, slip op. at 12. In response to Conrail's concerns about the flow of traffic, JMR also

states that it has informed Conrail that it would pay for a passing track to alleviate congestion on the Sound Shore Line.

Having concluded that JMR would require operating, but not construction, authority to carry out its proposal, the Board must now examine whether JMR's petition sufficiently demonstrates that an exemption for operating authority should be granted. The Board concludes that JMR has made the proper demonstration.

Rail Transportation Analysis. JMR has filed a petition for declaratory order instead of a petition for an individual exemption under § 10502, which would have been the appropriate means of seeking operating authority in this proceeding. JMR's petition, however, also addresses the exemption criteria under § 10502(a) and provides the necessary evidence for the Board to consider whether an exemption from the prior approval requirements of 49 U.S.C. § 10901 should be granted to permit JMR to operate over the above-described tracks as a rail common carrier. (See Pet. 10-13.)

Under § 10502(a), the Board must exempt a transaction or service from the prior approval requirements of § 10901 when it finds that: (1) those procedures are not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101 and (2) either (a) the proposal is of limited scope; or (b) the full application of those provisions is not necessary to protect shippers from an abuse of market power.

Based on the record, the Board concludes that the proposed operation by JMR, which was unopposed, qualifies for an exemption under § 10502 from the formal application procedures of § 10901. Detailed scrutiny of the proposal under 49 U.S.C. § 10901 is not necessary in this case to carry out the RTP. JMR's proposal would restore rail service to an industrial area and promote rail transportation in Linden and the surrounding area. An exemption would minimize the need for federal regulation, expedite consideration of JMR's proposals, and reduce regulatory barriers to entry for JMR to serve Tremley Point. 49 U.S.C. §§ 10101(2), (7), (15). The proposed operation exemption also would promote the RTP by providing rail access and intermodal competition to shippers lacking freight rail options and ensuring the continuation of a sound rail transportation system to meet the needs of the public, consistent with the goals of 49 U.S.C. §§ 10101(4) and (5). Other aspects of the rail transportation policy would not be adversely affected.

Nor is detailed scrutiny of the proposed transaction necessary to protect shippers from an abuse of market power. As explained above, the operations would enhance competition by providing rail service where it does not currently exist. Moreover, JMR proposes to alleviate increased congestion on the Sound Shore Line by funding a passing track.[7]

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[7] Because the Board concludes that regulation is not needed to protect shippers from the abuse of market power, it need not determine whether the transaction is limited in

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For the reasons discussed above, the Board will grant JMR's request for a declaratory order and exempt JMR from the prior approval requirements of 49 U.S.C. § 10901 to permit it to operate over the tracks at issue as a Class III carrier.

The proposed actions are exempt from environmental reporting requirements under 49 C.F.R. § 1105.6(c) because the operational changes would not exceed any of the thresholds established in 49 C.F.R. § 1105.7(e)(4) or (5).

It is ordered:

1. JMR's petition for declaratory order is granted to the extent discussed in this decision.

2. Under 49 U.S.C. § 10502, the Board exempts JMR's operation of the above-described tracks from the prior approval requirements of 49 U.S.C. § 10901.

3. Notice of the exemption will be published in the Federal Register.

4. The exemption will become effective on February 15, 2017.

5. Petitions to stay the exemption must be filed by February 7, 2017. Petitions for reconsideration of the exemption must be filed by February 9, 2017.

6. This decision is effective on its date of service.

By the Board, Acting Chairman Begeman, Vice Chairman Miller, and Commissioner Elliott.

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scope. See 49 U.S.C. § 10502(a).