

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35090

JP RAIL, INC.—LEASE AND OPERATION EXEMPTION—NAT INDUSTRIES, INC.

Decided: December 5, 2007

On October 17, 2007, JP Rail, Inc. (JP Rail), a Class III short line railroad, filed a verified notice of exemption under 49 CFR 1150.41 to lease from NAT Industries, Inc. (NAT) and to operate approximately 1 mile of track in Carroll Township, PA. The line is known as the Donora Line (the Line) and was formerly operated by NAT as private industrial track. JP Rail stated that it would hold itself out to provide common carrier rail freight service over the Line, that it planned to serve customers originating traffic at JP Rail's Pleasantville, NJ facility, and that it also planned to market its service to local customers.

According to JP Rail, the traffic would consist of construction and demolition materials (C&D), which would be transported from Pleasantville by Norfolk Southern Railway Company to a connection with the Line at milepost ML40 in Carroll Township. JP Rail would then transport the C&D over the Line for subsequent transloading into trucks for movement to "Westmoreland Waste's landfill," approximately 3 miles from Carroll Township. JP Rail stated that this operation was intended to be temporary until a permanent rail unloading facility could be constructed on Westmoreland Waste's site and its landfill permit could be amended to allow for rail traffic. Finally, JP Rail asserted that the proposed transaction was exempt from environmental review under the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* (NEPA), pursuant to 49 CFR 1105.6(c)(2)(i), because it would not cause any operating changes that exceed the thresholds established in 49 CFR 1105.7(e)(4) or (5), and from historic review under 49 CFR 1105.8(b)(1).

The Board, through the Director of the Office of Proceedings, in a decision served October 26, 2007, directed JP Rail to file supplemental information describing in more detail its anticipated operations and supporting its claim that environmental review under NEPA is not warranted. The Board also directed JP Rail to serve a copy of its verified notice and the October 26 decision on appropriate federal, state, and local entities. Finally, the Board extended the effective date of the exemption until December 6, 2007, to allow time for those parties to participate, if they wish. The Board published notice of the exemption in the Federal Register on November 2, 2007. The Board's notice set a deadline of November 29, 2007, for the filing of any petitions for stay.

On October 31, 2007, JP Rail filed a verified statement from David M. DeClement, an officer of JP Rail, to supplement its notice of exemption. On November 29, 2007, the Board received three petitions in opposition to the notice of exemption. The Pennsylvania Waste Industries Association (PWIA) asks the Board to revoke the exemption or to stay its effectiveness, arguing that the notice contains false and misleading information rendering it void ab initio, and maintaining that environmental review under NEPA is required if this project is to proceed. The New Jersey Department of Environmental Protection (NJDEP) also seeks revocation of the exemption or a stay of its effectiveness, arguing that use of the summary class exemption process is not appropriate here because the notice contains false and misleading information, the matter is very controversial and heavily opposed, and environmental review is needed. The Pennsylvania Department of Environmental Protection (PaDEP), citing misrepresentations and unauthorized operations by JP Rail, asks the Board to: (1) find the notice of exemption void ab initio; (2) issue a cease and desist order; (3) continue to delay the effectiveness of the exemption; (4) require JP Rail to submit an environmental assessment; and (5) extend the period for submission of further comments and petitions.

More specifically, in its petition PaDEP states that it has inspected the Line. It submits verified statements and photographic evidence to support its assertion that JP Rail has already delivered a dozen rail cars containing municipal solid waste and recyclable materials over the Line and to the proposed transfer facility. PaDEP further alleges that JP Rail has informed it that another six rail cars are en route.

PaDEP also maintains that, during its inspection, contrary to JP Rail's representations, waste was being deposited on the ground, large amounts of dust were released from the transfer operations, and no measures were being used to protect the ground water or surface waters. PaDEP also argues that JP Rail has conducted earth-moving activities at the proposed site that have disturbed soil and stainless steel slag waste potentially high in toxic metals. PaDEP asserts that these activities violate Pennsylvania law and warrant environmental review. PaDEP urges the Board to direct JP Rail to remove waste-containing rail cars from this site and to refrain from bringing additional rail cars to the Line.

Based on this evidence, JP Rail appears to be presently conducting operations on the Line, despite the fact that an exemption for it to lease and operate the line has not yet become effective. JP Rail does not presently have authority to operate over the Line, and there appears to be serious potential harm to the environment as a result of these unauthorized operations, which the Board has not found to be exempt from the need to prepare environmental documentation under NEPA. Therefore, JP Rail is directed to remove waste-containing rail cars from this site, to refrain from bringing additional rail cars to the Line, and to immediately cease and desist any further operations over the Line until further order of the Board. Moreover, we note that states and localities retain police powers to protect the public health and safety on railroad property, so

long as the state and local regulation does not unreasonably interfere with interstate commerce. See Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005).<sup>1</sup>

We will address in a later decision the contentions of PWIA, NJDEP, and PaDEP that the Board should revoke or reject the notice of exemption and conduct an environmental review under NEPA. To allow JP Rail an opportunity to respond to the arguments in the petitions from PWIA, NJDEP, and PaDEP, and to allow the Board to fully consider these petitions and JP Rail's response, we will delay the effectiveness of this exemption for an additional 45 days. JP Rail will be directed to reply to the petitions from PWIA, NJDEP, and PaDEP by December 17, 2007.

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

It is ordered:

1. JP Rail is directed to remove waste-containing rail cars from this site, to refrain from bringing additional rail cars to the Line, and to immediately cease and desist any further operations over the Line until further order of the Board.
2. JP Rail is directed to file, by December 17, 2007, a reply to the petitions of PWIA, NJDEP, and PaDEP.
3. The exemption that is the subject of the notice in this proceeding will not become effective, if at all, until January 20, 2008.

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<sup>1</sup> For example, railroads can be required to comply with some health and safety rules, such as fire and electrical codes. States and localities also can require a railroad to allow inspections of the facility and to notify the locality when the railroad is undertaking an activity for which a non-railroad entity would require a permit. See New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway—Construction, Acquisition and Operation Exemption—In Wilmington and Woburn, MA, STB Finance Docket No. 34797, slip op. at 9 (STB served July 10, 2007).

4. This decision is effective on its service date.

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

Vernon A. Williams  
Secretary