

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35246

JAMES RIFFIN—ACQUISITION AND OPERATION—VENEER SPUR—IN BALTIMORE
COUNTY, MD.

Digest:¹ Mr. James Riffin appeals an order issued by the Director of the Office of Proceedings. The order dismissed an attempt by Riffin to obtain a license to acquire and operate rail lines. Riffin’s appeal argues that the Director should have awaited the outcome of other litigation before issuing the order and that she lacked the authority to issue the order. The Board finds that Riffin filed his appeal late and that his arguments lack merit. Accordingly, the Board denies the appeal.

Decided: February 2, 2011

This case involves an attempt by James Riffin to obtain Board permission to acquire a short segment of unused spur track, ostensibly for use as a line of railroad in connection with a proposed truck-rail transload service. Riffin sought permission to acquire the track under 49 U.S.C. § 10902, a statutory provision under which an existing Class II or Class III rail carrier may acquire an extended or additional line of railroad. Relying on a prior Board decision that Riffin is not a rail carrier and on Board records showing that the spur track involved had been lawfully severed from the national rail system, the Director of the Office of Proceedings dismissed Riffin’s application as improperly filed under § 10902. Riffin now appeals that decision to the Board. We conclude that Riffin’s appeal is late and, in any event, without merit.

BACKGROUND

On May 6, 2009, Riffin filed an application to acquire and operate, under 49 U.S.C. § 10902, approximately 400 feet of track formerly known as the Veneer Manufacturing Company Spur (Veneer Spur) located at milepost 15.05 on the Cockeysville Industrial Track (CIT), in Cockeysville, Baltimore County, Md. Riffin claimed that he intended to haul freight the 400 feet between an interchange point with Norfolk Southern Railway (NSR) at the western end of the Veneer Spur and a proposed truck-rail transload facility at the eastern end.

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).

On the same date, Riffin filed a petition for declaratory order posing the following questions: (1) did Riffin become a common carrier by rail when the Board authorized him to acquire a line of railroad in Allegany County, Md. (Allegany Line);² and (2) would Riffin's operation of the Veneer Spur constitute operating an additional line of railroad. James Riffin—Petition for Declaratory Order, FD 35245 (STB served Sept. 15, 2009).

By decision served May 29, 2009, this proceeding was held in abeyance pending resolution of those questions before the Board in the declaratory order proceeding in FD 35245. In a decision served in that docket, on September 15, 2009, the Board found that: (1) Riffin is not a rail carrier because he lacks the ability to provide rail service on the Allegany Line; and (2) because Riffin is not a rail carrier and does not operate any rail line, his proposed operation of the Veneer Spur does not qualify as the operation of an "extended or additional rail line" under 49 U.S.C. § 10902.

On October 5, 2009, Riffin filed a motion asking the Board to postpone rendering a further decision in this proceeding on the basis of its ruling in FD 35245 until: (1) the United States Court of Appeals for the District of Columbia Circuit ruled on a pending Riffin appeal, Riffin v. STB, No. 08-1208, that could affect his status as a carrier, and (2) the Board resolved the status of Riffin's offer of financial assistance (OFA) to acquire and operate a portion of rail line under 49 U.S.C. § 10904, in Consolidated Rail Corporation—Abandonment Exemption—In Hudson County, N.J., AB 167 (Sub-No. 1190X).

Those two matters were subsequently resolved in a manner adverse to Riffin's position that he is a carrier. In an unpublished decision in Riffin v. STB, No. 08-1208, 2010 WL 606188 (D.C. Cir. Jan. 22, 2010), the court upheld a Board decision refusing Riffin's request that the Board compel CSX Transportation, Inc. (CSXT), to reissue the deed to the Allegany Line to Riffin, which, had the Board granted the request, could have led to Riffin's becoming a carrier.³ As for the second matter, the Board exempted the entire Lehigh Valley Line from the OFA provisions of 49 U.S.C. § 10904. Consol. Rail Corp.—Aban. Exemption—In Hudson Cnty., N.J., AB 167 (Sub-No. 1190X) (STB served May 17, 2010). As a result, Riffin could not become a carrier on the Lehigh Valley Line because there was no line for him potentially to acquire pursuant to 49 U.S.C. § 10904.

As a consequence of those 2 decisions, the Director of the Office of Proceedings concluded that there was no longer any reason to hold this proceeding in abeyance and dismissed

² By decision served on August 18, 2006, the Board permitted Riffin to substitute for his then-corporate affiliate, WMS, LLC, as the prospective purchaser of the 8.54-mile Allegany Line. CSX Transp., Inc.—Aban. Exemption—In Allegany Cnty., Md., AB 55 (Sub-No. 659X) (STB served Aug. 18, 2006).

³ The Board issued its decision in CSX Transportation, Inc.—Abandonment Exemption—In Allegany County., Md., AB 55 (Sub-No. 659X) (STB served Apr. 24, 2008). CSXT had consummated the sale in July 2006 and had issued the deed to WMS.

the application. James Riffin—Acquis. & Operation—Veneer Spur—In Balt. Cnty., Md., FD 35246 (STB served Aug. 19, 2010). The Director based her decision on two grounds. First, Riffin had sought to acquire the Veneer Spur under 49 U.S.C. § 10902, which applies only to Class II or III carriers, and the Board had determined that Riffin was not a rail carrier. Second, assuming for the sake of argument that the Veneer Spur was connected to the CIT (and thus the national rail system) when Riffin filed his application,⁴ it no longer was. That is because in April 2010, the Board authorized NSR to abandon the freight operating rights on a portion of the CIT that included milepost 15.05 (where the Veneer Spur is located),⁵ and on May 5, 2010, NSR filed a notice consummating its abandonment authority. As a result, the Veneer Spur could not be considered a part of the national rail system subject to the Board's authority.

On September 8, 2010, Riffin filed an appeal of the Director's decision on the ground that he has several appeals of Board decisions pending in court. Riffin alleges that if at least one of those appeals were decided in his favor, that would undercut the legal basis for the Director's decision to dismiss his application.

On September 10, 2010, NSR replied, arguing that Riffin's appeal is untimely because an appeal of such an action by the Director has to be filed within 10 days of service or publication of the Director's decision according to 49 C.F.R. § 1011.2(a)(7), and Riffin did not meet that deadline.⁶ In a response filed September 15, 2010, Riffin argues that his appeal was not untimely because the 10-day deadline under § 1011.2(a)(7) does not apply. Riffin claims that appeals under § 1011.2(a)(7) apply to specific actions by the Director, none of which include the sort of dismissal at issue.

Also in his September 15 filing, Riffin further supplements his appeal by arguing that the Director has no authority to dismiss an application filed under 49 U.S.C. § 10902. On

⁴ In the related declaratory order proceeding, NSR contended among other things that the Veneer Spur had already been abandoned, and thus, regardless of whether or not Riffin was a rail carrier, the Veneer Spur could not be acquired as an additional or extended line of railroad. The Board denied Riffin's requested declaratory order concerning the Veneer Spur, but based its decision on Riffin's lack of rail carrier status and did not rule on NSR's claim that the Veneer Spur had already been abandoned. See James Riffin—Petition for Declaratory Order, FD 35245, slip op. at 7 (STB served Sept. 15, 2009).

⁵ Norfolk S. Ry.—Petition for Exemption—In Balt. City & Balt. Cnty., Md., AB 290 (Sub-No. 311X) (STB served Apr. 5, 2010), stay denied (STB served May 4, 2010).

⁶ Initially, both NSR and Riffin cite to "49 C.F.R. § 1011.7(b)" in discussing the scope of authority delegated to the Director; this is an outdated version of the Code of Federal Regulations. Currently, 49 C.F.R. § 1011.7(b) pertains to delegated powers of the Office of Public Assistance, Governmental Affairs, and Compliance. See Removal of Delegations of Auth. to Sec'y, EP 685, slip op. at 3 (STB served Oct. 15, 2009). Indeed, NSR acknowledges this mistake and identifies 49 C.F.R. § 1011.7(a) as the appropriate section discussing some of the delegated powers of the Director.

September 20, 2010, NSR filed a reply, explaining that it did not represent in its earlier filing that the Director had acted under § 1011.7(a), but only that to “the extent that the Director” issued her order under § 1011.7(a), the Board should dismiss Riffin’s appeal as untimely. NSR also renews its request that the Board dismiss Riffin’s appeal as untimely.

DISCUSSION AND CONCLUSIONS

Untimely Appeal. As discussed below, Riffin’s appeal concerns an action by the Director performed pursuant to § 1011.6, not § 1011.7, the section he cites. Appeals of an employee action made pursuant to 49 C.F.R. § 1011.6 must be made within 10 days after the date of the employee action. 49 C.F.R. § 1011.6(b). Because Riffin filed his appeal 20 days after the Director dismissed his petition, the appeal is untimely.

Even if the appeal had been timely filed, however, Riffin’s two arguments challenging the Director’s decision are without merit. We discuss those arguments below.

The Director’s Authority. Riffin first argues that the Director lacked the authority to issue the dismissal decision because 49 C.F.R § 1011.7, which addresses delegations of authority by the Board to specific offices, does not provide any authority for the Director to make the type of dismissal at issue here. Riffin, however, overlooks the relevant rule, 49 C.F.R § 1011.6, which gives the Director authority to dispose of routine procedural matters. This authority was specifically delegated to the Director when the Board’s Secretary position was abolished. Removal of Delegations of Auth. to Sec’y, EP 685, slip op. at 3 (STB served Oct. 15, 2009).

Pursuant to 49 C.F.R. § 1011.6(c)(3), “[u]nless otherwise ordered by the Board in individual proceedings, authority to dispose of routine procedural matters in proceedings assigned for handling under modified procedure, other than those assigned to an administrative law judge or a Board Member, is assigned to the Director of the Office of Proceedings.” Because the question of whether an application was filed under the proper statutory provision is a routine procedural matter, the Director had express authority to act as she did.

Here, Riffin filed his application under 49 U.S.C. § 10902, a provision for short line purchases by Class II and Class III rail carriers. As discussed above, the Board determined in September 2009 in a separate proceeding that Riffin is not a carrier. The Director reasonably waited for decisions in the 2 proceedings specified by Riffin as the basis for his October 2009 abeyance request: the Board’s decision in Consolidated Rail Corporation—In Hudson County and the D.C. Circuit’s decision in Riffin v. STB, No. 08-1208. Both decisions ruled against Riffin’s claim to rail carrier status. Given that the Board had earlier determined that Riffin is not a rail carrier and that NSR’s abandonment of the relevant portion of the CIT had severed the Veneer Spur from the national rail system, the Director performed the ministerial task of

dismissing Riffin's improperly filed application. Accordingly, Riffin's argument that the Director lacked authority to take such an action is without merit.⁷

Premature Decision. Riffin also argues that the Board should set aside the Director's dismissal as premature because of new and additional appeals now pending with the U.S. Court of Appeals for the District of Columbia Circuit. The standard for overturning a Board employee action under § 1011.6 is a high bar: "Appeals are not favored and will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice." 49 C.F.R. § 1011.6(b). Here, Riffin has not shown the existence of exceptional circumstances, a clear error of judgment, or that manifest injustice would ensue if the Director's decision stands. Once the Board and the court reached final determinations adverse to Riffin's interests in the proceedings that served as the basis for Riffin's abeyance request, it was proper for the Director to act in the interest of administrative finality to dismiss Riffin's application.⁸

In sum, Riffin's appeal is late and, in any event, without merit. As such, the appeal will be denied.

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

It is ordered:

1. Riffin's request to sanction NSR and its attorney is denied.
2. For the reasons stated above, Riffin's appeal is denied.
3. This decision is effective on its service date.

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

⁷ In his September 15 filing, Riffin accuses NSR and its attorney of failing to read fully the relevant parts of the Code of Federal Regulations, and Riffin asks the Board to sanction NSR and its attorney for misrepresenting those regulations to the Board. There is no basis whatsoever on this record to take this serious action, and we will not do so here.

⁸ Moreover, the Court of Appeals has since ruled against Riffin in the one appeal cited by Riffin that could have resulted in Riffin acquiring rail carrier status. In Riffin v. STB, No. 09-1277, 2010 WL 4924719 (D.C. Cir. Nov. 30, 2010), the D.C. Circuit affirmed the Board's September 2009 decision that Riffin is not a rail carrier. In the three other appeals that Riffin cites, a ruling favorable to Riffin would not, in and of itself, result in Riffin's being a rail carrier; it would simply mean that the OFA process would continue. Finally, although Riffin claims that the trustee of his bankruptcy estate is seeking to compel CSXT to transfer the deed to the Allegany Line to Riffin, more recent filings indicate that the trustee and CSXT have reached an agreement for that line to be deeded to another party independent of Riffin.