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SERVICE DATE – OCTOBER 9, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34982

JAMES RIFFIN D/B/A THE NORTHERN CENTRAL RAILROAD—ACQUISITION AND
OPERATION EXEMPTION—IN BALTIMORE CITY, MD

Decided: October 5, 2007

On January 12, 2007, James Riffin d/b/a The Northern Central Railroad (NCR) filed a verified notice of exemption pursuant to 49 U.S.C. 10902 and 49 CFR 1150.41 to acquire and operate approximately 2.2 miles of line formerly known as the Maryland and Pennsylvania Railroad (MPR) line, located between the northerly side of the former Pennsylvania Railroad right-of-way, where MPR connected to the former Pennsylvania Railroad line near Pennsylvania Station, along, adjacent and parallel to Falls Road, a distance of approximately 1.4 miles, to where the MPR right-of-way passed under 29th Street, together with the 0.8-mile long switchback that connected MPR to the former Baltimore and Ohio Railroad, on the north side of North Avenue, all in Baltimore City, MD. NCR proposed to interchange with CSX Transportation, Inc. (CSXT), and/or Norfolk Southern Railway Company (NS). On January 26, 2007, notice of the exemption in this proceeding was served and published in the Federal Register (72 FR 3914) (January 2007 decision). The exemption was scheduled to become effective on February 11, 2007.

On February 2, 2007, the Maryland Transit Administration (MTA) filed a petition to revoke the exemption and a petition to stay the effective date of the exemption. Also on February 2, 2007, the Baltimore Streetcar Museum, Inc. (BSM), filed a petition to revoke the exemption and a request that the exemption be stayed for at least 120 days, and CSXT filed a letter comment and supported a stay of the exemption. In a letter submitted to the Board on February 5, 2007, NCR stated that it did not oppose a 30-day stay.

On February 9, 2007, a housekeeping stay was issued to allow sufficient time to fully consider the issues raised by the parties in opposition to the notice of exemption, and to allow the parties to clarify and supplement the record.

NCR filed a reply to the petitions to revoke, as well as what it called a Motion for Determination, on February 20, 2007. On March 6, 2007, separate comments in response were filed by MTA, BSM, CSXT, the City of Baltimore, and W.R. Allen Associates.

DISCUSSION AND CONCLUSIONS

A notice of exemption under 49 CFR 1150.41 must include the information set forth in 49 CFR 1150.43. NCR provides some information pertaining to each of the criteria in that subsection, but fails to provide sufficient information to meet the Board's requirements, as discussed below.¹ The information provided by NCR in its notice of exemption, even as supplemented by its reply to petitions to revoke, is inadequate to allow the Board to determine that NCR's notice was filed properly under 49 U.S.C. 10902 and 49 CFR 1150.41, and there is significant uncertainty as to the accuracy of some of the information that has been provided. Therefore, we will reject NCR's notice as incomplete.

Summary of the Proposed Transaction. 49 CFR 1150.43(e) requires a Class III railroad applicant to provide a brief summary of the proposed transaction, including the name and address of the railroad transferring the subject property to the Class III rail carrier applicant, 49 CFR 1150.43(e)(1), and the mileposts of the subject property, including any branch lines, 49 CFR 1150.43(e)(3). 49 CFR 1150.43(c) also requires a statement that an agreement has been reached or details about when an agreement will be reached. NCR's notice of exemption fails to provide sufficient information for the Board to determine whether the proposed transaction is eligible for exemption under 49 U.S.C. 10502.

In its notice of exemption, NCR does not indicate who the current owner of the subject property is; rather, it states only that "[t]he transferor of the line will be whomever presently owns the right-of-way." Based on the comments submitted by the parties, it appears that ownership of the right-of-way is deeply contested. In its reply to the petitions to revoke, NCR asserts that the transaction at issue here involves a railroad line that was abandoned,² but is now owned and operated by Norfolk Southern Railway Company (NS), as successor to the Pennsylvania Railroad (PRR). NCR provides little, if any, verifiable evidence to support this claim. Rather, NCR relies primarily on physical track markings, a website photo caption, and the lack of any evidence that PRR did not acquire the property. The City of Baltimore, BSM, and CSXT, however, challenge NCR's assertion and state that, after the line was abandoned, the property was acquired by the City of Baltimore and leased to BSM. BSM states that it now operates a demonstration streetcar line on the property, pursuant to a lease agreement with the City of Baltimore. The City of Baltimore further notes that the property is also used for a Maryland Department of Transportation salt storage facility and a bike trail along Falls Road.

To complicate further the determination of ownership, NCR's description of the property is vague, preventing the Board and parties from discerning the precise location of the subject

¹ Because the Board issued a housekeeping stay on February 9, 2007, the exemption never became effective. Therefore, although MTA and BSM filed petitions to revoke the notice of exemption, it is appropriate to handle the proceeding as a proceeding for rejection, rather than for revocation of the exemption.

² Maryland & P.R. Co. Abandonment, 295 I.C.C. 719 (1958).

property. NCR does not provide mileposts in its description of the property, as required by 49 CFR 1150.43(e)(3), nor on its hand-drawn map. Without any definitive reference points, the Board cannot verify NCR's assertions.

NCR also fails to include a statement that an arrangement has been reached or details about when an agreement may be reached, as required by 49 CFR 1150.43(c). NCR only states, "No agreement has been reached. Agreements are expected to be executed sometime after the date this Notice of Exemption has been filed." An agreement need not be completed when a party files its notice; however, to qualify for the class exemption, the Board needs enough information to support the conclusion that some understanding exists between the parties, particularly in this case where the parties who might be involved in such agreements, or at least impacted by the transaction, have raised strong concerns about the accuracy of NCR's assertions.³

Nature of the Property. 49 U.S.C 10902 and 49 CFR 1150.41 apply to the acquisition of existing lines. As the Board noted in its January 2007 decision, "NCR describes the line it wishes to acquire as part of the 'former Maryland and Pennsylvania Railroad.' If, indeed, the line is not part of an existing line of railroad, a verified notice must be filed under 49 U.S.C. 10901 and 49 CFR 1150.31."

As noted above, NCR asserts this proceeding involves a line that was abandoned, was acquired by PRR, and continued to be used as a line of railroad after MPR ceased its Maryland operations. It further contends that, because no record granting authority to abandon or discontinue service over this portion of MPR exists, the line remains a line of railroad subject to Board jurisdiction. CSXT and BSM argue that NCR wishes to use the class exemption at 49 CFR 1150.41 to acquire property that is not an existing line of railroad and that does not connect to the national railroad system. They also note that, assuming MPR did transfer its interest, it most likely transferred the property to a third party as an industrial spur, which did not require ICC approval under former 49 U.S.C. 10907(b). Therefore, CSXT and BSM argue, NCR incorrectly filed its notice under 49 U.S.C 10902 and 49 CFR 1150.41.

The evidence provided by NCR to support its position that the subject property is an existing line of railroad, including physical track marks and lack of any record to the contrary, is inconclusive, at best. Even NCR concedes that its research into this matter is incomplete. In

³ In James Riffin d/b/a The Raritan Valley Connecting Railroad—Acquisition and Operation Exemption—on Raritan Valley Connecting Track, STB Finance Docket No. 34963 (STB served Dec. 20, 2006), a notice of exemption was accepted for publication despite some uncertainties. There, an amended notice was filed and published after questions were raised as to information provided in the original notice. In this case, however, significant questions about this proposal remain, following the issuance of a housekeeping stay that provided opportunity to submit supplemental information. Thus, it would not be appropriate to publish an amended notice to handle NCR's request.

these circumstances, the Board can make no determination as to whether NCR properly filed its notice under 49 U.S.C. 10902 and 49 CFR 1150.41.

For these reasons, NCR's notice of exemption will be rejected as incomplete. The rejection is without prejudice, but given the numerous questions that have been raised regarding this proposal, any new filing should be in the form of a petition for exemption, or a full application, to allow the level of scrutiny the Board would need to accord to the proposed acquisition in light of the questions and concerns that have been presented here.

Motion for Determination. NCR also filed a Motion for Determination, requesting that the Board: (1) make a determination that the property NCR seeks to acquire and operate is still a line of railroad; (2) grant leave to NCR to amend its notice to cite appropriate statutory authority, if the Board determines that the property is no longer subject to its jurisdiction; (3) make a determination that rail carriers may use the class exemption procedures to obtain authority to acquire and obtain a rail line even when the acquisition and operation is opposed; and (4) grant NCR an individual exemption authorizing NCR's proposal, if the Board determines that the class exemption procedures are not appropriate in this proceeding.

The Board finds no basis for granting the Motion for Determination sought by NCR given the findings set out above. Therefore, NCR's Motion for Determination 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. NCR's notice of exemption is rejected as incomplete.
2. NCR's Motion for Determination is denied.
3. This decision is effective on its date of service.

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

Vernon A. Williams
Secretary