

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35705

JAMES RIFFIN AND ERIC STROHMEYER—
ACQUISITION AND OPERATION EXEMPTION—
IN RIO GRANDE AND MINERAL COUNTIES, COLO.

Digest:¹ The Board rejects a request for authorization under the Board's expedited class exemption procedure of a transaction that provides for operation of a rail line and trackage rights over the same rail line.

Decided: January 11, 2013

James Riffin and Eric Strohmeyer (Applicants), both noncarriers, have filed a verified notice of exemption under 49 C.F.R. § 1150.31 to operate a railroad line in southern Colorado (the Line) owned by the Denver & Rio Grande Railway Historical Foundation (DRGHF), and to acquire trackage rights from DRGHF over the Line. For the reasons discussed below, the class exemption at 49 C.F.R. part 1150, subpart D will be revoked insofar as it otherwise would apply to this transaction, and the notice of exemption will be rejected.

BACKGROUND

According to Applicants, the Line extends approximately seven miles, beginning at milepost 299.30, in Derrick (South Fork), Colo., and ending 10 feet before the first railroad trestle bridge that crosses the Rio Grande River, near milepost 306.38, approximately seven miles north of South Fork, in Rio Grande and Mineral Counties, Colo. The Line has not been used in freight rail operations since the mid-1980s, long before it was acquired by DRGHF.² Applicants state that a tentative operating and trackage rights agreement has been reached, and that they expect to file a copy of the final, executed agreement under seal before the date this exemption would become effective. Applicants also state that either they or their designee would be the operators of the Line. Applicants further state that they propose to interchange traffic with the San Luis and Rio Grande Railroad (SLRG) in Derrick, Colo.

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 in Decisions, EP 696 (STB served Sept. 2, 2010).

² See Denver & Rio Grande Ry. Historical Found.—Adverse Aban.—in Mineral Cnty., Colo., AB 1014, slip op. at 1 (STB served May 23, 2008).

According to Applicants, their operation of the Line would exclude transportation by Applicants or their designee of toxic by inhalation (TIH) commodities. However, Applicants state that DRGHF would retain its broad underlying common carrier obligation under 49 U.S.C. § 11101 to provide transportation over the Line of all commodities that have not been exempted from regulation, including TIH.³

On December 17, 2012, Union Pacific Railroad Company submitted a comment stating, among other things, that it does not have an ownership interest in DRGHF or SLRG. On January 2, 2013, SLRG submitted a reply and comments in opposition to the notice of exemption, asking the Board to dismiss Applicants' notice of exemption for a number of reasons, some of which relate to the bona fides of the transaction. On January 4, 2013, a petition to reject the notice of exemption was submitted by the City of Creede, Colo., Mineral County, Elk Creek Ranch, Wason Ranch Corporation, and two local homeowners. On January 7, 2013, the Town of South Fork submitted a protest opposing the notice of exemption. Among other things, these protestors claim that the class exemption under 49 C.F.R. § 1150.31 is only available for incidental trackage rights, which is not what Applicants are seeking here.

Riffin submitted a reply to SLRG on January 4, 2013. On January 8, 2013, Riffin submitted: a motion for leave to file an amended verified notice of exemption, with an amended verified notice attached; a motion to strike the City of Creede's petition to reject; a motion for protective order; and, under seal, certain financial information and a copy of an "operating and trackage rights agreement" with DRGHF.

DISCUSSION AND CONCLUSIONS

In general, the notice of exemption process is an expedited means of obtaining Board authorization in certain classes of transactions, as defined in the Board's regulations, that ordinarily do not require greater regulatory scrutiny.⁴ In cases that require information beyond that provided through simplified notice procedures, or that are controversial, the Board has rejected notices of exemption.⁵

³ See Eric Strohmeyer & James Riffin—Acquis. & Operation Exemption—Valstir Indus. Track in Middlesex & Union Cntys., N.J., FD 35527, slip op. at 4 (STB served May 14, 2012).

⁴ See Class Exemption for the Acquis. & Operation of Rail Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810, 811 (1985) (class exemption is "designed to meet the need for expeditious handling of a large number of requests that are rarely opposed.").

⁵ See, e.g., ABC & D Recycling, Inc.—Lease & Operation Exemption—Line of R.R. in Ware, Mass., FD 35397 (STB served Jan. 20, 2011); FPN USA, Inc.—Operation Exemption—Tijuana-Tecate Shortline, FD 35155 (STB served Aug. 8, 2008); Pro-Go Corp.—Operation

(continued . . .)

Here, the proposed transaction is opposed by several parties, and it raises issues that require a more detailed examination than that accompanying the notice of exemption process. For example, the nature of the rights being sought is unclear. The first sentence of the verified notice, read literally, seems to indicate that Applicants actually seek to acquire the Line itself: Applicants state that they are providing a verified notice “to acquire and operate over” the Line. Elsewhere, however, the notice indicates that Applicants, rather than acquiring the Line, are seeking both “operating rights” and “trackage rights” over the Line pursuant to 49 U.S.C. § 10901—the latter, apparently, in connection with their proposal concerning TIH—but it is unclear whether Applicants use those terms synonymously, or whether they are seeking two independent types of licensing authority over the same line. Thus, on the present record, the nature of the transaction for which Applicants seek authorization is not clear. Moreover, Applicants’ proposal, using the unusual transaction presented here to limit their common carrier obligation to the movement of only non-TIH commodities, presents a novel legal question, the implications of which would need to be thoroughly explored in a full proceeding.⁶

Pursuant to the Rail Transportation Policy under our authorizing statute, the Board is charged with, among other things, “ensur[ing] the development and continuation of a sound rail transportation system . . . to meet the needs of the public and the national defense,” 49 U.S.C. § 10101(4), and “encourag[ing] honest and efficient management of railroads,” 49 U.S.C. § 10101(9). On the limited record available under the notice of exemption procedure, authorizing the unusual proposed transaction before us may be inconsistent with these policies. Accordingly, to seek authorization from the Board for this transaction, Applicants must do so under the Board’s full application procedure, pursuant to 49 C.F.R. § 1150.1 *et seq.*, which affords more information and greater opportunity for legal and factual analysis. In particular,

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Exemption—in Suffolk Cnty., N.Y., FD 35120 (STB served Mar. 13, 2008); Winamac S. Ry. Co.—Trackage Rights Exemption—A. & R. Line, Inc., FD 35208 (STB served Jan. 9, 2009).

⁶ Riffin cites Saratoga & North Creek Railway—Acquisition & Operation Exemption—Delaware & Hudson Railway (Saratoga), FD 35500 (STB served June 1, 2011) in connection with Applicants’ proposal related to TIH. In Saratoga, the applicant stated that it was negotiating an agreement with the owner of the track that would preclude the applicant from transporting municipal solid waste or construction and demolition material. *Id.*, slip op. at 3. The exemption in that case was permitted to take effect, but the Board’s notice also pointed out that the applicant “cannot by contract avoid its common carrier obligation to transport a commodity over the line.” *Id.*, slip op. at 3 n.5. Here, unlike Saratoga, and as discussed above, significant questions and unusual circumstances surround the proposed transaction in addition to Applicants’ proposed TIH restriction, and the Board is rejecting the notice based on all of these issues and circumstances.

given the circumstances of this proceeding,⁷ it is necessary and appropriate for the Board to obtain and review the detailed information (including but not limited to the financial information⁸) required in a full application in order to “ensure sound economic conditions in transportation.” 49 U.S.C. § 10101(5).

In sum, under the circumstances here, applying the standards of 49 U.S.C. § 10901 and the full application requirements at 49 C.F.R. part 1150, subpart A to this proposed transaction is necessary to carry out the Rail Transportation Policy. The class exemption at 49 C.F.R. part 1150, subpart D therefore will be revoked insofar as it otherwise would apply to this transaction. See 49 U.S.C. § 10502(d).

For the foregoing reasons, the notice of exemption will be rejected.

Finally, because the Board is requiring that, if Applicants seek authorization from the Board for this transaction, they do so under the Board’s full application procedure, Riffin’s January 8, 2013 submittals are rejected as moot.

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

It is ordered:

1. The class exemption at 49 C.F.R. part 1150, subpart D is revoked as to this transaction.
2. The notice of exemption is rejected.

⁷ See Norfolk S. Ry.—Aban. Exemption—in Norfolk & Va. Beach, Va., AB 290 (Sub-No. 293X), slip op. at 8 (STB served Nov. 6, 2007), pet. for review dismissed, sub nom. Riffin v. STB, No. 07-1483 (D.C. Cir. Apr. 22, 2009) (the Board will “closely scrutinize any future filings by Mr. Riffin in this or any other proceeding before the Board”); Consol. Rail Corp.—Aban. Exemption—in Hudson Cnty., N.J., AB 167 (Sub-No. 1190X), slip op. at 5 (STB served May 17, 2010), aff’d mem., Riffin v. STB, No. 10-1150 (D.C. Cir. May 27, 2011).

⁸ In his January 4 Reply, Riffin states that he is incorporating by reference the personal financial statement he submitted on October 10, 2012, in Stewartstown Railroad—Adverse Abandonment—in York County, Pennsylvania, Docket No. AB 1071. This personal financial statement, however, does not provide the information required under the Board’s application procedure, for example, pursuant to 49 C.F.R. § 1150.6. Although the Board is rejecting Riffin’s January 8, 2013 submittals as moot, we note that the information included in these submittals also does not satisfy the requirements of a full application. If Applicants submit an application, it must be a complete filing in itself.

3. Riffin's January 8, 2013 submittals are rejected as moot.

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

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