

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35527

ERIC STROHMEYER AND JAMES RIFFIN—ACQUISITION AND OPERATION  
APPLICATION—VALSTIR INDUSTRIAL TRACK IN MIDDLESEX AND  
UNION COUNTIES, N.J.

Digest:<sup>1</sup> The Board denies a petition to reopen a prior decision, in which the Board rejected an application for common carrier authority on the basis that the application was inherently defective and incomplete. The Board denies the petition to reopen because the petitioner has failed to demonstrate material error in the Board's prior decision.

Decided: May 10, 2012

In this decision, the Board denies the petition of Eric Strohmeyer to reopen this proceeding. In a prior decision, the Board denied an application filed by Strohmeyer and James Riffin under 49 U.S.C. § 10901 to acquire and operate approximately 800 feet of industrial track in Plainfield, Union County, N.J. and Dunellen, Middlesex County, N.J., which is currently owned by Valstir LLC, a noncarrier (Valstir Industrial Track). Strohmeyer has not met the standard for reopening because his petition fails to demonstrate material error in the Board's prior decision.

BACKGROUND

On September 1, 2011, Strohmeyer and Riffin filed an application under 49 U.S.C. § 10901 to acquire and operate the Valstir Industrial Track. The applicants purportedly sought a certificate of public convenience and necessity in order to provide rail service as a common carrier by hauling freight between an interchange point with Consolidated Rail Corporation at the western end of the Valstir Industrial Track and four industrial/commercial properties adjacent to the track. Strohmeyer and Riffin also proposed to establish a transload facility and provide transload service to noncontiguous local shippers.

By a decision served on October 22, 2011, we rejected the application as defective and incomplete, because Strohmeyer and Riffin expressly conditioned their request to acquire and

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<sup>1</sup> 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).

operate the Valtir Industrial Track on receiving common carrier authority without any obligation to transport shipments designated as a toxic inhalation hazard (TIH).<sup>2</sup> Our decision explained that freight rail carriers have a statutory common carrier obligation to transport hazardous materials (including TIH), and that § 10901 applications that seek to limit the requested certificate of public convenience and necessity in such a way as to exclude the transportation of TIH from the applicant's common carrier responsibilities are inherently defective and incomplete.

On December 19, 2011, Riffin appealed our decision to the United States Court of Appeals for the District of Columbia Circuit. On December 21, 2011, Strohmeyer filed the instant petition in which he asserts as a basis for reopening only that the Board's prior decision contained material error.<sup>3</sup>

### DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 722(c), a petition to reopen a Board decision will be granted only upon a showing that the prior decision involved material error or would be affected materially because of new evidence or changed circumstances. Strohmeyer's petition does not allege the existence of new evidence or changed circumstances, but does argue that the Board's prior decision contained material error because it concluded that "an applicant attempting to become a common carrier must agree to carry TIH materials." Petition at 1. We find that Strohmeyer's argument lacks merit and that reopening is not warranted.

Strohmeyer asserts that a noncarrier seeking to become a freight rail carrier should be treated differently than an existing freight rail carrier for purposes of determining the extent of their respective common carrier obligations, simply because an applicant preemptively seeks to limit the scope of that obligation in its § 10901 application. The Board does not recognize such a distinction, in accord with the broad principle that "[r]ailroads have a statutory common carrier obligation under 49 U.S.C. [§] 11101 to provide transportation for commodities that have not been exempted from regulation pursuant to 49 U.S.C. [§] 10502."<sup>4</sup> Furthermore, with regard to

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<sup>2</sup> 49 C.F.R. § 1150.10(f) requires the Board to (1) publish a notice summary of a § 10901 application in the Federal Register or (2) reject the application if it is incomplete.

<sup>3</sup> On February 3, 2011, the D.C Circuit granted the Board's unopposed motion to hold Riffin's appeal in abeyance pending resolution of Strohmeyer's petition to reopen. Riffin v. STB, No. 11-1480 (D.C. Cir. Feb. 3, 2011).

<sup>4</sup> Union Pac. R.R.—Petition for Declaratory Order, FD 35219, slip op. at 3 (STB served June 11, 2009); see also W. Res., Inc. v. Atchison, Topeka & Santa Fe Ry., NOR 41604, slip op. at 4-5 (STB served May 17, 1996) (a railroad's common carrier obligation requires it to comply with any reasonable request for service). Strohmeyer's statement that carriers were "permitted to delineate the goods they wish[ed] to carry for hire" at common law, Petition at 2, is not relevant

(continued . . . )

TIH shipments in particular, freight rail carriers have “a statutory common carrier obligation to transport hazardous materials ‘where the appropriate agencies have promulgated comprehensive safety regulations.’”<sup>5</sup> Simply put, the statutory responsibilities imposed by § 11101 do not vary according to what an entity asserts in its § 10901 application when seeking a certificate of public convenience and necessity.

As an initial matter, Strohmeier does not argue that our decisions in BNSF Railway Co.—Petition for Declaratory Order, FD 35164 (STB served Dec. 2, 2010) and Union Pacific Railroad Co.—Petition for Declaratory Order, FD 35219 (STB served June 11, 2009) were wrongly decided.<sup>6</sup> Rather, he relies solely on his contention that new entrants seeking to limit their common carrier responsibilities should be treated differently than existing rail carriers. But he includes neither precedential support nor cogent rationale for this proposition. Likewise, the petition fails to confront the reality that allowing new applicants to limit their common carrier obligation in whatever ways they choose would produce gaps in the existing rail system with regard to specific traffic, thereby undermining Congress’ clear intent to establish an integrated national network.<sup>7</sup> As a result, Strohmeier has failed to demonstrate that the Board committed material error in its prior decision.

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( . . . continued)

to the issue of a freight rail carrier’s statutory obligations under § 11101. See Akron, Canton & Youngstown R.R. v. ICC, 611 F.2d 1162, 1168 (6th Cir. 1979) (explaining that railroads’ common carrier duties “are not dependent upon . . . their supposedly conscious refusal to ‘hold themselves out’” as carriers of particular commodities and that “public needs must shape the boundaries” of railroads’ statutory common carrier duties).

<sup>5</sup> BNSF Ry.—Petition for Declaratory Order, FD 35164, slip op. at 6 (STB served Dec. 2, 2010) (quoting Union Pac., slip op. at 3-4); see also Akron, 611 F.2d at 1169; Consol. Rail Corp. v. ICC, 646 F.2d 642, 650 (D.C. Cir. 1981) (Conrail). A number of federal agencies—including the Department of Transportation, the Federal Railroad Administration, the Transportation Security Administration, and the Nuclear Regulatory Commission—have promulgated extensive regulations governing the transportation of hazardous materials by rail. BNSF, slip op. at 6 & n.14.

<sup>6</sup> Indeed, Strohmeier appears to acknowledge that the Board correctly decided those two cases. Petition at 3.

<sup>7</sup> Cf. Fayus Enters. v. BNSF Ry., 602 F.3d 444, 452 (D.C. Cir. 2010) (explaining that preemption of state antitrust law in the context of rail carrier-shipper arrangements results in part from a congressional directive to avoid the creation of a patchwork rail system); CSX Transp., Inc. v. Williams, 406 F.3d 667, 673 (D.C. Cir. 2005) (describing national rail system as “complex” and “interdependent”).

In an attempt to bolster his argument, Strohmeyer asserts that the Board and its predecessor agency, the Interstate Commerce Commission (ICC), in the past “have relieved a carrier of the obligation to carry specific goods” on numerous occasions. Petition at 2. While Strohmeyer does not provide any particular cases to support this assertion, he does list several contexts in which this type of limitation allegedly has been allowed. *Id.* However, each of the scenarios described by Strohmeyer is distinguishable from the facts of this proceeding.

Strohmeyer’s first example involves the issue of trackage rights. Specifically, he asserts that existing rail carriers sometimes “receive[] authority to carry only one commodity” when seeking trackage rights to operate over another carrier’s rail line. *Id.* But the fact that a host carrier can grant another carrier commodity-specific trackage rights over the host’s line does not support the idea that a new entrant should be allowed to limit the scope of its common carrier obligation over its own line. Under a trackage rights arrangement, a grant or exchange of trackage rights does not extinguish the granting carrier’s broad underlying common carrier obligation.<sup>8</sup> In such situations, the granting rail carrier retains the § 11101 common carrier obligation to provide transportation for commodities that have not been exempted from regulation, even if it has granted another carrier the right to conduct commodity-specific operations on its line. Under Strohmeyer’s paradigm, in contrast, no carrier would have the underlying obligation to carry all non-exempt commodities over the new entrant’s line.

Strohmeyer further asserts that, because rail carriers have “no obligation to carry exempt commodities,” a new rail carrier should be allowed to limit its obligation by designating at the outset the commodities it will carry. *Id.* 49 U.S.C. § 10502(a), however, instructs the Board to exempt certain types of rail services from regulation “to the maximum extent” possible once it makes certain findings. While the Board has made such determinations for certain commodities,<sup>9</sup> it has never done so with regard to TIH, and Strohmeyer’s argument fails as a result.

Strohmeyer also seeks to support his claim by alleging that a “barge line may seek authority to carry only [a single] commodity.” *Id.*<sup>10</sup> But the various transportation modes are

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<sup>8</sup> See, e.g., S. Pac. Transp. Co.—Trackage Rights Exemption—The Houston Belt & Terminal Ry., FD 33461 *et al.*, slip op. at 13 (STB served Dec. 21, 1998) (“The leases, trackage rights, and similar operational arrangements that rail carriers enter into do not extinguish the granting carrier’s common carrier obligation.”).

<sup>9</sup> See, e.g., Rail Gen. Exemption Auth.—Nonferrous Recyclables, EP 561, slip op. at 5 (STB served Apr. 21, 1998) (granting § 10502 exemption to 29 nonferrous recyclable commodity groups).

<sup>10</sup> The ICC licensed water carriers until that authority was repealed in the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995).

subject to their own economics, statutory provisions, and regulatory treatment. While the ICC historically permitted certain common carriers—primarily motor and water carriers—to carve out business niches in certain circumstances, freight rail carriers generally are required to carry non-exempt hazardous materials so long as adequate and appropriate safety regulations are in place, due to the public need for the transportation of such materials by rail.<sup>11</sup> As we have explained, regardless of how other modes have been regulated, freight “[r]ailroads have a statutory common carrier obligation under 49 U.S.C. [§] 11101 to provide transportation for commodities that have not been exempted from regulation.” Union Pac., slip op. at 3. The regulatory treatment accorded other modes and other commodities does not undercut the Board’s consistent interpretation of the common carrier obligation in the context of freight rail carriers and non-exempt hazardous materials (such as TIH).

Finally, Strohmeyer asserts that “freight railroads no longer are obligated to carry passengers, nor their baggage,” despite the fact that neither passengers nor their baggage have been declared an exempt commodity. Id. at 4. What Strohmeyer fails to acknowledge, however, is that the Rail Passenger Service Act of 1970 specifically directed that a rail carrier is “relieved of its common carrier obligation to provide rail passenger service by assigning its passenger service to Amtrak.” Canadian Pac. Ltd.—Purchase & Trackage Rights—Del. & Hudson Ry., FD 31700, 7 I.C.C.2d 95, 121-22 (1990). Strohmeyer’s final example, like his others, simply has no relevance to the § 11101 obligation of freight rail carriers to provide transportation for non-exempted commodities such as TIH.

In sum, none of the arguments put forth in the instant petition supports Strohmeyer’s contention that a noncarrier seeking to become a freight rail carrier should be treated differently than an existing freight rail carrier for purposes of determining the extent of their respective common carrier obligations. Our prior decision in this case properly rejected the application for a certificate of public convenience and necessity filed by Strohmeyer and Riffin, and because Strohmeyer has failed to demonstrate that this decision contained material error, we deny his petition to reopen.

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

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<sup>11</sup> See Union Pac., slip op. at 3-4 (rail carrier required to carry chlorine); BNSF, slip op. at 6 (same); Conrail, 646 F.2d at 650 (rail carrier required to carry spent nuclear fuel); Akron, 611 F.2d at 1168 (explaining that a railroad’s common carrier duties are not controlled by common law, but rather by the needs of the public as determined by the agency under the Interstate Commerce Act).

It is ordered:

1. Strohmeier's petition to reopen is denied.
2. This decision is effective on its service date.

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