37751 SERVICE DATE – MARCH 15, 2007
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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34958

NEVADA PACIFIC RAILROAD CORPORATION–LEASE AND OPERATION EXEMPTION–RAIL LINES OF PAN WESTERN CORPORATION

Decided: March 13, 2007

On November 14, 2006, Nevada Pacific Railroad Corporation (NPRC), a noncarrier, filed a notice of exemption under 49 CFR 1150.31 to lease from Pan Western Corporation (Pan Western) and operate approximately 2.66 miles of private rail track owned by Pan Western, extending between milepost 0.0 and milepost 2.66, in Clark County, NV.[1] Notice of NPRC's exemption authority was served and published in the Federal Register (71 FR 75293) on December 14, 2006.[2]

The verified notice of exemption was originally filed under the name UP Nevada Railroad LLC (UPNR). However, the Union Pacific Railroad Company (UP) objected to this name as a violation of its trademarks. Accordingly, by letters filed November 20, 2006, and November 22, 2006, counsel addressed issues relating to the identity and name of the entity seeking authority (the Applicant) in this proceeding and, in the latter letter, requested that Nevada Pacific Railroad Corporation be substituted as the Applicant.

On December 15, 2006, Nevada Central Railroad (NCR) filed a petition to dismiss the notice or revoke the exemption.[3] NPRC filed a reply to NCR's petition.

For the reasons discussed below, we find that there is no basis to reject or revoke NPRC's notice of exemption.

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[1] This track was the subject of a previous notice of exemption that, according to the current verified notice, was never consummated. See Tonopah & Tidewater Railroad Co.–Lease and Operation Exemption–Pan Western Corporation, STB Finance Docket No. 34547 (STB served Sept. 30, 2004) (Tonopah & Tidewater).

[2] Under the Board's rules that were in place at the time, the exemption automatically became effective on November 21, 2006, 7 days after the notice was filed.

[3] We will treat the petition to dismiss as a petition to revoke the exemption.

DISCUSSION AND CONCLUSIONS

Notices of exemption that contain false and/or misleading information are void ab initio under 49 CFR 1150.32(c) and are subject to being rejected. NCR asserts that NPRC submitted materially false, misleading, and therefore fraudulent information in its notice. Specifically, NCR asserts that the notice was defective because at the time it was filed, the original applicant, UPNR, did not exist. NCR argues that NPRC, a separate entity, could not therefore replace UPNR.

Applicant acknowledged that, due to a miscommunication with its counsel, its actual name, UP Nevada Corporation, was incorrectly stated as UPNR in the Notice. As stated above, in the November 20th letter, UP Nevada Corporation, based on objections to its name, disclosed the mistake in the original notice. In a letter dated November 22, 2006, in response to UP's objections, UP Nevada Corporation asked the Board to substitute NPRC as the Applicant.

The Applicant amended the Notice of Exemption prior to its Federal Register publication and the exemption was published under NPRC's name and correct address. Accordingly, the exemption was not granted under false or misleading circumstances. Furthermore, no party was prejudiced because the information contained in the Federal Register Notice was correct.

NCR also claims that it has provided new evidence showing that UP Nevada Corporation and NPRC are two distinct entities and that UP Nevada Corporation and its counsel cannot apply for operating authority on behalf of a third party.[4] According to NCR, this information and the information discussed above requires reopening this proceeding and revoking the exemption.

Under 49 U.S.C. 10502(d), we may revoke an exemption if regulation is necessary to carry out the rail transportation policy of 49 U.S.C. 10101 (RTP). To obtain a revocation, the petitioner must demonstrate that greater regulatory scrutiny is necessary to carry out the RTP. When taken together, the information provided by NCR to reject the Notice does not show that the transaction is contrary to the RTP. NCR has not demonstrated that greater regulatory scrutiny is necessary and that revocation is warranted because NPC's presentation does not provide a basis for finding that NPRC should not have authority to lease and operate the Pan Western trackage or that NPRC has abused the Board's processes in pursuing that authority.

Finally, NCR requests that the Board publicly confirm that the lease and operation exemption in Tonopah & Tidewater is null and void. A Board grant of authority is merely permissive. Once a Board exemption has become effective, it is up to the parties to determine whether to move forward with the underlying transaction. According to the

[4] NCR itself, however, states that both companies have the same President and that individuals from NCR have spoken to the President of UP Nevada Corporation and NPRC regarding this proceeding.

notice filed by the Applicant, the Tonopah & Tidewater Railroad Co. did not move forward and the transaction never occurred.[5] There is no need, however, to formally withdraw the authority that was never used.

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 petition to dismiss or revoke is denied.

2. This decision is effective on the date of service.

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

Vernon A. Williams
Secretary

[5] NCR asserts that Mr. Mitchell Truman, who signed the verified statement, was the President of both the Applicant and the Tonopah & Tidewater Railroad Corporation at the time the notice was filed with the Board.