

SERVICE DATE – OCTOBER 29, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 34997

JAMES RIFFIN—PETITION FOR DECLARATORY ORDER

Docket No. FD 35245

JAMES RIFFIN—PETITION FOR DECLARATORY ORDER¹

Digest:² The Board denies James Riffin’s request to reopen these previously decided cases and find that he was a rail common carrier immune from state and local environmental laws. The Board also denies Riffin’s renewed request for authority to acquire and operate a rail line in Baltimore County, Md.

Decided: October 26, 2012

On September 12, 2011, James Riffin filed consolidated petitions to reopen these proceedings pursuant to 49 C.F.R. § 1115.4, and, upon reopening, find that: (1) he was a rail common carrier with respect to a line of railroad in Allegany County, Md., from August 16, 2006, until March 17, 2011 (Docket No. FD 35245), and, as a result, (2) he could, as a rail carrier, perform maintenance work on the line in Allegany County and construct a maintenance-of-way facility on his Cockeysville property in Baltimore County, Md., under the statutory federal preemption authority for rail carriers (Docket No. FD 34997). Based on these requested findings, Riffin asserts that the Board also should find that he properly sought, as a rail carrier, to acquire and operate certain track in Baltimore County as an additional line of railroad in James Riffin—Acquisition & Operation Exemption—Veneer Spur—in Baltimore County., Md. (Veneer Spur), FD 35246. The Maryland Transit Administration and Allegany County, Md., filed a joint reply opposing the petitions to reopen. The consolidated petitions to reopen the two proceedings are being denied.

¹ These proceedings are not consolidated; a single decision is being issued for administrative convenience.

² 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).

BACKGROUND

The Cockeysville Property.

In February 2004, Riffin began to construct a purported maintenance-of-way facility on two pieces of land he had purchased in Cockeysville near a rail line known as the Cockeysville Industrial Track (CIT). Although Riffin had not been authorized to provide common carrier freight rail service on the CIT (or anywhere else), he began to construct the facility by, among other things, clearing, filling, and grading land and stockpiling soil. State and local authorities obtained an order from the Baltimore County Circuit Court requiring Riffin to comply with applicable state and county environmental laws, cease further excavation, and take certain steps to prevent the discharge of soil and sediment into an adjacent waterway that ultimately flows into metropolitan Baltimore's main water reservoir. Riffin challenged this order unsuccessfully in state and federal court. As explained in more detail later in this decision, Riffin eventually turned to the Board, seeking a declaration that he was a rail carrier and that his activities were immune from state and local environmental laws by virtue of federal preemption under 49 U.S.C. § 10501(b). In the meantime, Riffin defied the court order and continued his construction activities. In December 2007, the Baltimore County Circuit Court found him in contempt.

The Allegany Line.

During this time, Riffin became involved in another case arising some 150 miles to the west. In 2005, CSX Transportation, Inc. (CSXT), sought Board permission to abandon a dormant 8.54-mile rail line (Line) in Allegany County, Md. A West Virginia-chartered company that referred to itself in its filings only as "WMS" or "WMS, LLC" (WMS), invoked the offer of financial assistance (OFA) provisions of 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27(c) to purchase the Line for continued rail service.³ In December 2005, upon being informed that the parties had reached a voluntary agreement for the sale of the Line, the Board authorized "WMS, LLC" to acquire and operate the Line pursuant to the OFA provisions.⁴

Before WMS and CSXT entered into a written contract, WMS experienced problems with its financing. Riffin agreed to provide the necessary financing for WMS to purchase the Line in exchange for a 98% interest in WMS and the right to acquire the Line from WMS. Thereafter, in March 2006, CSXT entered into a written contract with WMS for the sale of the Line. After wiring part of the purchase price to CSXT, Riffin claims to have learned that, although the Board had authorized "WMS, LLC" to acquire the Line, no entity by that name existed in West Virginia or Maryland. Thus, Riffin states that he chartered in Maryland a new legal entity, "WMS, L.L.C.," with himself as the sole owner. (We shall refer to this entity as "WMS-Maryland," to distinguish it from the West Virginia-based WMS.)

³ WMS described itself as "a Maryland limited liability company . . . chartered in West Virginia." CSX Transp., Inc.—Aban. Exemption—in Allegany Cnty., Md. (CSXT—Allegany County), AB 55 (Sub-No. 659X) OFA at 2 filed October 21, 2005.

⁴ CSXT—Allegany County (STB served Dec. 14, 2005).

In June 2006, before the sale was completed, WMS, referring to itself for the first time as “WMS, LLC, a/k/a Western Maryland Services, LLC,” asked the Board to allow Riffin to substitute for WMS as the purchaser of the Line.⁵ While the substitution request was pending, Riffin wired CSXT the balance of the purchase price. On July 10, 2006, seeking to avoid further ownership, maintenance, and inspection costs associated with the Line, CSXT issued a quitclaim deed for the Line to “WMS, a Maryland limited liability company,” and filed a letter notifying the Board that it had done so. In August 2006, the Board authorized Riffin to substitute for WMS as the purchaser.⁶ Concerned that neither WMS nor WMS-Maryland could properly deed the Line to him, Riffin sought without success to have the Board force CSXT to re-deed the Line to him.⁷

While this was going on, Riffin became embroiled in another environmental dispute, this time over proposed maintenance activities on the Line. Riffin determined that the Line needed maintenance to repair sections of track eroded by a nearby creek. Because the Line is located in a floodplain, state and local environmental officials insisted that permits be obtained before the work could begin. Riffin sought without success an order from the Allegany County Circuit Court to enjoin the county from attempting to enforce its environmental regulations against his intended maintenance activities, arguing that the work was subject to the Board’s exclusive jurisdiction and that state and local environmental laws were completely preempted under § 10501(b).

Riffin’s Petitions for Declaratory Order.

Docket No. FD 34997—The Federal Preemption Proceeding. In February 2007, shortly after the Baltimore County Circuit Court enjoined his construction activities at the Cockeysville property and ordered him to take certain other actions, Riffin petitioned the Board to institute a declaratory order proceeding and find that 49 U.S.C. § 10501(b) preempts application of state and local environmental laws in connection with his construction activities on the Cockeysville property and maintenance activities on the Line. Riffin also asked the Board to stay the court’s December 2007 order.

In May 2008, the Board denied Riffin’s request to stay the order of the Baltimore County Circuit Court and ruled on the merits of his request for a declaratory order.⁸ Without determining whether Riffin was a rail carrier with respect to the Line (or any other line), the Board found that: (1) if Riffin were a rail carrier, his maintenance work on the Line would constitute transportation by rail carrier, and thus would be entitled to federal preemption under § 10501(b); and (2) federal preemption would not, however, apply to Riffin’s construction activities in Cockeysville, even assuming Riffin were a rail carrier with respect to the Line,

⁵ CSXT—Allegany County (filed June 14, 2006).

⁶ CSXT—Allegany County (STB served Aug. 18, 2006).

⁷ CSXT—Allegany County (STB served Apr. 24, 2008).

⁸ See James Riffin—Petition for Declaratory Order (Federal Preemption), FD 34997 (STB served May 2, 2008).

because Riffin could not operate as a rail carrier on the CIT and his Cockeyville property was not otherwise connected to any rail line over which he had authority to operate. The D.C. Circuit vacated and remanded the Board's decision, concluding that it "does not adequately explain why Riffin's activities at the Cockeyville property do not fall under the Board's jurisdiction and within the preemptive ambit of § 10501(b)."⁹ In July 2011, the Board explained on remand that, having determined in another proceeding that Riffin was not a rail carrier with respect to the Line (discussed below), Riffin's activities at the Cockeyville property and on the Line were not covered by federal preemption.¹⁰

Docket No. FD 35245—The Rail Carrier Status Proceeding. While judicial review of the Board's May 2008 decision in Federal Preemption was pending, Riffin filed another petition for a declaratory order.¹¹ There, Riffin asked the Board to find that he became a rail carrier with respect to the Line in 2006 when the Board authorized him to substitute for WMS as the purchaser of the Line. Riffin simultaneously filed an application under 49 U.S.C. § 10902 to acquire and operate approximately 400 feet of track, formerly known as the Veneer Manufacturing Company Spur (Veneer Spur), which was located at milepost 15.05 on the CIT.¹² Because § 10902 applies only to rail carriers, the Board in a decision served on May 29, 2009, held Riffin's Veneer Spur application in abeyance while it considered Riffin's second petition for a declaratory order in these proceedings.

In a decision served on September 15, 2009, in the Rail Carrier Status proceeding, the Board noted that Riffin had obtained authority to acquire and operate the Line, but concluded that he did not thereby become a rail carrier. The Board stated that "Riffin's admitted failure to obtain title to the line undercuts his claim to be a rail carrier" and found that "Riffin does not appear to be capable of providing service over the Allegany line at this time as he does not own the line or have any other suitable legal interest in it that gives him the ability to exercise the authority the Board has granted."¹³ Based on that finding, the Board also determined that Riffin's application to acquire and operate the Veneer Spur did not qualify as the operation of an additional line of railroad under § 10902. The D.C. Circuit subsequently affirmed the Board's determination that Riffin was not a rail carrier with respect to the Line.¹⁴ Thereafter, the Board dismissed Riffin's application to acquire and operate the Veneer Spur and denied Riffin's administrative appeal of that decision.¹⁵

⁹ Riffin v. STB, 592 F.3d 195, 198 (D.C. Cir. 2010).

¹⁰ See Federal Preemption (STB served July 13, 2011).

¹¹ See James Riffin—Petition for Declaratory Order (Rail Carrier Status), FD 35245 (filed May 6, 2009).

¹² See Veneer Spur (filed May 6, 2009).

¹³ Rail Carrier Status (STB served Sept. 15, 2009) slip op. at 6.

¹⁴ See Riffin v. STB, No. 09-1277, 2010, WL 4924719 (D.C. Cir. Nov. 30, 2010) (per curiam).

¹⁵ See Veneer Spur (STB served Aug. 19, 2010 and Feb. 4, 2011).

Proceedings Related to Riffin's Bankruptcy.

In January 2010, Riffin filed a voluntary petition for bankruptcy under Chapter 7 of the Bankruptcy Code.¹⁶ The trustee appointed to oversee Riffin's bankruptcy estate (Trustee) determined that Riffin possessed an equitable interest in the Line, and reached an agreement to sell that interest to Eighteen Thirty Group, LLC (Eighteen Thirty), subject to the approval of the U.S. Bankruptcy Court for the District of Maryland, Baltimore Division (bankruptcy court). The proposed sale necessitated several regulatory filings with the Board. On October 19, 2010, Eighteen Thirty filed a verified notice of exemption under 49 C.F.R. § 1150.31 to acquire the Line.¹⁷ On the same day, Eighteen Thirty's corporate affiliate, Georges Creek Railway, LLC (Georges Creek), filed a verified notice of exemption under 49 C.F.R. § 1150.31 to operate the Line;¹⁸ and Duncan Smith and Gerald Altizer, the owners of Eighteen Thirty and Georges Creek, filed a verified notice of exemption under 49 C.F.R. § 1180.2(d)(2) to continue in control of Eighteen Thirty and Georges Creek upon their becoming Class III rail carriers.¹⁹ After the bankruptcy court approved the sale of the Line to Eighteen Thirty,²⁰ Eighteen Thirty notified the Board that the sale had been consummated on March 3, 2011, and the Trustee reported the sale on March 17, 2011.²¹ In April 2012, the Board denied a request by Riffin to retroactively withdraw its authorization for the sale of the Line to Eighteen Thirty.²²

Riffin requests that the Board reopen these proceedings and find that he was a rail common carrier immune from state and local environmental laws. And based on these requested findings, Riffin further requests that his proposed acquisition of the Veneer Spur be found to

¹⁶ See In re Riffin, No. 10-11248 (Bankr. D. Md. Jan. 20, 2010).

¹⁷ Eighteen Thirty Group, LLC—Acquis. Exemption—in Allegany Cnty., Md. (Eighteen Thirty—Acquis.), FD 35438, et al. (filed Oct. 19, 2010). Also on October 19, 2010, Eighteen Thirty filed a petition for an exemption from 49 U.S.C. § 10904(f)(4)(A), which prohibits for a 5-year period the transfer of a rail line sold under the OFA process to anyone other than the carrier from whom it was purchased. Because the Line had been sold to WMS less than 5 years earlier under the OFA process, Eighteen Thirty sought the exemption to permit it to purchase the Line from the Trustee. The Board granted Eighteen Thirty's exemption request in a decision served on December 30, 2010. See CSXT—Allegany County (STB served Dec. 19, 2010).

¹⁸ Georges Creek Ry., LLC—Operation Exemption—in Allegany Cnty, Md., FD 35437 (filed Oct. 19, 2010).

¹⁹ Duncan Smith and Gerald Altizer—Continuance in Control Exemption—Eighteen Thirty Group, LLC & Georges Creek Ry., LLC, FD 35436 (filed Oct. 19, 2010).

²⁰ See Transcript of Ruling, In re Riffin, No. 10-11248 (Bankr. D. Md. Feb. 16, 2011) (Transcript of Ruling).

²¹ Report of Sale of Property to Eighteen Thirty Group, LLC, In re Riffin, No. 10-11248 (Bankr. D. Md. Mar. 17, 2011) (ECM Doc. 237).

²² Eighteen Thirty—Acquis. (STB served Apr. 5, 2012).

constitute the acquisition of an additional line of railroad under § 10902 and that he be granted authority to acquire and operate it.

DISCUSSION AND CONCLUSIONS

Under 49 C.F.R. § 1115.4, a petition to reopen an administratively final Board action will be granted only upon a showing of material error, new evidence, or substantially changed circumstances. To warrant reopening, the new evidence must be newly available, and the new evidence or substantially changed circumstances must materially affect the prior decision. Riffin has failed to demonstrate a basis for reopening these proceedings.

Riffin contends that multiple grounds exist for reopening these proceedings. He argues that the Board committed material error in finding that the Line was owned by WMS,²³ not by Riffin, and that Riffin was not a rail common carrier with respect to the Line because he did not have a suitable legal interest in it. Riffin further contends that the findings and conclusions of the bankruptcy court support his position and that those findings constitute new evidence and substantially changed circumstances.

As to the Rail Carrier Status proceeding, Riffin requests that on reopening the Board vacate the finding in the September 15, 2009 decision, that Riffin had “no suitable legal interest” in the Line, and instead find that he obtained a suitable legal interest in the Line sufficient to provide common carrier service on August 16, 2006, the date the Board authorized him to substitute for WMS as the purchaser of the Line.²⁴ Thus, Riffin asserts that he “was the common carrier rail carrier associated with the Allegany Rail Line from August 16, 2006 until March 17, 2011, the date the sale of the Line to the 1830 Group LLC was reported to the Board.”²⁵

As to the Federal Preemption proceeding, Riffin requests that on reopening the Board vacate the July 13, 2011 decision, which denied on remand Riffin’s requested preemption findings with respect to his construction activities at Cockeysville and maintenance work on the Line. Asserting that the Board should now find in the Rail Carrier Status proceeding that he was a rail common carrier from August 16, 2006 until March 17, 2011, Riffin argues that the Board should also: (1) find that his construction activities at Cockeysville and his maintenance work on the Line were subject to the Board’s exclusive jurisdiction pursuant to § 10501(b); (2) find that his proposed acquisition of the Veneer Spur would constitute the acquisition of an additional line

²³ In Federal Preemption, Motion for Administrative Stay at 4 (filed Dec. 17, 2007), Riffin, referring to himself as the Petitioner, explained that “[o]n **October 21, 2005**, Petitioner, knowing full well that if the true identity of the Offeror were to be known, an objection would be filed, filed an Offer of Financial Assistance under the pseudonym WMS (in which Petitioner had a 98% ownership interest), to purchase from CSX[T] the Georges Creek line of railroad CSX[T] had filed to abandon.”

²⁴ See supra note 6 and accompanying text.

²⁵ Consolidated Petitions to Reopen at 8.

of railroad under § 10902; and (3) grant him authority to acquire and operate the Veneer Spur under §10902.

Although Riffin cites and discusses numerous findings by the bankruptcy court, the crux of Riffin’s “new evidence” is his characterization of the bankruptcy court as finding that, in Riffin’s words, when “the Board authorized Riffin to acquire and operate the Allegany Rail Line, the common carrier rights associated with the Line were transferred to Riffin.”²⁶ In fact, the bankruptcy court, in its own words, found to the contrary. Discussing its understanding of how someone becomes a common carrier, the bankruptcy court said that

[t]he rights are associated [with the line], and if the acquirer both acquires legal title to the property and is approved by the [B]oard as a responsible person for that line, then those facts apparently create the status and legal rights of a common carrier over that line . . .²⁷

Applying its understanding of the law to Riffin, the bankruptcy court said, “Mr. Riffin did not acquire the requisite legal title to the line,”²⁸ and, accordingly, “Mr. Riffin is not a common carrier for the reasons the Surface Transportation Board stated.”²⁹ Thus, Riffin’s claim that the bankruptcy court found that the common carrier rights to the Line had been transferred to him is without any merit.

The many other bankruptcy court findings accurately cited by Riffin do not support his claim on this critical point. For example, Riffin argues that the bankruptcy court found that: (1) the old deed from CSXT to WMS, LLC, a Maryland limited liability company, “is void;” (2) WMS never acquired legal title to the Line; (3) the common carrier rights associated with the Line were never abandoned; (4) Riffin’s bankruptcy estate acquired all of the rights (equitable title, i.e., the right to acquire legal title) to the Line that Riffin possessed as of the date he filed his bankruptcy petition; and (5) the Trustee obtained authority from the bankruptcy court to transfer all of Riffin’s rights in the Line to Eighteen Thirty.³⁰ But none of these findings, individually or taken together, supports the contention that Riffin acquired the common carrier rights over the Line. CSXT’s unsuccessful effort to transfer legal title to the Line to WMS simply means that CSXT retained its common carrier rights to the Line until the sale to Eighteen Thirty was consummated. On the other hand, the bankruptcy court’s findings that: (1) Riffin acquired only an equitable interest (i.e., the right to acquire legal title) in the Line; (2) the bankruptcy estate acquired that equitable interest when Riffin filed his bankruptcy petition; and (3) the Trustee was authorized to transfer that equitable interest in the Line to Eighteen Thirty,

²⁶ Id. at 5.

²⁷ Transcript of Ruling at 17-18.

²⁸ Id. at 13.

²⁹ Id. at 20.

³⁰ Transcript of Ruling at 13, 17-18, and 22.

all contradict Riffin's argument that he acquired the common carrier rights to operate the Line.³¹ Clearly, the bankruptcy court understood all of this, because, as noted earlier, it concluded that Mr. Riffin was not a common carrier for the reasons the Board stated.³²

In sum, the Board's findings in these proceedings are consistent with those of the bankruptcy court and have not otherwise been shown on this record to be in error, much less material error. Nor has Riffin introduced new evidence or demonstrated substantially changed circumstances warranting reopening of these proceedings. Accordingly, we are denying Riffin's consolidated petitions to reopen these proceedings. As a consequence, because Riffin is not a rail carrier, we also are denying as moot Riffin's requests that his acquisition of the Veneer Spur be found to constitute the acquisition of an additional line of railroad under § 10902, and that he be granted authority to acquire and operate the Veneer Spur under § 10902.

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 consolidated petitions to reopen these proceedings are denied.
2. Riffin's requests that his acquisition of the Veneer Spur be found to constitute the acquisition of an additional line of railroad under § 10902 and that he be granted authority to acquire and operate the Veneer Spur under § 10902 are denied as moot.
3. This decision is effective on its service date.

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

³¹ Id. at 12-14, 16, and 22. The Trustee acquired Riffin's equitable interest (i.e., the right to acquire legal title) in the Line, and, with the approval of the bankruptcy court, transferred that interest to Eighteen Thirty. Eighteen Thirty acquired legal title to the Line after acquiring a deed to the Line (CSXT, at the Trustee's direction, transferred a deed to Eighteen Thirty) and perfecting its ownership of the Line under Maryland law.

³² See supra note 29.