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SERVICE DATE – AUGUST 16, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34986

ASHLAND RAILROAD, INC.–LEASE AND OPERATION EXEMPTION–RAIL LINE
IN MONMOUTH COUNTY, NJ

STB Finance Docket No. 34987

G. DAVID CRANE–CONTINUANCE IN CONTROL EXEMPTION–ASHLAND
RAILROAD, INC.

Decided: August 14, 2007

For the reasons discussed below, we are rejecting the notices of exemption filed in these proceedings.

BACKGROUND

These proceedings involve the proposed lease and operation of approximately 1.5 miles of currently unused track in the Township of Freehold, in Monmouth County, NJ. In STB Finance Docket No. 34986, Ashland Railroad, Inc. (ASRR), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 for authority to lease and operate as a common carrier by railroad the line owned by Grems-Kirk Railway, LLC (GKR), also a noncarrier. ASRR states that it plans to develop a transload facility on the track and interchange traffic with Consolidated Rail Corporation (Conrail).

The transaction is related to a concurrently filed notice of exemption in STB Finance Docket No. 34987, wherein G. David Crane seeks to continue in control of ASRR upon that entity's becoming a Class III rail carrier.¹

On February 21, 2007, the New Jersey Department of Environmental Protection (NJDEP) filed a petition asking the Board to stay the effective date of the exemptions. NJDEP asserted that further development of facts was necessary to determine whether ASRR would become a rail carrier as defined by 49 U.S.C. 10102(5). NJDEP asked that the Board require ASRR and Mr. Crane to provide additional, specific information with respect to the nature of the proposed operations; whether the proposed facility would operate as a solid waste rail/truck transload facility; the nature of the freight; the nature

¹ ASRR's notice of exemption was published in the Federal Register on February 14, 2007 (72 FR 12973). Mr. Crane's notice of exemption also was published in the Federal Register on February 14, 2007 (72 FR 12974).

and volume of the shipments expected; the identity and nature of the shippers; the names of ASRR's management and their qualifications to provide rail transportation; and other information relevant to a determination of whether ASRR would be a rail carrier. NJDEP also raised a concern that there is insufficient evidence to support ASRR's claim that environmental review is exempted pursuant to 49 CFR 1105.6.

By pleading filed on February 22, 2007, New Jersey Transit Corporation (NJT) also sought a stay pending receipt of further information regarding the proposed operations by ASRR, which could impact NJT trackage. And, by letter filed on February 21, 2007, Conrail reported that it had had no discussions to date with ASRR regarding the interchange of traffic.

By decision served on February 27, 2007, the effective date of the exemptions was stayed. The decision explained that a stay was appropriate because more time was needed for ASRR and Mr. Crane to answer the concerns raised and for the Board to consider the matters presented. The decision ordered ASRR and Mr. Crane to provide additional information by March 30, 2007.

ASRR and Mr. Crane timely filed a joint response on March 28, 2007. They provided no discussion of management or its rail experience except for a brief reference to Mr. Crane. Their discussion of shippers is similarly vague. ASRR and Mr. Crane state that they will primarily serve Clayton Sand Company and its subsidiaries, but they do not identify any of those related entities. Similarly, even though Mr. Crane allegedly has a long standing relationship with Clayton Sand Company, ASRR and Mr. Crane state that they do not know how much volume they will handle or where it will go. There is no discussion of the actual operations ASRR will perform or their environmental impacts.

On April 4, 2007, NJDEP filed a reply requesting that the Board continue to stay the proceedings. NJDEP stated that Mr. Crane and ASRR had failed to provide sufficient information for us to determine whether ASRR would become a rail carrier and listed a number of other areas where the record allegedly remained deficient.² For example, NJDEP notes that the parties have provided very little detail concerning whether ASRR intends to operate locomotives, own or lease rail cars, provide local or overhead rail operations, establish through rates and divisional arrangements with any other rail carrier, or whether the proposed facility is in fact only a private switch. In a letter attached to the pleading, NJDEP asks the parties' counsel why no contracts have been provided between ASRR, Mr. Crane and any shippers on the line. NJDEP further asks in the attachment, among other questions, how waste will be handled if it is provided in a shipment and whether the other shippers the parties hope to attract are shippers of waste materials.

² On April 30, 2007, the Monmouth County Solid Waste Advisory Council (SWAC) filed a comment supporting NJDEP's stay request. SWAC asserted, among other things, that it would be appropriate to require ASRR to provide additional information to show that ASRR's proposed arrangements would constitute rail transportation, because the site appears to be ill-suited for rail operations based on its rugged topography and the presence of wetlands.

In a decision served on April 30, 2007, a proceeding in these dockets was instituted under 49 U.S.C. 10502(b). The decision noted that the record in this case was still insufficient for the Board to determine whether ASRR would become a rail carrier and did not provide enough information on the extent of ASRR's proposed operations. The decision directed ASRR and Mr. Crane to file additional information to address NJDEP's concerns; explain why ASRR would become a rail carrier; and describe in detail the operations ASRR proposed to perform. The decision provided that ASRR's and Mr. Crane's supplement would be due on May 30, 2007, that replies would be due on June 29, 2007, and that ASRR's and Mr. Crane's rebuttal would be due on July 19, 2007.

Mr. Crane and ASRR jointly filed a submission on May 8, 2007, and a similar submission on May 30, 2007, and provided photographs of the proposed trackage on June 4, 2007.³ In these filings, they assert only that ASRR would provide common carrier service to Clayton Sand Company, a company affiliated with GKR; that ASRR hopes to attract other shippers; that ASRR does not intend to handle municipal solid waste or construction and demolition debris at a transfer site where the material is placed on the ground, sorted, and then placed into railcars; and that ASRR would not build or operate a building for the sorting of waste. (They state that they would be willing to have restrictions placed upon ASRR's proposed operating authority prohibiting such waste operations.)

In a reply filed on June 29, 2007, NJDEP asks that the Board reject the notices of exemption. The state agency maintains that ASRR and Mr. Crane have failed to provide the information required by the Board's decisions. NJDEP argues, among other things, that they have not explained why ASRR would become a rail carrier, or responded to potential environmental impacts related to wetlands and streams present on the property that it and SWAC have raised. NJDEP also notes that the record here suggests that solid waste would be handled at the proposed facility, and that it likely would be handled in the open air rather than in an enclosed building, which could pose serious potential concerns under the state's Solid Waste Management Act and the federal Resource Conservation and Recovery Act. NJDEP further argues that the class exemption process was not meant for a case like this one where the proposed transaction has generated substantial controversy and opposition, and where the proposal is to convert a long-inactive track and non-rail property into a common carrier operation.

On July 2, 2007, SWAC submitted a filing that echoes NJDEP's concerns about the possible solid waste activities and the lack of information about how ASRR would protect the wetlands and drinking-water resources on the GKR property. The local entity asks that the Board undertake an environmental review of the proposed transaction and that the Board's Section of Environmental Analysis (SEA) conduct a site visit.

³ They also attached a map and letter of support from GKR to their May 30 submission.

On July 18, 2007, Congressman Christopher H. Smith, Dorothy Avallone, the Mayor of Freehold Township, and Michael Wilson, the mayor of Freehold Borough (Representatives) jointly filed a request asking that SEA conduct a full environmental review of the proposal and that the Board hold a hearing in Monmouth County. The Representatives note that future rail operations could have detrimental impacts on the property's wetlands and raise concerns regarding potential harm to the area's drinking water and air emissions. On the same day, Mayor Wilson filed an additional pleading requesting preparation of a full Environmental Impact Statement.⁴

ASRR and Mr. Crane have not filed any rebuttal, as provided for in the Board schedule established for these proceedings. Thus, the record contains no response by ASRR and Mr. Crane to the concerns raised regarding the alleged omissions in their late May and early June filings.

DISCUSSION AND CONCLUSIONS

To come within the Board's jurisdiction (and thus be covered by the Federal preemption in 49 U.S.C. 10501(b)), an activity must constitute transportation provided by, or under the auspices, of a "rail carrier." See 49 U.S.C. 10501. The February and April 2007 decisions asked ASRR and Mr. Crane to answer basic questions regarding their proposed operations and, in particular, explain why ASRR would become a rail carrier. However, they have failed to respond or have provided only vague and confusing answers to address the specific questions posed and the concerns raised by the opposing parties. They have failed to adequately describe the shippers that they will serve, the operations that they will conduct, the arrangements that they will have with rail carriers, or the environmental impacts of the proposed activities. Indeed, they have failed to file any rebuttal to the arguments made in the replies filed by the opposing parties, even though the procedural schedule specifically provided for a rebuttal to be filed. Their unresponsiveness to the requests for additional information leaves us with insufficient basis upon which to authorize the proposed activities. Accordingly, we will reject the notices of exemption.

Our rejection of the notices of exemption is without prejudice. Should ASRR and Mr. Crane be in a position to provide the information requested in the Board's prior decisions and demonstrate that ASRR would become a bona fide rail carrier engaged in rail transportation, they may refile. We note, however, that a number of parties have argued that an environmental review under the National Environmental Policy Act is warranted here because of potential impacts to wetlands and the water supply. Therefore, should ASRR and Mr. Crane again seek authority, they should explain, in detail, why these transactions would not warrant the preparation of environmental documentation by the Board. See 49 CFR 1105.6(d).

⁴ Mr. James H. Brown submitted filings on April 23, 2007, and July 5, 2007, asserting that more information about this proposal is needed before it should be allowed to go into effect.

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

It is ordered:

1. The notices of exemption are rejected without prejudice.
2. This decision is effective on its service date.

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

Vernon A. Williams
Secretary