

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34952

DEVENS RECYCLING CENTER, LLC—PETITION FOR DECLARATORY ORDER

Decided: January 9, 2007

On November 7, 2006, Devens Recycling Center, LLC (Devens), filed a petition for institution of a declaratory order proceeding. Devens seeks a determination that the Board's prior authorization is not required under 49 U.S.C. 10901 for the construction of a track in Middlesex County, MA, because the track would qualify for the exception contained under 49 U.S.C. 10906 for ancillary (spur, industrial, team switching, or side) track. Additionally, Devens seeks a determination that, regardless of the classification of the track, the construction would not result in either Massachusetts Development Finance Agency (Massachusetts Development) or Devens becoming rail common carriers.

BACKGROUND

Devens is a Massachusetts limited liability company planning to build and operate a construction and demolition recycling facility (C&D facility) in Middlesex County, MA. In order to increase the efficiency and capacity of this facility, Devens plans to construct approximately 1,462 feet of track from a main line owned and operated by Boston and Maine Corporation, Springfield Terminal Railway, and/or Guilford Transportation Industries, Inc. (Boston & Maine) to its property boundary and then through its property for another 820 feet. In order to build its recycling center and the track at issue, Devens has purchased an 11.10-acre lot from Massachusetts Development and entered into an Army Sublease and Easement Agreement and other related agreements with Massachusetts Development.

Devens explains that it would be responsible for building the track and would retain ownership of it and track-related structures. Devens states that it would enter into an agreement with Boston & Maine, whereby that carrier would switch railroad cars to and from the track.

The proposed C&D facility would obtain and process construction debris for shipment from the facility by truck and rail. The facility would consist of a building between 80,000 and 100,000 square feet, which would include a totally enclosed material processing area, personnel and administrative offices, an educational learning center, and a truck-to-rail transfer station. The C&D processing would take place inside the building.

Devens states that there are no plans to allow any other shippers to use any part of the track. According to Devens, the owners of adjoining properties to the east and west of the C&D

facility have both stated that they have no need for rail access. The property to the east, Southern Container Corp., is served by a side track on the east side of the building, and the property to the west, Kraft Foods, has a building that both blocks any further extension of the track and is on a substantially different grade than the track, making use of the track by Kraft Foods impractical. There are no potential shippers to the south of the C&D facility needing or planning access to rail, and the north side of the facility borders wetlands, ponds, and draining areas.

Devens argues, based on the physical characteristics and intended use of the track, that the proposed track is ancillary spur track, excepted under 49 U.S.C. 10906 from the pre-approval requirement of 49 U.S.C. 10901. Devens claims that the track has the physical characteristics of a spur because it is short, stub-ended, would be used for operations that are ancillary to the Boston & Maine's operations over its main line, and would end in Devens' C&D facility. Devens further states that there would not be transfer stations, agents or loading platforms constructed along the track, that all rail traffic would be shipments for Devens, and that the track would not invade the territory of another railroad. Rather, Devens states, the track would be built only to meet Devens' own transportation needs.

Devens also argues that neither it nor the owner of the land on which the track would sit, Massachusetts Development, are or intend to become a common carrier. Devens suggests that the operator, Boston and Maine, would acquire a common carrier obligation after the proposed transaction is complete, citing Maine, DOT—Acq. Exemption, ME Central R. Co., 8 I.C.C.2d 835 (1991) (State of Maine).

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. 554(e) and 49 U.S.C. 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty as to the status of particular track. It is not necessary for the Board to institute a declaratory order proceeding here, however, because it is clear that the track at issue would be private track, which is not covered by the Interstate Commerce Act and does not require any authority from the Board to build or operate.

Under the statute, the Board has jurisdiction over transportation by rail carrier, 49 U.S.C. 10501(a)(1), and the term "rail carrier" is defined as "a person providing common carrier railroad transportation for compensation," 49 U.S.C. 10102(5). The agency's jurisdiction, however, does not extend to wholly private rail operations conducted over private track, even when such operations are conducted by an operator that conducts common carrier operations elsewhere, if it operates on the private track exclusively to serve the owner of the track pursuant to a contractual arrangement with that owner. See B. Willis, C.P.A., Inc.—Petition for Declaratory Order, STB Finance Docket No. 34013 (STB served Oct. 3, 2001), aff'd, 2002 LEXIS 24269 (D.C. Cir. 2002) (B. Willis). Private track is typically built by a shipper (or its contractors) to serve only that shipper, moving the shipper's own goods, so that there is no "holding out" to serve the public at large. Id., slip op. at 2. See also Hanson Natural Resources Company—Non-Common Carrier Status—Petition for Declaratory Order, Finance Docket No. 32248, slip op. at 20-21 (ICC served Dec. 5, 1994). While the term "private track" is not defined in the statute, Congress has stated: "[N]on-railroad companies who construct rail lines to serve

their own facilities [exclusively] . . . are not required to obtain agency approval to engage in such construction.” H.R. Rep No. 422, 104th Cong., 1st Sess. (1995) at 179.

Here, Devens has submitted evidence that it owns the easements on the land and will own the rail track being constructed after transactions with Massachusetts Development are completed. Devens also asserts that neither it nor Massachusetts Development has any intention of becoming a common carrier, and neither party has held out to, or granted, Boston & Maine the right to provide service over the track to any other shipper. Moreover, Devens states that Boston & Maine will not own the track, and states that Devens will be the only shipper able to receive shipments on the track.

As past cases make clear, where, as here, track is built to meet a shipper’s own transportation needs and there is no holding out of the possibility for any other shipper to obtain service, the track is private track. Neither the construction of such track nor the wholly private operations over it are subject to the jurisdiction of the Board. This is so even when such operations are conducted by an operator such as Boston and Maine that conducts common carrier rail operations elsewhere if, as in this case, operations on the private track are exclusively to serve the owner of the track pursuant to a contractual arrangement with the owner. B. Willis.¹

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

It is ordered:

1. The petition for a declaratory order is denied.
2. The decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary

¹ Contrary to Devens’ suggestion, State of Maine is not implicated here because the common carrier obligation does not apply to private operations on private track.