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SERVICE DATE – JANUARY 20, 2011

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35397

ABC & D RECYCLING, INC.
—LEASE AND OPERATION EXEMPTION—
A LINE OF RAILROAD IN WARE, MASS.

Decided: January 19, 2011

Digest:¹ ABC & D Recycling, Inc., has notified the Board that it plans to begin Board-regulated railroad operations in Ware, Mass. The Board will not allow ABC & D to begin railroad operations at this time.

BACKGROUND

On July 28, 2010, ABC & D Recycling, Inc. (ABC & D), a noncarrier, filed a verified notice of exemption under 49 C.F.R. § 1150.31 (Notice) to lease from the O’Riley Family Trust, and to operate, 773 feet of rail line (the trackage) located at milepost 12.8, in Ware, Mass. (Ware). The trackage is currently operated by the Massachusetts Central Railroad Corporation.

Notice of the exemption was served and published in the Federal Register on August 13, 2010 (75 Fed. Reg. 49,549-50). ABC & D’s exemption was scheduled to become effective on August 27, 2010. However, on August 17, 2010, Ware filed a petition to reject and/or dismiss ABC & D’s Notice, and to stay the effective date of ABC & D’s exemption (Petition). In a decision served on August 26, 2010, the Board granted the stay request to delay the effective date of the exemption pending further order of the Board. The Board’s decision set a due date for ABC & D’s reply to Ware’s Petition. ABC & D submitted its reply on September 2, 2010 (Reply).

¹ 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).

In its Notice, ABC & D stated that it handles² construction and demolition debris (C&D) as part of its operations at its facility, which is served by the trackage, and that it holds state and local permits necessary to handle C&D. ABC & D also stated that, upon the effective date of its exemption, it will operate as a common carrier while continuing to handle C&D. It acknowledged that if it wishes to transfer solid waste or municipal solid waste (MSW), as defined in the Clean Railroads Act of 2008, 49 U.S.C. §§ 10501(c)(2)(B), 10908-10910 (CRA),³ it must: (1) obtain all state and local permits necessary in order to transfer such solid waste; or (2) obtain a land-use exemption from the Board for any permits (affecting the siting of the facility) that it is unable to obtain from state or local government entities.⁴

² ABC & D repeatedly states that it plans to “handle” municipal solid waste (MSW) at its facility, and indicates that its facility will therefore be subject to the Clean Railroads Act of 2008, 49 U.S.C. §§ 10501(c)(2)(B), 10908-10910 (CRA), provided ABC & D becomes a rail common carrier. The CRA regulates “solid waste rail transfer facilit[ies],” which are defined as facilities “where solid waste, as a commodity to be transported for a charge, is collected, stored, separated, processed, treated, managed, disposed of, or transferred, when the activity takes place outside of original shipping containers.” 49 U.S.C. § 10908(e)(1)(H)(i). While the CRA does not define a solid waste rail transfer facility as one at which MSW is “handled,” the handling activities that ABC & D describes appear to be a form of transfer, and accordingly may fall within the CRA’s definition. Unless discussing ABC & D’s own description of its activities contained in its Notice, we will refer herein to ABC & D’s activities as “transfer.”

³ ABC & D and Ware use the terms “solid waste” and “municipal solid waste” (MSW) interchangeably. Both types of materials, as well as C&D, are subject to regulation under the CRA and are defined within it at 49 U.S.C. § 10908(e). Because ABC & D sought authority to handle MSW in its 2007 Site Suitability Application and refers to MSW in other relevant materials (which are attached as exhibits to Ware’s Petition), we use the term MSW in this decision to refer to both solid waste and municipal solid waste.

⁴ Assuming that ABC & D’s facility would be subject to the CRA, ABC & D would need to comply with the statute as well as the Board’s implementing regulations, set forth at 49 C.F.R. part 1155. Pursuant to the CRA, in order to operate a solid waste rail transfer facility, a rail carrier must obtain all necessary state and local permits for its operation that do not affect the siting of the facility. It may also elect to seek state and local siting permits. However, a rail carrier that owns and operates (or proposes to own or operate) a solid waste rail transfer facility may petition the Board for a land use exemption permit, which, if granted, would preempt state and local laws or requirements affecting the siting of the facility, as identified in the rail carrier’s petition. 49 U.S.C. §§ 10909(a)(1), (f). State and local governments retain traditional police powers over such facilities and may require ABC & D to comply with public health and safety rules and regulations that do not affect the siting of the facility. *Id.* § 10910. In addition, the
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In its Petition, Ware argues that ABC & D's Notice contains omissions and false and misleading information and is, therefore, void ab initio. For example, Ware claims that ABC & D failed to disclose that Ware had previously denied ABC & D's application to transfer MSW at its facility and that the Special Permit it now holds, authorizing its existing operations, may be invalid. Ware states that ABC & D has brought lawsuits in the Massachusetts courts regarding these matters. In one action, ABC & D challenges the denial of its application to handle MSW, while in the other action, it seeks a declaratory ruling regarding the validity of its Special Permit.

Ware also claims that ABC & D has falsely represented that it has reached an agreement with the O'Riley Family Trust and that it intends to act as a common carrier. Ware argues that the physical limitations of ABC & D's facility may preclude ABC & D from providing common carrier service and that, in any event, ABC & D does not intend to offer common carrier service. Additionally, Ware describes ABC & D's efforts to seek common carrier status using the Board's class exemption procedures as a "sham" designed to circumvent state and local laws. Ware further contends that ABC & D's Notice addresses complicated and disputed matters. As a result, Ware argues the Board should not authorize the transaction using its abbreviated class exemption procedures.⁵

In its Reply, ABC & D responds to Ware's allegations. ABC & D claims it is "already virtually a common carrier railroad operation" (Reply at 2) and will operate as a common carrier if its Notice becomes effective. ABC & D argues that, to the extent there is any controversy regarding this matter, it relates only to MSW. ABC & D maintains that even if its Notice were to take effect, it would only authorize it to act as a common carrier and would not decide the issues related to MSW which, under the CRA, are subject to other federal, state, and local laws. Additionally, ABC & D argues that the record now before the Board is entirely adequate and, therefore, that further proceedings are not needed for the Board to decide this matter.

(. . . continued)

Board may require that the facility comply with state and local requirements as part of any land use exemption permit. Id. § 10909(f).

⁵ The Massachusetts Department of Environmental Protection and the Massachusetts Department of Transportation each filed comments supporting Ware. In their comments, they repeat many of the arguments that Ware makes, including that ABC & D appears incapable of providing common carrier service.

PRELIMINARY MATTERS

On September 10, 2010, Ware filed a motion for a partial waiver of the Board's rule prohibiting replies to replies (Motion). Ware also filed an accompanying sur-reply in order to respond to certain arguments, which it claims that ABC & D raised for the first time in its Reply. ABC & D in turn filed a motion in opposition (Opposition) on September 16, 2010, in which it argues that the Board should deny Ware's Motion and reject the accompanying sur-reply, or in the alternative, permit ABC & D to respond to Ware's sur-reply. In light of our findings below, we will deny both Ware's Motion and ABC & D's Opposition as moot, and we will not consider the sur-reply accompanying Ware's Motion. Additionally, in light of our rejection of ABC & D's Notice, Ware's August 17, 2010 petition for a stay of ABC & D's exemption will also be denied as moot.

DISCUSSION AND CONCLUSIONS

The Board's class exemption procedures provide an expedited means of obtaining Board authority in certain classes of transactions involving routine matters. A notice that raises unresolved issues or questions that require considerable scrutiny may be rejected. Winamac S. Ry.—Trackage Rights Exemption—A. & R. Line, Inc., FD 35208, slip op. at 2 (STB served Jan. 9, 2009). Additionally, a notice that is misleading is void ab initio, and the Board will reject it. U S Rail Corp.—Lease & Operation Exemption—Shannon G., FD 35042, slip op. at 3-4 (STB served Oct. 8, 2008).⁶ Because ABC & D's Notice raises questions that require scrutiny beyond that available under the Board's class exemption procedures, and because it is misleading, the Board will reject it.

This proceeding involves numerous complex questions that cannot be addressed through the class exemption procedure. Ware has raised significant questions regarding ABC & D's ability and intent to act as a common carrier, and ABC & D has not adequately responded to Ware's concerns. In addition, the structure of the underlying transaction remains unclear, notwithstanding the parties' extensive filings. ABC & D stated in its Notice that it had reached

⁶ The Board's class exemption procedures are not intended for use in matters that attract substantial controversy and local interest. Ne. Interchange Ry.—Lease & Operation Exemption-Line in Croton-on-Hudson, N.Y., FD 34734, slip op. at 4 (STB served Nov. 18, 2005). Such interest is evidenced here by the ongoing litigation involving Ware and ABC & D regarding the validity of ABC & D's Special Permit and ABC & D's efforts to obtain necessary MSW permit authority, as well as the opposition of Ware, the Massachusetts Department of Environmental Protection, and the Massachusetts Department of Transportation to ABC & D's Notice.

an agreement “pursuant to which ABC & D leases and will operate the railroad trackage in Ware, Massachusetts owned by [the] O’Riley Family Trust.” Notice at 3. Now, however, ABC & D claims that, while no written lease agreement exists, a written agreement would be a mere “formality.” Reply at 6. Indeed, it now appears that ABC & D will not enter into a lease with the O’Riley Family Trust, but rather will enter into an agreement with an individual, Chris Berardi, who will make the acquisition from the O’Riley Family Trust. Petition at 3. Another key component of the proposed transaction that remains ambiguous relates to the respective parcels of land owned or controlled by the O’Riley Family Trust and by the Massachusetts Department of Transportation. It is unclear whether either parcel, or both, would be necessary for ABC & D to provide common carrier rail service. See, e.g., Petition at 5 n.8. In short, there remain a number of unanswered questions surrounding ABC & D’s Notice.

In its Notice, ABC & D also stated that it is engaged “primarily in the business of handling construction and demolition debris,” (Notice at 2) and that, in connection with those activities, it had “obtained” all required state and local permits. Notice at 5. However, while ABC & D may have obtained certain permits, it failed to disclose that the validity of its Special Permit has been called into question and is the subject of litigation, and that its proposal to transfer MSW has been rejected and is also the subject of litigation. ABC & D does not dispute these facts. Rather, it states: “None of the omitted facts are necessary to render anything contained in the Notice of Exemption not misleading.” Reply at 26.

We disagree. While ABC & D’s Notice creates the appearance of an entity positioned to commence common carrier operations, including the transfer of C&D and, in the future, MSW, the facts cited above, which ABC&D did not disclose, call this appearance into question. As a result of the Notice’s misleading nature, which renders it void ab initio, see, e.g., U S Rail at 3-4, and because of the unresolved issues and questions the Notice raises that require considerable scrutiny, the Board will reject it. See, e.g., Winamac S. Ry. at 2.

Furthermore, ABC & D acknowledges that if it becomes a common carrier, it may then seek a land use exemption permit from the Board under the CRA.⁷ Thus, this notice may trigger novel issues regarding the applicability of the CRA that would best be resolved with a more fully developed and briefed record.

⁷ ABC & D states: “Unless ABC & D becomes a common carrier railroad, it will have no opportunity to demonstrate that the special permit affects the siting of its facility or to demonstrate that its existing construction and demolition debris business is not detrimental to the public health, safety or welfare or to demonstrate that the invalidation of the special permit unreasonably burdens interstate railroad transportation.” Reply at 3.

If ABC & D wishes to seek lease and acquisition authority from the Board with respect to the trackage, the more extensive record afforded in an application or petition for exemption proceeding is needed. Unlike a notice of exemption, a petition or application would provide for responsive pleadings, allow the Board ample time to consider the issues before it, and require payment of higher filing fees that reflect the Board resources required for consideration of the matter. If ABC & D chooses to pursue this matter through either a petition for exemption or an application, it must file it under a new docket number and submit the appropriate filing fees.

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

It is ordered:

1. ABC & D's Notice is rejected and this proceeding is discontinued.
2. Ware's motion for a partial waiver of 49 C.F.R. § 1104.13(c) is denied as moot and the accompanying sur-reply is not accepted for filing.
3. ABC & D's motion in opposition to Ware's motion for a partial waiver of 49 C.F.R. § 1104.13(c) is denied as moot.
4. Ware's petition for a stay is denied as moot.
5. This decision is effective on its date of service.

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