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SERVICE DATE – JANUARY 8, 2013

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35685

RAIL SWITCHING SERVICES, INC.—OPERATION EXEMPTION—PEMISCOT COUNTY
PORT AUTHORITY

Docket No. FD 35686

PIONEER RAILCORP—CONTINUANCE IN CONTROL EXEMPTION—RAIL
SWITCHING SERVICES, INC.¹

Digest:² This decision rejects Rail Switching Services, Inc.'s request for Board authority to operate over a rail line owned by Pemiscot County Port Authority. The decision finds that RSS misled the Board by stating that the two parties had entered into an agreement for RSS to operate the line at issue.

Decided: January 7, 2013

BACKGROUND

On October 15, 2012, Rail Switching Services, Inc. (RSS), a noncarrier, filed a verified notice of exemption under 49 C.F.R. § 1150.31 to operate approximately 4.9 miles of rail line owned by Pemiscot County Port Authority (PCPA) between the BNSF Railway Company (BNSF) interchange at milepost 212.32, at Hayti, Mo., and milepost 217.22 at Pemiscot Port Harbor, on the Mississippi River between Hayti and Caruthersville, Mo. (the Line).³ Pioneer Railcorp (Pioneer) concurrently filed a verified notice of exemption under 49 C.F.R. § 1180.2(d)(2) to continue in control of RSS upon RSS's becoming a Class III rail carrier. Notices of the exemptions were served and published in the Federal Register, 77 Fed.

¹ These proceedings are not consolidated but are being addressed in the same decision 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).

³ PCPA previously obtained Board authority to construct and operate the Line. Pemiscot Cnty. Port Auth.—Constr. Exemption—Pemiscot Cnty., Mo., FD 34117 (STB served Aug. 26, 2003).

Reg. 65,937, on October 31, 2012. The exemptions were scheduled to become effective on November 14, 2012.

On October 26, 2012, PCPA, the owner of the Line, filed a petition to reject the exemptions. PCPA argues: (1) RSS lacks an agreement with PCPA to provide common carrier railroad service over the Line and the notices of exemption are therefore false or misleading and should be found to be void ab initio; (2) Board authority is unnecessary for the services that RSS provides on the Line; and (3) the matter involves unusual, complex, and controversial issues not suitable for the Board's expedited class exemption procedures.⁴ On November 1, 2012, PCPA filed a supplement to its petition to reject that included a petition to stay.

On November 5, 2012, RSS and Pioneer filed joint replies to PCPA's petitions. RSS and Pioneer argue that the notices are not novel or complex and involve a routine invocation of the Board's class exemptions.⁵ They argue the notices are neither false nor misleading, as there is an existing contract between the parties, which was fully disclosed to the Board.⁶ Ultimately, RSS and Pioneer argue that the Board's authority is permissive, and the underlying contractual dispute relied upon by PCPA as grounds for rejection is a matter for the courts, not the Board, to decide.⁷ RSS and Pioneer also responded to PCPA's petition to stay.

On November 8, 2012, BNSF filed a letter in opposition to RSS's notice of exemption for operating authority. BNSF challenges RSS's assertion that "only RSS is entitled to provide service between PCPA line shippers and BNSF."⁸ BNSF argues that it has authority to operate on the Line because of an existing agreement with PCPA that predated the PCPA/RSS agreement that is the subject of the dispute here.⁹ BNSF also argues that PCPA has the right to operate on the Line.¹⁰

On November 8, 2012, PCPA filed a petition for leave to reply to the RSS/Pioneer joint replies, stating that it wished to address certain incorrect assertions made by RSS.¹¹ PCPA argues that RSS does not require Board authority under the RSS/PCPA contract because a private carrier can provide non-common carrier services over a regulated line of railroad without obtaining Board operating authority.¹² PCPA also submitted a verified statement from the

⁴ PCPA Pet. to Reject 2-3.

⁵ RSS & Pioneer Reply to Pet. to Reject 3.

⁶ Id.

⁷ Id. at 3-4.

⁸ BNSF Nov. 8 Letter 2 (quoting RSS & Pioneer Reply to Pet. to Reject 12 n.7).

⁹ BNSF Nov. 8 Letter 2.

¹⁰ Id.

¹¹ PCPA Pet. for Leave to Reply 2. On November 9, 2012, PCPA filed a corrected version of its November 8, 2012 petition.

¹² Id. at 4-5.

president of Marquis – Missouri Terminal, LLC (MMT), the only shipper currently located on the Line, according to the record. MMT states, *inter alia*, that it does not require services from RSS and that it located on the Line in order to obtain direct service from BNSF.¹³

On November 9, 2012, RSS and Pioneer filed a motion seeking to strike and to reply to PCPA's petition for leave to reply. In that motion, they argue that 49 C.F.R. § 1104.13(c) prohibits the filing of a reply to a reply.¹⁴ RSS and Pioneer contend that, while RSS does not need Board authority to engage in its current activity on the Line (movement of cars for storage purposes), it possesses the right to provide switching services between BNSF and the shipper on the Line,¹⁵ service that, in their view, requires Board authority.¹⁶ RSS and Pioneer request the Board to consider their reply if the Board considers PCPA's petition for leave to reply.¹⁷

Also on November 9, 2012, RSS and Pioneer filed a letter in response to BNSF's November 8 letter. RSS and Pioneer again assert that BNSF does not have the authority to operate over the Line.¹⁸ RSS and Pioneer argue that, if BNSF is serving MMT under the terms of its 2003 Industry Track Agreement with PCPA, it is in violation of the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803.¹⁹ Later that day, BNSF filed a letter in response to RSS's November 9, 2012 letter. BNSF attempts to refute RSS/Pioneer's assertion that it is providing service to MMT in violation of the Board's statute.²⁰ On November 13, 2012, PCPA filed a reply to the RSS/Pioneer motion to strike.

As stated previously, the exemptions were scheduled to become effective on November 14, 2012. In order to fully consider the arguments presented by the parties, the Board imposed a housekeeping stay on November 13, 2012. The stay postponed the effective date of both exemptions until further order of the Board.

PRELIMINARY MATTER

Under the Board's rules of practice, a reply to a reply is not permitted. 49 C.F.R. § 1104.13(c). The Board does, however, have the discretion to accept otherwise impermissible filings when it is appropriate to do so. In the interest of obtaining a more complete record, the Board will accept into the record all pleadings submitted as of the service date of this decision.

¹³ PCPA Pet. for Leave to Reply, V.S. of D.L. Marquis 1-2.

¹⁴ RSS & Pioneer Motion to Strike & Reply 2.

¹⁵ Id. at 7.

¹⁶ Id.

¹⁷ Id. at 14.

¹⁸ RSS & Pioneer Letter 2.

¹⁹ Id.

²⁰ BNSF Nov. 9 Letter 1.

DISCUSSION AND CONCLUSIONS

An exemption under 49 C.F.R. pt. 1150 Subpart D is void ab initio if the notice contains false or misleading information. Failure to disclose material information can render a notice misleading by omission, and therefore void ab initio. U S Rail Corp.—Lease & Operation Exemption—Shannon G., a N.J. LLC (U S Rail), FD 35042, slip op. at 3-4 (STB served Oct. 8, 2008). Material means the transaction would not have otherwise qualified for an exemption. Berkshire Scenic Ry. Museum, Inc. v. ICC, 52 F.3d 378, 381 (1st Cir. 1995).

When a party files a verified notice of exemption under 49 C.F.R. pt. 1150 Subpart D, § 1150.33(c) requires “[a] statement that an agreement has been reached or details about when such an agreement will be reached.” This rule contemplates that the party seeking authority to operate as a common carrier over the subject line either has, or is in the process of acquiring, an agreement with the underlying owner to provide that service. Without an agreement, or a plan to reach an agreement, a transaction would not qualify for an exemption under Subpart D. Therefore, under § 1150.33(c), an agreement is material to the transaction.

In its verified notice of exemption, RSS failed to advise the Board of the active dispute between it and the owner of the Line regarding the interpretation of the agreement at issue here, namely, whether the agreement provided that RSS could seek operating authority from the Board to operate as a common carrier over the Line. We consider that omission of material fact to be misleading, and the notice is therefore void ab initio pursuant to 49 C.F.R. § 1150.32(c). See, e.g., U S Rail, slip op. at 3-4 (rejecting the filer’s notice of exemption because it failed to advise the Board of a known condemnation action that was occurring on the line at issue in that lease and operation exemption proceeding).

RSS’s notice of exemption will also be rejected because the record indicates that this matter is controversial and not routine, and therefore the use of the Board’s class exemption procedures is not appropriate in this case. See, e.g., Winamac S. Ry.—Trackage Rights Exemption—A. & R. Line, Inc., FD 35208 (STB served Jan. 9, 2009) (rejecting a trackage rights exemption because the successor to the original granting carrier was actively opposed to the transaction and asserted the agreement was no longer in effect.). Here, PCPA, the owner of the Line, actively opposes the exemption sought by RSS and disagrees with RSS’s assertion that the two parties have an agreement that permits RSS to seek operating authority from the Board. Moreover, the ongoing contractual dispute between the parties raises fundamental issues of state contract law that should be addressed before RSS again seeks to obtain Board authority to operate over the Line.

As noted above, RSS’s notice of operation exemption is related to a concurrently filed notice of exemption for Pioneer Railcorp to continue in control of RSS upon RSS’s becoming a Class III rail carrier. See Pioneer Railcorp—Continuation in Control Exemption—Rail Switching Services, Inc., FD 35686 (STB served Oct. 31, 2012). Our finding here that RSS’s notice of operation exemption is void ab initio means that RSS is not a rail carrier and Pioneer

does not need authority to continue in control. Thus, the control authority sought pursuant to the notice in FD 35686 is of no effect, and we will dismiss that notice as moot.²¹

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

It is ordered:

1. All pleadings submitted as of the service date of this decision are accepted into the record.
2. PCPA's petition to reject the notice filed by RSS is granted.
3. RSS's notice of exemption is void ab initio and rejected.
4. Pioneer's notice of exemption is dismissed as moot.
5. This decision is effective on its service date.

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

²¹ While RSS and Pioneer have questioned whether BNSF is lawfully operating over the Line, that issue has no bearing on whether we should grant PCPA's petition to reject RSS's notice of exemption. However, because PCPA obtained Board authority to construct the Line, including authority to operate the Line as a common carrier railroad line, it would appear that BNSF would not be able to operate over PCPA's Line without obtaining Board authority itself. We expect BNSF to seek promptly any needed Board authority for its operations over the Line to be in compliance with our statute.