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SERVICE DATE – JANUARY 18, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35090

JP RAIL, INC.—LEASE AND OPERATION EXEMPTION—NAT INDUSTRIES, INC.

Decided: January 17, 2008

BACKGROUND

On October 17, 2007, JP Rail, Inc. (JP Rail), a small Class III railroad, filed a verified notice of exemption under 49 CFR 1150.41 to lease from NAT Industries, Inc. (NAT) approximately 1 mile of track in Carroll Township, PA (the Line). JP Rail also seeks to operate the Line. JP Rail stated that the Line is a stub-ended spur connecting to the Donora Line and that it was formerly operated by NAT as private industrial track. JP Rail stated that it would hold itself out to provide common carrier rail freight service over the Line; that it planned to serve customers originating traffic at JP Rail's Pleasantville, NJ facility; and that it also planned to market its service to local customers.

According to JP Rail, the traffic would consist of construction and demolition materials (C&D), which would be transported from Pleasantville by Norfolk Southern Railway Company to a connection with the Line at milepost ML40 in Carroll Township. JP Rail would then transport the C&D over the Line for subsequent transloading into trucks for movement to "Westmoreland Waste's landfill," approximately 3 miles away. JP Rail stated that this operation was intended to be temporary until a permanent rail unloading facility could be constructed on Westmoreland Waste's site and its landfill permit could be amended to allow for rail traffic. Finally, JP Rail asserted that the proposed transaction is exempt from environmental review under the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* (NEPA), pursuant to 49 CFR 1105.6(c)(2)(i), because it would not cause any operating changes that exceed the thresholds established in 49 CFR 1105.7(e)(4) or (5), and from historic review under 49 CFR 1105.8(b)(1).

The Board, through the Director of the Office of Proceedings, in a decision served October 26, 2007, directed JP Rail to file supplemental information describing in greater detail its anticipated operations and supporting its claim that environmental review under NEPA is not warranted. The Board also directed JP Rail to serve a copy of its verified notice and the October 26 decision on appropriate federal, state, and local entities. Finally, the Board extended the effective date of the exemption until December 6, 2007, to allow time for those parties to participate, if they wish. The Board published notice of the exemption in the Federal Register on November 2, 2007. The Board's notice set a deadline of November 29, 2007, for the filing of any petitions for stay.

On October 31, 2007, JP Rail filed a verified statement of David M. DeClement, an officer of JP Rail, to supplement its notice of exemption. On November 29, 2007, the Board received three petitions in opposition to the notice of exemption. The Pennsylvania Waste Industries Association (PWIA) asked the Board to revoke the exemption or to stay its effectiveness, arguing that the notice contains false and misleading information rendering it void ab initio, and maintaining that environmental review under NEPA is required. The New Jersey Department of Environmental Protection (NJDEP) also sought revocation of the exemption or a stay of its effectiveness, arguing that use of the summary class exemption process is not appropriate here because the notice contains false and misleading information, the matter is very controversial and heavily opposed, and environmental review is needed. The Pennsylvania Department of Environmental Protection (PaDEP), citing misrepresentations and unauthorized operations by JP Rail, asked the Board to: (1) find the notice of exemption void ab initio; (2) issue a cease and desist order; (3) continue to delay the effectiveness of the exemption; (4) require JP Rail to submit an environmental assessment; and (5) extend the period for submission of further comments and petitions.

Based on the evidence from PaDEP that JP Rail had already delivered cars over the Line and transloaded materials, which PaDEP argued was causing significant harm to the environment, the Board found in a decision served on December 5, 2007, that JP Rail was conducting unauthorized operations on the Line, because no exemption authorizing it to lease and operate the Line had yet become effective. The Board therefore directed JP Rail to remove waste-containing rail cars from this site, to refrain from bringing additional rail cars to the Line, and to immediately cease and desist any further operations over the Line until further order of the Board. To allow JP Rail an opportunity to respond to the arguments in the petitions from PWIA, NJDEP, and PaDEP (petitioners), and to allow the Board to fully consider these petitions and JP Rail's response, the Board delayed the effectiveness of this exemption for an additional 45 days and directed JP Rail to reply to the petitions from PWIA, NJDEP, and PaDEP by December 17, 2007.

JP Rail filed a reply on December 17, 2007, in which it argues that petitioners have failed to show any basis for rejection or revocation of the exemption it is seeking. JP Rail argues that the information it submitted in support of its notice of exemption fully satisfies the Board's regulatory requirements. Moreover, JP Rail maintains that its earlier operations on the Line constituted private carriage pursuant to an account with Westmoreland Waste and were therefore not subject to the Board's jurisdiction. JP Rail argues that its operations as a private carrier over this "private industrial spur track" serving a single customer neither required Board approval nor misused the Board's exemption process.

On December 28, 2007, PaDEP filed a motion for leave to file a response to JP Rail's reply, as well as its response. In its response, PaDEP questions the ownership of the Line and the route of truck traffic serving the Line. On January 7, 2008, JP Rail filed a reply requesting that the Board strike PaDEP's response as a prohibited reply to a reply and responding to the

assertions contained therein. In the interest of compiling a complete record, we will consider both PaDEP's response and JP Rail's reply thereto. We will therefore grant PaDEP's motion for leave to file a response and deny JP Rail's request that we strike that response.

DISCUSSION AND CONCLUSIONS

On December 26, 2007, the Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844 (2007) (Act), was enacted into law. Among other things, the Act provides the Board with funding for fiscal year 2008. As pertinent here, section 193 of the Act provides:

(a) None of the funds appropriated or otherwise made available under this Act to the Surface Transportation Board of the Department of Transportation may be used to take any action to allow any activity described in subsection (b) in a case, matter, or declaratory order involving a railroad, or an entity claiming or seeking authority to operate as a railroad, unless the Board receives written assurance from the Governor, or the Governor's designee, of the State in which such activity will occur that such railroad or entity has agreed to comply with State and local regulations that establish public health, safety, and environmental standards for the activities described in subsection (b), other than zoning laws or regulations.

(b) Activities referred to in subsection (a) are activities that occur at a solid waste rail transfer facility involving—

(1) the collection, storage, or transfer of solid waste (as defined in section 1004 of the Solid Waste Disposal Act (42 U.S.C. 6903)) outside of original shipping containers; or

(2) the separation or processing of solid waste (including baling, crushing, compacting, and shredding).

Consequently, no Board decision issued during the period covered by the Act can authorize any of the aforementioned activities prior to receipt of the written assurance referenced in the Act from the governor of the state (or governor's designee) where such activities are proposed. Because JP Rail's proposal predominantly involves the transportation and transloading of "solid waste" as defined in 42 U.S.C. 6903 in a manner not permitted under the Act, we will not permit JP Rail's notice of exemption to become effective.

As described in its notice and subsequent pleadings, JP Rail anticipates transporting C&D originating at its Pleasantville, NJ facility over the Line and transloading the C&D to truck for ultimate transport to Westmoreland Waste's landfill. The stated purpose of the proposed operations, as presented by JP Rail, appears to be focused on facilitating the transloading of C&D for ultimate disposal at a landfill; while the notice states that JP Rail will hold itself out to provide common carrier service and will market its services to local customers, JP Rail does not mention specific plans to transport any other commodities. Under the Solid Waste Disposal Act, the term "solid waste" is defined to include "discarded material, including solid . . . material

resulting from industrial, commercial, mining, and agricultural operations, and from community activities” 42 U.S.C. 6903(27). The transloading of this C&D appears to be exactly the type of activity that is the focus of the Act, because this C&D evidently would be transported solely for the purpose of disposal in a C&D landfill. See 40 CFR 257.2. JP Rail has not submitted any written assurance of agreement to comply with state and local public health, safety, and environmental regulations from the Governor of Pennsylvania, or the Governor’s designee. Indeed, the only state authority from Pennsylvania that has participated in this proceeding, PaDEP, opposes the project. Neither has JP Rail shown that its proposed activities would consist of transferring C&D in “original shipping containers.” Under these circumstances, we will not authorize JP Rail’s operations as they are described in its notice, and JP Rail’s notice of exemption will be rejected.

Moreover, while the Line here may have been formerly operated by NAT as private track, as JP Rail alleges, no operations over the Line by JP Rail to serve Westmoreland Waste can qualify as private carriage outside the Board’s jurisdiction. The Board’s jurisdiction 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) (B. Willis), aff’d sub nom. B. Willis, C.P.A., Inc. v. STB, 51 Fed. Appx. 321 (D.C. Cir. 2002). 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. B. Willis, 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).

Although JP Rail’s description of the ownership of the Line and the adjacent Donora Line has been different in each pleading it has submitted in this proceeding, in no instance has JP Rail alleged that the Line is owned by Westmoreland Waste. Most recently, in its reply to PaDEP’s response, JP Rail states that the Line is owned by the Middle Monongahela Industrial Development Association (MIDA), not by NAT or Westmoreland Waste, which is the only shipper JP Rail alleges it serves. Nor has JP Rail demonstrated on the record the existence and terms of a contract. JP Rail therefore has not shown that it will be operating the Line “exclusively to serve the owner of the track” pursuant to a “contractual arrangement” to serve MIDA. Finally, JP Rail made clear in its notice that its intention was to provide common carrier rail freight service over the Line. Accordingly, any arguments that JP Rail’s operations would constitute private carriage over private track are unavailing.

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

It is ordered:

1. PaDEP's motion for leave to file a response to JP Rail's reply is granted, and JP Rail's request to strike that response is denied.
2. JP Rail's notice of exemption is rejected.
3. This decision is effective on its service date.

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

Anne K. Quinlan
Acting Secretary