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SERVICE DATE – DECEMBER 6, 2010

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35304

SAN FRANCISCO BAY RAILROAD-MARE ISLAND—OPERATION EXEMPTION—  
CALIFORNIA NORTHERN RAILROAD

Docket No. FD 35303<sup>1</sup>

DAVID GAVRICH—CONTINUANCE IN CONTROL EXEMPTION—SAN FRANCISCO  
BAY RAILROAD-MARE ISLAND

Digest: This decision finds that San Francisco Bay Railroad-Mare Island (S.F.-M.I. R.R.) submitted false or misleading information to the Board when it sought the Board's permission to operate over rail track extending from Flosden Junction in Vallejo, Cal., to Mare Island in Vallejo, Cal. Even though permission to operate has already been given to S.F.-M.I. R.R., the Board will treat the request as if it has never been granted because of the misleading statements. Thus, S.F.-M.I. R.R. is not and never was a rail carrier.<sup>2</sup>

Decided: December 3, 2010

BACKGROUND

Mare Island is the southern tip of a peninsula jutting into San Pablo Bay, as the northernmost part of San Francisco Bay is called. Directly to the east of Mare Island is the City of Vallejo, Cal. (Vallejo), across a narrow channel called the Mare Island Strait. For more than 150 years, the U.S. Navy maintained a base on Mare Island. Among the facilities the Navy operated on the Island was the Mare Island Shipyard. In order to support its activities on the Island, the Navy installed and operated railroad track. The track crosses Mare Island Strait on a causeway that connects the Island to Vallejo. The Navy closed the base in 1996. In anticipation of acquiring and redeveloping the base for civilian use, Vallejo appointed Lennar Mare Island, LLC (LMI) the master developer in 1997. In 2002, the U.S. Government sold Mare Island to

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<sup>1</sup> These proceedings are not consolidated but are being addressed in the same decision for administrative convenience.

<sup>2</sup> 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).

Vallejo. The same day, Vallejo conveyed to LMI a 653-acre portion of Mare Island that included the former Navy trackage. The massive redevelopment project on Mare Island is ongoing.

Prior to the change in ownership, the U.S. Navy granted permission to California Northern Railroad (California Northern) to provide switching services at shipyard facilities on Mare Island. California Northern did not obtain authority from this agency to operate over the track. California Northern provided switching service between the Island and the Vallejo Branch of the Southern Pacific Railroad, now the Vallejo Branch of the Union Pacific Railroad, at Flosden Acres in Vallejo, Cal. until March 2008, when it ceased operations.

On September 28, 2009, San Francisco Bay Railroad-Mare Island (S.F.-M.I. R.R.), a noncarrier, filed a verified notice of exemption under 49 C.F.R. § 1150.31 to operate as a rail carrier approximately 8 miles of track on Mare Island and across the Mare Island causeway to Flosden junction in Vallejo, Cal.<sup>3</sup>

The Board published the notice of exemption on October 14, 2009, and the exemption became effective on October 28, 2009. S.F. Bay R.R.-Mare Island—Operation Exemption—Cal. N. R.R., FD 35304 (STB served Oct. 14, 2009).<sup>4</sup>

On March 19, 2010, LMI filed a petition asking us to set aside S.F.-M.I. R.R.'s exemption. LMI asserted that the notice contained false and misleading information relating to the ownership of the track and S.F.-M.I. R.R.'s rights as to the track.<sup>5</sup> LMI points out that the notice submitted by S.F.-M.I. R.R. states: "San Francisco Bay Railroad – Mare Island is currently negotiating an operating agreement with the City of Vallejo which is the residual common carrier as it owns the real estate occupied by the line of railroad."<sup>6</sup> LMI asserts that this statement misled the Board to believe that all of the track subject to the notice was owned by

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<sup>3</sup> On the same day, Mr. David Gavrich filed a notice of exemption to continue in control of S.F.-M.I. R.R. upon S.F.-M.I. R.R.'s becoming a Class III rail carrier. See David Gavrich—Continuance in Control Exemption—S.F. Bay R.R.-Mare Island, FD 35303 (STB served Oct. 14, 2009).

<sup>4</sup> On March 15, 2010, in a related docket (FD 35360), S.F.-M.I. R.R. filed an emergency service request under 49 U.S.C. § 11123 and 49 C.F.R. § 1146.1, and a request for a declaratory order concerning the track at issue here. LMI and Vallejo filed separate replies on March 22, 2010. In a separate decision served concurrently today, the Board is denying both requests for relief by S.F.-M.I. R.R.. See S.F. Bay R.R.—Mare Island Petition for Emergency Serv. Order & Petition for Declaratory Order—Lennar Mare Island LLC, FD 35360 (STB served December 6, 2010).

<sup>5</sup> Notices that contain false or misleading information are void ab initio (void "from the beginning"). See 49 C.F.R. § 1150.32(c). Authority sought pursuant to a notice of exemption found void ab initio is considered as never having taken effect.

<sup>6</sup> S.F.-M.I. R.R. Notice of Exemption (Notice) ¶ c.

Vallejo—when in fact the portion of the trackage on Mare Island itself is owned by LMI, not Vallejo—and that S.F.-M.I. R.R. did not need to reach an agreement with LMI. LMI adds that, in fact, it and S.F.-M.I. R.R. attempted to negotiate an agreement, but failed to do so.

S.F.-M.I. R.R. filed a reply to the petition on April 8, 2010. S.F.-M.I. R.R. asserts that the notice is not misleading because the exemption authorized by the Board notes that the track is owned by Vallejo and LMI. On April 14, 2010, LMI responded to that reply.

#### PRELIMINARY MATTER

On June 8, 2010, Vallejo filed a motion to intervene in the proceeding and for leave to file a reply to S.F.-M.I. R.R.'s reply to LMI's petition to revoke, accompanied by the reply.<sup>7</sup> Vallejo's statement responds to S.F.-M.I. R.R.'s assertion that Vallejo has a residual common carrier obligation here. On June 16, 2010, S.F.-M.I. R.R. responded.

Vallejo's motion to intervene and for leave to file its reply will be denied and its pleading will be rejected. Vallejo's motion and statement are significantly late-filed and no good reason is given for the delay. Moreover, the issue in that filing—whether Vallejo has any common carrier obligation here—is not relevant to the Board's determinations in this proceeding. Because we are rejecting Vallejo's statement, S.F.-M.I. R.R.'s response to that statement will also be rejected.

As noted above, on April 14, 2010, LMI filed a reply to S.F.-M.I. R.R.'s reply to LMI's petition to revoke. This pleading is a reply to a reply, prohibited under the Board's rules. LMI asked the Board to accept the pleading, which was also filed in San Francisco Bay Railroad—Lennar Mare Island LLC. Indeed, most of the material in the pleading deals with that proceeding rather than this one. The pleading introduces no new evidence and adds nothing necessary for us to adjudicate LMI's petition. Thus, even though S.F.-M.I. R.R. has not objected to it, we will reject LMI's reply.

#### DISCUSSION AND CONCLUSIONS

Pursuant to 49 C.F.R. § 1150.32, a notice of exemption containing false or misleading information is void ab initio. Failure to disclose material information can render a notice misleading by omission, and therefore void ab initio. See U S Rail Corp.—Lease & Operation Exemption—Shannon G., a N.J. LLC, 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 (1st Cir. 1995).

S.F.-M.I. R.R.'s notice materially misrepresents the facts related to the required “statement that an agreement has been reached or details about when an agreement will be reached[.]” 49 C.F.R. § 1150.33(c). The notice devotes a section to discussing the details of attempting to reach an agreement with Vallejo to operate over the track, yet that section makes

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<sup>7</sup> Replies to replies are prohibited under the Board's rules at 49 C.F.R. § 1104.13(c).

no mention of LMI, even though LMI owns the property on Mare Island itself and S.F.-M.I. R.R. attempted but failed to reach an agreement with LMI: “San Francisco Bay Railroad - Mare Island is currently negotiating an operating agreement with the City of Vallejo which is *the* residual common carrier as *it* owns the real estate occupied by the line of railroad.”<sup>8</sup> Because S.F.-M.I. R.R. recites that it was negotiating an agreement with Vallejo, S.F.-M.I. R.R. led the Board to believe that the requirements of the class exemption at 49 C.F.R. part 1150, subpart D, had been fulfilled. But they had not. In sum, the notice failed to make clear that Vallejo and LMI each own separate portions of the track and suggested that an operational agreement with Vallejo would be sufficient to convey operating rights over the entire trackage—even the segment owned by LMI. S.F.-M.I. R.R.’s failure to disclose all of the relevant facts is a material misrepresentation by omission.

Thus, we find that the notice was false or misleading and therefore void ab initio.<sup>9</sup>

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

It is ordered:

1. In FD 35304, Vallejo’s motions to intervene and for leave to file a reply are denied and Vallejo’s pleading is rejected.
2. In FD 35304, S.F.-M.I. R.R.’s response to Vallejo’s submission is rejected.
3. In FD 35304, LMI’s reply to S.F.-M.I. R.R.’s reply is rejected.

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<sup>8</sup> Notice ¶ c. (emphasis added). Elsewhere, the notice states that it pertains to “lines owned by the City [of Vallejo] . . . and [LMI],” (Notice ¶ a.), and that S.F.-M.I. R.R.’s operations would be “over lines owned by the City [of Vallejo] . . . and/or [LMI].” (Notice ¶ d.). Those vague allusions to some sort of ownership interest by LMI, however, do not overcome the misleading implication in paragraph c. that Vallejo is the only entity with which an agreement would be necessary because “the City [of Vallejo] . . . is the residual common carrier as it owns the real estate occupied by the line of railroad.” Only in LMI’s petition to revoke does it become clear that LMI alone owns the portion of the trackage on Mare Island while Vallejo owns the trackage on the causeway and in Vallejo itself and that, therefore, agreements would be needed with both.

<sup>9</sup> As noted above, S.F.-M.I. R.R.’s operation exemption is related to a concurrently filed notice of exemption for David Gavrich to continue in control of S.F.-M.I. R.R. upon S.F.-M.I. R.R.’s becoming a Class III rail carrier. See David Gavrich—Continuance in Control Exemption—S.F. Bay R.R.-Mare Island, FD 35303 (STB served Oct. 14, 2009). Although Gavrich’s exemption became effective on October 28, 2009, our finding here that S.F.-M.I. R.R.’s notice is void ab initio means that S.F.-M.I. R.R. is not a carrier and that Mr. Gavrich does not commonly control 2 carriers. Thus, the control authority obtained pursuant to the notice in FD 35303 is currently of no effect.

4. In FD 35304, S.F.-M.I. R.R.'s notice of exemption is void ab initio.
5. This decision is effective on its date of service.

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