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SERVICE DATE – FEBRUARY 2, 2022

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35996

SAN JACINTO TRANSPORTATION COMPANY, INC.—OPERATION EXEMPTION—
SJRE-RAILROAD SERIES

Docket No. FD 36473¹

W&P DEVELOPMENT CORPORATION, WW CHAMPION DEVELOPMENTS, INC., AND
SJRE-RAILROAD SERIES—PETITION FOR DECLARATORY ORDER

Digest:² This decision vacates the operation exemption of San Jacinto Transportation Company, Inc. (SJT), for a rail line in Harris County, Tex. The Board finds that SJT’s verified notice contains materially misleading information about the line and that the exemption is therefore void ab initio. This decision also denies as moot a petition for declaratory order that asks the Board to find that SJT is not a common carrier.

Decided: February 1, 2022

On June 25, 2021, W&P Development Corporation (W&P), WW Champion Developments, Inc. (WWCD), and SJRE-Railroad Series (SJRE-RS) (collectively, Petitioners), filed a petition to revoke as void ab initio the exemption of San Jacinto Transportation Company, Inc. (SJT), to operate approximately 6.0 miles of rail line located within the San Jacinto River and Rail Park (the Park) in Harris County, Tex. (the Line).³ Petitioners claim that SJT’s verified notice of exemption contains materially misleading or false information, particularly with respect to the length and location of the Line. Alternatively, Petitioners ask the Board to issue a declaratory order finding that SJT is not, and cannot become, a common carrier, because it never exercised the authority it obtained under the exemption and now cannot do so. On August 16,

¹ These proceedings are not consolidated but are being addressed in the same decision for administrative convenience. Unless otherwise noted, record citations are to filings submitted in both Docket No. FD 35996 and Docket No. FD 36473.

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. See Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

³ W&P and WWCD are commonly controlled affiliates that each own portions of the Park. (Pet. 3.) SJRE-RS is a “non-owner Park manager” controlled by San Jacinto Real Estate, a Series LLC (SJRE), and W&P controls SJRE. (Pet. 1, 3-4.)

2021, SJT filed a reply asking the Board not to decide this matter until the Harris County, Texas, District Court, before which a contractual dispute between the parties is pending, decides the issues before it relating to that contractual dispute. SJT also argues that its notice of exemption is not misleading and that it has taken steps to become a common carrier. Petitioners filed a surreply on September 7, 2021. For the reasons discussed below, the Board will find that the exemption is void ab initio.

BACKGROUND

On March 10, 2016, SJT filed with the Board a verified notice of exemption under 49 C.F.R. § 1150.31 to operate “a certain line of railroad . . . located within the San Jacinto River and Rail Park,” pursuant to an operating agreement with SJRE-RS (the Agreement). (SJT Notice, FD 35996.) SJT stated that the “total route miles to be operated is approximately 6.0 miles,” and explained that the Line was “located at milepost 344-346 on the Lafayette Subdivision” and would connect with Union Pacific Railroad Company and BNSF Railway Company. (*Id.*) SJT also submitted a map of the Line. (*Id.*, Ex. A.) Notice of the exemption was served and published in the Federal Register on March 25, 2016 (81 Fed. Reg. 16,252).

In June 2021, Petitioners filed a petition to revoke SJT’s exemption as void ab initio. Among other things, Petitioners argue that SJT’s notice of exemption is “materially false and misleading, particularly with respect to the scope and location of the supposed ‘railroad lines’” within the Park. (Pet. 2). Specifically, Petitioners argue that the Park has contained approximately 3.5 miles of track since the date that SJT filed its notice of exemption,⁴ whereas the map attached to SJT’s notice of exemption identifies approximately 5.1 miles of track, all of which is “located and aligned differently” than the actual existing track within the Park. (*Id.* at 6, 14, V.S. Blackburn 3-4.) “Put more plainly,” Petitioners allege, “SJT’s class exemption encompasses the construction and operation of entirely new trackage – none of which has been built.” (Pet. 6.) Petitioners argue that SJT misled the Board by suggesting that the Line existed, and that the Board “very likely would have rejected SJT’s notice filing” if it had known that the track did not exist. (*Id.* at 15.)

In the alternative, Petitioners argue that SJT never became a rail carrier because it never exercised the granted authority, (*id.* at 16-21), and that it now *cannot* do so, in part because SJRE-RS terminated the Agreement in December 2017 due to SJT’s alleged failure to satisfy its contractual obligations, (*id.* at 11-12, 21-22). Petitioners argue that the Board should not address any underlying contract issues, as such matters are pending before the state court, but Petitioners state that a Board decision “on SJT’s non-jurisdictional status would assist with the progress of the state court litigation.” (*Id.* at 12 n.18.)

In its reply, SJT states that it filed suit against SJRE-RS in the state court for breach of the Agreement, and SJT asks the Board not to issue a decision here until the state court “decides

⁴ Petitioners state that the track previously supported a now-decommissioned paper mill and that the track has been inactive since 2013. (Pet. 3.)

the many factual issues upon which petitioners are relying.”⁵ (SJT Reply 3.) SJT also argues that its notice of exemption is “true and reflected the obligations of the parties to the Agreement.” (*Id.* at 6.) SJT explains that the parties had contemplated development of the Park, beginning with approximately 6.0 miles of track, but that SJRE-RS failed to construct the track as required by the Agreement. (*Id.* at 4, 6.) SJT submits that it satisfied its obligations under the Agreement, including by filing the notice of exemption. (*Id.* at 3-4.) SJT also responds to Petitioners’ remaining arguments by asserting, *inter alia*, that it has taken several steps to become a common carrier. (*Id.* at 4-6.)

On September 7, 2021, Petitioners filed a surreply and a motion for leave to file.⁶ Petitioners argue that they would be prejudiced if the Board suspended action on their petition, in part because SJT is interfering with plans to develop and operate the Park. (Petitioners Surreply 3-4.) Petitioners also argue that SJT failed to refute the alleged substantive and procedural deficiencies in the notice of exemption, and instead “tries to shift the discussion to its view about why the lines involved have not been constructed.” (*Id.* at 6.) Petitioners maintain that SJT failed to obtain authorization to construct the Line. (*Id.* at 7 (citing 49 U.S.C. § 10901).)

DISCUSSION AND CONCLUSIONS

The verified notice of exemption at issue here was submitted under the class exemption at 49 C.F.R. part 1150 subpart D, which provides an expedited process for obtaining authority to operate or acquire rail lines. 49 C.F.R. § 1150.31. That process was adopted pursuant to 49 U.S.C. § 10502, which directs the Board to exempt proposed transactions from regulation when certain findings are made indicating that a full regulatory review is not necessary.⁷ See Eastside Cmty. Rail, LLC—Acquis. & Operation Exemption—GNP Rly Inc., FD 35692 et al., slip op. at 3 (STB served Dec. 22, 2020). “In essence, the requisite statutory findings for a class exemption are made up-front in the rulemaking for qualified transactions, and so, as long as a party shows that its transaction fits within the class, detailed review is unnecessary.” *Id.*

An exemption under 49 C.F.R. pt. 1150 subpart D is void *ab initio* if the verified notice contains false or misleading information and the false or misleading information is material. See

⁵ SJT filed its state court petition on September 3, 2019. (SJT Reply, Ex. C.) A trial was scheduled for September 2021, but the parties sought a continuance of the trial. (*Id.* at 3.) The trial currently is scheduled for March 2022. See San Jacinto Transp. Co. v. SJRE-R.R. Series, No. 201962755 (164th Dist. Ct., Harris County, Tex. filed Sept. 3, 2019).

⁶ In the interest of compiling a complete record, the Board will grant Petitioners’ motion for leave to file a surreply and accept the surreply. See, e.g., City of Alexandria, Va.—Pet. for Declaratory Ord., FD 35157, slip op. at 2 (STB served Nov. 6, 2008).

⁷ Specifically, the Board, to the maximum extent possible, “shall exempt . . . a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part is not necessary to carry out the transportation policy of section 10101” and either “the transaction or service is of limited scope” or “the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.” 49 U.S.C. § 10502(a).

49 C.F.R. § 1150.32(c); Berkshire Scenic Ry. Museum, Inc. v. ICC, 52 F.3d 378, 381 (1st Cir. 1995). The “void ab initio” language was designed to be interpreted literally, without regard to a party’s intentions. St. Louis Sw. Ry.—Aban. Exemption—in Gasconade, Maries, Osage, Miller, Cole, Morgan, Benton, Pettis, Henry, Johnson, Cass, & Jackson Cntys., Mo., AB 39 (Sub-No. 18X) et al., slip op. at 2 (ICC served Apr. 1, 1994). Information is material if the transaction would not have otherwise qualified for an exemption. Berkshire Scenic Ry. Museum, Inc., 52 F.3d at 381; see Ohio River Partners LLC—Acquis. & Operation Exemption—Hannibal Dev., LLC, FD 35984, slip op. at 3 (STB served Apr. 1, 2016). Failure to disclose material information can render a verified notice misleading by omission. Ohio River Partners, FD 35984, slip op. at 3; see Eastside Cmty. Rail, FD 35692 et al., slip op. at 4. The party seeking revocation of a notice of exemption has the burden of demonstrating that the verified notice contains false or misleading information. See Gen. Ry.—Exemption for Acquis. of R.R. Line—in Osceola & Dickinson Cntys., Iowa, FD 34867, slip op. at 4 (STB served June 15, 2007).

The Board finds that SJT’s verified notice of exemption filed in Docket No. 35996 is materially misleading by omission, rendering the exemption void ab initio. The notice implies that SJT would operate over an existing rail line within the Park, and it omits any information relating to the planned construction of the Line. Specifically, the notice references “a certain line of railroad” that is approximately 6.0 miles long and “is located” within the Park, and SJT provided corresponding mileposts and a “map illustrating the line.” (SJT Notice, Ex. A, FD 35996.) But the Line described by SJT did not exist, (see Pet. 14, Ex. C), and SJT does not argue that the notice correctly identifies the location and length of existing track within the Park. Instead, SJT argues that its notice is not misleading because the parties had agreed to develop the Park “starting with +/- 6 miles of track” and the notice “reflected the obligations of the parties” under the Agreement. (SJT Reply 6.) This rationalization is unpersuasive because the notice itself contains no such explanation.⁸ See Eastside Cmty. Rail, FD 35692 et al., slip op. at 4 (explaining that “an integral component of all of the Board’s processes is candor and full disclosure”). Further, the notice does not indicate that a party planned to obtain Board authorization to construct the Line, and no party sought such authorization, as required by 49 U.S.C. § 10901(a).⁹ These omissions, even if unintentional, rendered the notice misleading. St. Louis Sw. Ry., AB 39 (Sub-No. 18X) et al., slip op. at 2.

SJT’s omissions were material. Authority under 49 U.S.C. § 10901(a)—the source of the Board’s rail licensing authority, and the provision from which SJT sought an exemption¹⁰—is

⁸ As Petitioners state, several tracks on the map submitted by SJT were “designated as ‘proposed’ (under the abbreviation ‘PROP’).” (Pet. 14; see SJT Notice, Ex. C.) But SJT did not address this designation or provide any explanation in the notice.

⁹ The Board makes no findings relating to which party was responsible, under the Agreement, for either constructing the Line or obtaining construction authority from the Board.

¹⁰ Although the exemption provisions focus on matters such as market power and the rail transportation policy, the Board looks to the purpose of the underlying regulatory provision when reviewing an exemption request. See Vill. of Palestine v. ICC, 936 F.2d 1335, 1338-39 (D.C. Cir. 1991) (the scope of the agency’s review in an exemption proceeding will be a function of the

not like a driver's license, which permits an operator to operate on any public road. Section 10901 contemplates construction or operation of particular rail lines, see 49 U.S.C. §§ 10901(a) (permitting the construction of, or operation over, an additional railroad line or extension to a railroad line only with Board authority) and 10901(c) (allowing the Board to authorize "such activities" that are "requested in an application"), and the Board's regulations require detailed information about such a proposal, see 49 C.F.R. §§ 1150.4-.7. Further, use of the class exemption at 49 C.F.R. part 1150 subpart D requires "a verified notice providing details about the transaction." See 49 C.F.R. § 1150.32; see also 49 C.F.R. § 1150.33 (requiring specific information about the line to be acquired or operated). SJT's verified notice failed to indicate that the rail line over which it planned to operate did not yet exist within the Park. Neither the Board nor the public can ascertain the validity of a notice of exemption to operate over a line when, as in SJT's case, construction of that line neither has been authorized nor is the subject of a pending request for construction authority. Not only would it be unclear in such a case what rail line and rail facilities the would-be operator would operate, but a grant of operating authority in those circumstances could encourage parties to abuse the Board's processes by seeking authority to operate over non-existent and unapproved lines of railroad.

In short, had the Board known that the Line identified in SJT's notice did not exist, it would not have permitted SJT's exemption to go forward. Because SJT's notice was materially misleading, the exemption is void ab initio. 49 C.F.R. § 1150.32(c). Accordingly, it is not necessary for the Board to determine whether SJT is a common carrier, and the alternative petition for a declaratory order will be denied as moot.

The Board's decision does not constitute a ruling on any of the parties' contractual rights or obligations. See Saratoga & N. Creek Ry.—Operation Exemption—Tahawus Line, FD 35631, slip op. at 4 (STB served Oct. 11, 2012).

It is ordered:

1. All filings to date are accepted into the record.
2. The petition to revoke is granted, and the exemption in Docket No. FD 35996 is void ab initio.
3. The petition for declaratory order is denied as moot.
4. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.

relationship between the section from which an exemption is sought and the national rail transportation policy).