

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36296

PERRY COUNTY RAILROAD, LLC—OPERATION EXEMPTION—UNIONTOWN, ALA.

Decided: June 7, 2019

Perry County Railroad, LLC (PCR), a noncarrier, has filed a verified notice of exemption under 49 U.S.C. § 10901 to operate “20,700 feet (3.92 miles) of track” owned by Howling Coyote, LLC and Perry County Associates, LLC a/k/a Arrowhead (Owners) in Uniontown, Ala. (the Line). PCR states that the Line is currently used for private facility rail service, but that it seeks to commence common carrier rail service to the Owners and the public pursuant to an agreement between PCR and the Owners. PCR supplemented its verified notice with additional information on April 29, 2019 and May 9, 2019.

Where a verified notice raises too many unanswered questions, the Board will reject it. See FPN-USA, Inc.—Operation Exemption—Tijuana-Tecate Shortline, FD 35155, slip op. at 3 (STB served Aug. 8, 2008); see also Pro-Go Corp.—Operation Exemption—in Suffolk Cty., N.Y., FD 35120 (STB served Mar. 13, 2008) (rejecting notice of exemption for failing to submit sufficient information to determine whether the transaction qualified for class exemption). Moreover, a verified notice that is incomplete under the Board’s rules may be rejected. See, e.g., Wash. & Idaho Ry.—Lease & Operation Exemption—BNSF Ry., FD 35370 (STB served Apr. 23, 2010) (rejecting notice of exemption for failing to submit complete version of lease agreement).

First, the supplemented verified notice does not comply with 49 C.F.R. § 1150.33(h)(1), which requires the filing party to “certify whether or not a proposed acquisition or operation of a rail line involves a provision or agreement that may limit future interchange with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the purchase price or rental, positive economic inducement, or other means (‘interchange commitment’).” PCR’s verified notice submitted on April 24 did not include an interchange commitment certification pursuant to § 1150.33(h)(1). In its April 29 supplement, PCR provided additional information—specifically, the carrier’s address (required by 49 C.F.R. § 1150.33(a)), a statement as to whether revenues would exceed five million dollars (with respect to 49 C.F.R. § 1150.32(e)) and a statement which may have been intended as an interchange commitment

certification.¹ In its May 9 supplement, PCR provided an additional statement with respect to interchange agreements. Although this statement clarified PCR's "intent[] to negotiate an interchange agreement when it begins to attract business from patrons not already receiving service on the property," and states that "[r]estrictive interchange agreements would be inconsistent with both the existing and contemplated operations," among other things, these statements do not satisfy the requirements of § 1150.33(h)(1).

Additionally, the Line's description and map do not provide sufficiently clear information regarding the Line. The Board's regulations require that the notice contain "[a] map that clearly indicates the area to be served, including origins, termini, stations, cities, counties, and States." 49 C.F.R. § 1150.33(f). PCR's submitted map does not clearly indicate the area to be served or the Line. Moreover, the Line's description is not clear. PCR states that "[t]he main track to be operated will be all or part of a line and side tracks extending from Norfolk Southern Mainline Switch into the property." It is not clear from the verified notice whether this description applies only to a portion of the Line or the entirety of the Line. It is also unclear whether the referenced switch is located "1400' West of Mile Post 218" or "600' West of the Norfolk Southern Railroad Tayloe Rd. grade crossing." Moreover, the verified notice states that the transaction "does not contemplate the construction of track or facilities except within the existing, currently private, rail yard." (Verified Notice 3.) The verified notice, which implies that all of the track is being acquired under 49 U.S.C. § 10901, does not otherwise mention a rail yard, or excepted track under 49 U.S.C. § 10906. In any future verified notice, PCR would need to clearly explain the location and extent of the track being acquired and whether there are some existing tracks for which PCR does not seek authority.²

¹ The supplement states: "At the present time the private rail operation on the property is served by Norfolk Southern and such service will continue. The applicant inten[d]s to negotiate an agreement when it begins to attract business from patrons not already receiving service on the property. Until that time any moves from the property to the national system will be pursuant to a Rule 11 arrangement." (PCR Suppl. 1, Apr. 29, 2019.)

² PCR may also need to explain why authority to construct would not be needed. See 49 U.S.C. § 10901(a) (a person may "construct an extension to any of its railroad lines" or "construct an additional railroad line . . . only if the Board issues a certificate authorizing such activity.") But see 49 U.S.C. § 10906 (the Board does not have licensing authority "over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks"); Canadian Nat'l Ry.—Control—EJ&E W. Co., FD 35087, slip op. at 2 (STB served Feb. 20, 2008) (noting that "not all railroad construction activities require Board approval. Carrier improvements to or investments in their existing system do not require section 10901 authority").)

For these reasons, PCR's verified notice will be rejected. This rejection is without prejudice to PCR filing a new verified notice of exemption that provides clear and adequate information as described herein.

It is ordered:

1. PCR's verified notice of exemption is rejected.
2. The decision is effective on its service date.

By the Board, Allison C. Davis, Director, Office of Proceedings.