

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NOS. 34986 & 34987

**ASHLAND RAILROAD, INC. &
G. DAVID CRANE
NOTICES OF EXEMPTION**

**REPLY OF THE NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION**

The New Jersey Department of Environmental Protection ("NJDEP") submits this reply to Ashland Railroad, Inc. ("Ashland") and G. David Crane ("Crane")'s May 30, 2007 submission to the Surface Transportation Board ("Board") in accordance with the Board's April 27, 2007 decision. In sum, NJDEP submits that the Board should reject this Notice of Exemption and require the applicants to submit a full application under 49 C.F.R. 1150 so that a more complete record can be elicited. The exemption procedures are ill-suited to address the proposed transaction and Ashland's and Crane's failure to provide information in accordance with either the Board's decision or NJDEP's latest request for information highlights the need for in-depth Board review.

BACKGROUND

Through their Notice of Application, Ashland and Crane seek exemption from the requirement under the licensing provisions of 49 U.S.C. § 10901 that a non-carrier may acquire a rail line and operate as a common carrier only if the Board makes an express finding that the proposal is not inconsistent with the "public convenience and necessity." They propose to lease and operate approximately 1.5 miles of track in the Township of Freehold, County of Monmouth,

State of New Jersey and seek to develop a “terminal transloading facility” on land that is currently privately owned.

In the Board’s April 27, 2007 decision, the Board, because it found that “the record in this case is still insufficient for the Board to determine whether [Ashland] will become a rail carrier, including the extent of its proposed operations,” directed Ashland to “file additional information to address NJDEP’s concerns, explain why [Ashland] would become a rail carrier, and describe in detail the operations it proposes to perform” (emphasis supplied). The Board also directed replies to be filed by June 29, 2007. NJDEP set forth its concerns and requests for additional information in a letter dated April 4, 2007 to counsel for Ashland, John K. Fiorilla, Esq., attached as Exhibit A to NJDEP’s April 4, 2007 Request For a Continuation of a Stay of the Notice of Exemption proceedings. Some of the information that NJDEP requested in detail included a repeated request for operating or other agreements for the proposed operation at the subject property, various and specific questions with respect to the role of Clayton Sand Company, who Ashland named as the primary shipper, whether or not solid or hazardous waste would be offered as a commodity for shipment, and if waste would be offered, the details of such an arrangement.

On May 8 and 30, 2007, Ashland and Crane provided submissions to the Board. In its May 8, 2007 submission, Ashland and Crane stated that “they will not handle municipal solid waste or construction and demolition debris at a transfer site where the material is placed on the ground and then loaded into railcars. [Ashland] and Crane will not build a building for the sorting of such waste” (emphasis added). In its May 30, 2007 submission, the parties reiterated such information, including its indication that they would “be willing to have restrictions placed upon [their] rights to operate which prohibit such waste operations.” The submissions did not

discuss the current state of the track in question or mention any planned measures that would address potential environmental impacts to the property from the construction of the new side-track or the operation of the transloading facility.

Ashland also provided a letter from Grems-Kirk Railway, LLC, which is the entity that bought the subject property for \$1.00 from Clayton Sand Company and who indicated that it intends to lease the subject property to Ashland. In this letter, Grems-Kirk Railway, LLC provided very little information and merely repeated the vague information provided by Ashland and Crane (“[Ashland] will not accept MSW as a transfer station nor construct a building for such use”).¹ The parties submitted no other substantive information.

ARGUMENT

I. The Class Exemption Procedure is Not Appropriate for the Proposed Transaction

The nature of the transaction proposed by Ashland and Crane warrants full regulatory scrutiny. The class exemption procedures sought by Ashland and Crane were “adopted to serve shippers and community interests by facilitating continued rail service, on lines that the selling carrier could no longer operate profitably, by new, smaller carriers seeking to provide service more efficiently.” See Class Exemption - Acq. & Oper. of R. Lines Under 49 U.S.C. 10901, 1 I.C.C. 2d 810 (1985) (“Class Exemption”)(emphasis added). That is not the situation presented here. According to information provided to NJDEP by Monmouth County officials, the 1.5 miles of track at issue has been inactive, and possibly abandoned, for almost twenty years. The track was historically used to solely service the Brockway Glass company, a company that closed in

¹ Nor does Grems-Kirk Railway explain how it is in a position to dictate to Ashland what commodities the “railroad” can handle.

approximately 1988. Since that time, the Brockway Glass company facility has been used by Iron Mountain, an information protection and storage company, but the County does not believe that Iron Mountain has ever made use of the track. Thus, far from presenting a situation where an exemption applicant seeks to continue rail service without interruption, Ashland and Crane seek to begin service on a track that has been at least inactive - if not abandoned - for decades. Such an action is very different than a transaction that simply continues an existing service, and warrants a full Board review.

The Board has recognized at least two types of transactions that require additional scrutiny and the development of a record more complete record than those generated in the course of an exemption proceeding: (1) Transactions that “attract substantial controversy and opposition, including opposition from public agencies”, see Riverview Trenton Railroad Co. - Acq. and Oper. Exemption - Crown Enterprises, Inc., STB Fin. Dkt. No. 33980, Slip Op. at 6-10 (Served February 15, 2002) (“Riverview”); and (2) Transactions that would convert private carrier operations into common carrier service, id., see also Jefferson Terminal Railroad Co. - Acq. and Oper. Exemption - Crown Enterprises, Inc., STB Fin. Dkt. No. 33950, Slip Op. at 4-5 (Decided Mar. 15, 2001) (“Jefferson Terminal”). The transaction proposed by Ashland and Crane falls into both of these categories.

First, there is clear and widespread opposition to Ashland and Crane’s proposed use of the exemption process. NJDEP and Monmouth County both oppose the use of the exemption process to handle this transaction. New Jersey Transit (“NJT”), and Norfolk Southern Railway Company (“NS”) - the two entities most directly affected by the proposal - have similarly raised concerns about the lack of information available in the record before the Board. Concerns over

the potential transfer of solid waste at the site even prompted United States Congressman Frank Pallone, New Jersey State Senator Ellen Karcher, and Monmouth County Freeholder Barbara McMorrow to organize a press conference at the site on April 27, 2007 in opposition to the proposal. This is clearly not the routine and unopposed transaction for which the notice of exemption procedures were designed. See Riverview at 7 ("The procedures are designed to meet the need for expeditious handling of a large number of requests that are rarely opposed."); Northeast Interchange Railway, LLC - Lease and Operation Exemption - Line in Croton on - Hudson, New York, STB Finance Docket Nos. 34734 and 34735, Slip Op. at 4 (served November 18, 2005); New England Central Railroad, Inc. - Acq. and Oper. Exemption - Lines Between East Alburg, VT and New London, CT, Fin Dkt. No. 32432 (ICC served Dec. 20, 1994).

Second, the Ashland transaction seeks to convert a long-inactive track and non-rail property into a common carrier operation. As noted above, available information indicates that the track servicing the property has been inactive for almost twenty years. Ashland and Crane have submitted no information to the contrary, and have also submitted no information detailing whether a common carrier obligation ever attached to the track in question, let alone whether one continues to attach today. The question of whether Ashland proposes to acquire a rail line is a central one, addressed directly by NS and the Association of American Railroads which have both stated that all notices of exemption should include:

a statement that the subject property (1) has been operated as a line of railroad subject to the agency's abandonment authority; (2) is currently owned or leased by a rail carrier subject to the agency's jurisdiction; and (3) has not been abandoned pursuant to 49 U.S.C. §§ 10501 and 10903.

Norfolk Southern Filing, STB Fin Dkt. No. 34986 (March 5, 2007). Ashland and Crane's failure to provide such information leaves substantial factual and legal issues before the Board unanswered and warrants a more searching process to elicit a complete record. See Jefferson Terminal at 4-5.

Moreover, it is clear is that the proposed transloading facility will also require the construction of new track on property that is currently privately owned. The property on which Ashland proposes to locate its new transloading facility is currently a sod farm not associated with any common carriers. The conversion of this private land into a common carrier service dramatically affects the existing local land use control of the property. The Board has made it clear that such a conversion is not appropriately handled through a class exemption proceeding, and Ashland and Crane's attempt to do so here should be rejected. See Jefferson Terminal at 4 (exemption "procedures were not intended to apply to cases in which a noncarrier seeks to convert what could be non-rail property into a rail line."); Riverview at 8 ("A change in the status of the line from private to common carrier service, the effect of such a change on the local community, and the concerns expressed by the local community about that effect require our closer scrutiny of the proposal prior to the issuance of the authorization that is sought.") .

II. Ashland and Crane have failed to submit sufficient information to the Board

Approval of notices of exemption requires the submission of sufficient information "to enable the Board to determine the extent to which environmental review is required." LB Railco, Inc., STB Fin. Dkt. 34281 (Decision served Nov. 22, 2002). Ashland and Crane have failed to meet this requirement. Most notably, despite the Board's direction, Ashland and Crane failed to adequately respond to NJDEP's April 4, 2007 letter. Read favorably, the responses depict an

entirely amorphous operation. Besides Clayton Sand, there are no “other proposed shippers,” no indication of where commodities will originate from, no particular destination for shipments, no estimate of the potential volume of shipments through the facility, and no limit on the type of railcars to be used. The only clear response was that Ashland and Crane had not, and will not, communicate “with New Jersey agencies since there are no approvals required . . . for the operations that Ashland intends to operate.” Thus, without providing any detailed information on the proposed operation, Ashland and Crane claim full exemption from state requirements.

Unfortunately, their submissions also appear to be purposefully vague and confusing. For example, counsel for the two parties indicate that “they do not intend to handle Municipal Solid Waste or Construction and Demolition Debris at a transfer site where the material is placed on the ground, sorted and then placed into railcars” See May 30, 2007 submission. Ashland and Crane then indicate that “they will not build or operate a building for the sorting of waste.” See id. While these statements may give the appearance that solid waste will not be brought to the proposed transloading facility, a closer examination of Ashland and Crane’s carefully worded statements reveals the opposite. In fact, their description encompasses several problematic facilities in New Jersey that regularly accept solid waste that is dumped not on the “open ground” but on a cement slab or in an open hopper where the waste is sorted, processed and eventually loaded onto rail cars for shipment - all the while exposed to the elements and posing a threat to the surrounding environment and nearby residents’ public health. See e.g. Hi Tech Trans, LLC v. State of New Jersey, 382 F.3d 295 (3rd Cir. 2004).

Without additional information, NJDEP is thus forced to take a precautionary position and assume that solid waste will be handled at the proposed facility, but that it will be handled in

the open air rather than in an enclosed building. Such an operation poses serious potential concerns both under the State's Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., and the federal Resource Conservation and Recovery Act ("RCRA"), see 42 U.S.C. § 6945(a) (prohibiting open dumping of solid waste). More importantly, Ashland and Crane's submissions make it impossible for the Board to determine the potential environmental impacts of the transloading facility, or the appropriate level of environmental review to apply.

The lack of information is especially troubling considering the concerns raised by Monmouth County in their filings. Neither Ashland nor Crane have addressed the potential impacts of rail construction or the operation of a transload facility on the wetlands and streams present on the property. These streams feed the Manasquan River and Reservoir and the County correctly notes that impacts to the water resources and wetlands of the property would "commonly require several federal and state environmental permits" to address surface water, groundwater, and air discharges. Ashland and Crane's only submission regarding these environmental concerns is the conclusory statement that "the proposed transaction is exempt from environmental review." See ARRC January 29, 2007 Filing. Such disregard for the legitimate environmental concerns of the County further underscores the need for full regulatory review of the proposed transaction.

In addition to environmental issues, Ashland and Crane have again failed to provide basic information concerning the transaction including: (1) whether the proposed facility is a private switch or a line haul rail service; (2) whether Ashland intends to operate locomotives; (3) whether Ashland will own or lease rail cars; (4) whether the applicants will provide local or overhead rail operations; (5) whether Ashland will establish through rates and divisional

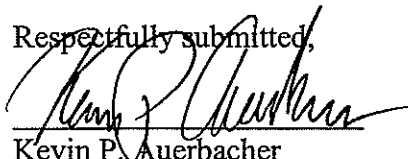
arrangements with any other rail carrier; or (6) whether Ashland will otherwise actually operate as a railroad common carrier. Simply stated, Ashland has not submitted a single reason why it should be treated as a rail carrier, as that term is defined in 49 U.S.C. §10102.

There is also clearly ample reason for NJDEP, the citizens of the State of New Jersey, and the STB to be concerned that this ill-defined operation will be inappropriately used in an attempt to shield Ashland, Crane and/or Grems-Kirk Railway from legitimate and essential environmental oversight by NJDEP and other state and federal agencies. As noted in NJDEP's initial request for a stay in this matter, Ashland Railway Inc. has a history in Ohio of involvement with solid waste transfer facilities and alleged non-compliance with that State's environmental regulations. Ashland's submissions to date provide little comfort that this pattern will not be repeated in New Jersey. Given the well-publicized history of abuses by various parties seeking to misuse the Board's jurisdiction and the preemption provision in Section 10501(b), Ashland and Crane's reluctance to provide essential information to the Board raises significant questions as to the bona fides of the proposed operation sufficient to warrant rejection of the Notice of Exemption in favor of full regulatory review.

The nature of the activities that Ashland and Crane truly have in mind might well trigger environmental review by the Board's Section of Environmental Analysis, completely aside from the interest that NJDEP and other state agencies may have, if these applicants were more forthcoming. But, for reasons known only to themselves, Ashland and Crane have elected not to provide information that would support the bona fides of the proposed "rail carrier" operation. Consequently, to the extent Ashland and Crane do still intend to pursue becoming a railroad, they have the opportunity to make that case in a Section 10901 application proceeding

or by use of a petition for exemption. Nonetheless, it is now time for the Board to reject this Notice of Exemption.

Dated: 6-29-07

Respectfully submitted,

Kevin P. Auerbacher
Deputy Attorney General
609-292-6945
Attorney for New Jersey Department
of Environmental Protection

CERTIFICATE OF SERVICE

I certify that I have this day, June 29, 2007, served copies of the Reply of the New Jersey Department of Environmental Protection in this proceeding (FD Nos. 34986 & 34987) upon John K. Fiorilla, Esq., attorney for applicant, Ashland Railroad, Inc., via electronic mail at jfiorilla@capehart.com.

Michele D. McGahey
Michele D. McGahey