

SERVICE DATE — JANUARY 22, 2016

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 837 (Sub-No. 1X)

THE LONG ISLAND RAIL ROAD COMPANY—ABANDONMENT EXEMPTION—IN
QUEENS COUNTY, N.Y.

Digest:¹ This decision allows Long Island Rail Road to end its common carrier obligation to provide freight rail service over two segments of railroad in Queens County, N.Y., subject to standard employee protective conditions and one environmental condition.

Decided: January 21, 2016

By petition filed on October 13, 2015, the Long Island Rail Road Company (LIRR) seeks an exemption pursuant to 49 U.S.C. § 10502(a) and 49 C.F.R. § 1152.60 from the prior approval requirements of 49 U.S.C. § 10903 to abandon two segments of rail line.² The first segment is approximately 0.69 miles of rail line (which is a portion of the Montauk Cutoff) between milepost 0.0 and milepost 0.69 in Long Island City, N.Y. and runs through United States Postal Zip Code 11101.³ The second segment is approximately 0.38 miles of rail line between milepost 0.82 and milepost 1.2 in Long Island City (the Main Line Cutoff), and runs through United States Postal Zip Code 11101.⁴ Notice of the exemption proceeding was served and published in the Federal Register on November 2, 2015 (80 Fed. Reg. 67,490).

¹ 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).

² On October 7, 2015, New York & Atlantic Railway Company (NYA) filed a petition for exemption in Docket No. AB 1236X to discontinue service over the same two rail line segments at issue here. The Board has granted NYA's petition in a separate decision that will be concurrently issued.

³ This portion of the Montauk Cutoff segment is referred to as "Segment 1" in the concurrent decision issued in Docket No. AB 1236X.

⁴ The Main Line Cutoff is referred to as "Segment 2" in the concurrent decision issued in Docket No. AB 1236X.

No comments in opposition to the proposed abandonment were filed. We are granting the exemption from 49 U.S.C. § 10903, subject to standard employee protective conditions and one environmental condition.

BACKGROUND

According to LIRR, it will maintain ownership of both segments following the proposed abandonment. It also states that, based on information in its possession, neither of the segments contains federally-granted rights of way, but that any documentation in its possession will be made available promptly to any party requesting it.

LIRR states that pursuant to an agreement between NYA and LIRR, NYA has the exclusive right to use the Montauk Cutoff for freight purposes. LIRR states that NYA does not currently operate over the Montauk Cutoff, and there are no longer any active shippers on the line segment. According to LIRR, the freight traffic formerly transported over this segment is now transported over the LIRR's Lower Montauk/C Secondary line.⁵ LIRR states that it does not currently operate over the Main Line Cutoff, and neither NYA nor any other freight carrier has used it.

LIRR states that it intends to remove a portion of the Montauk Cutoff that is approximately 0.04 miles in length and is located between milepost 0.24 and milepost 0.28 no earlier than the summer of 2016. LIRR states that the removal of this portion of the Montauk Cutoff would allow a more economical construction of tracks that will be necessary for storage facilities related to the East Side Access (ESA) project that will bring LIRR passenger trains into Manhattan's Grand Central Terminal. LIRR states that it does not intend, for the foreseeable future, to remove any other portions of the rail lines (including culverts, ballasts, and bridges) that it seeks to abandon, although it does intend to cut the rails of a bridge on the line and to lift that bridge to a vertical position, where it will be welded in place so that it will not be an impediment to navigation on Newtown Creek's Dutch Kills tributary. According to LIRR, it will continue to maintain these remaining portions, although the maintenance required is expected to decrease due to the absence of train movements.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10903, a rail line may not be abandoned without the Board's prior approval. Under 49 U.S.C. § 10502, however, the Board must exempt a transaction or service when it finds that: (1) continued regulation is not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

⁵ According to LIRR, the Metropolitan Transportation Authority, LIRR's parent company, will be providing the public with a Request for Expressions of Interest to determine possible future uses for the Montauk Cutoff. Future possible uses include, but are not limited to, public open space, urban farming, or museum and sculpture garden space.

Here, detailed scrutiny of the proposed abandonment under 49 U.S.C. § 10903 is not necessary to carry out the RTP. By minimizing the administrative expense of the application process, an exemption would reduce regulatory barriers to exit. 49 U.S.C. §§ 10101(2), (7), & (15). Neither LIRR nor NYA, the freight operator with the exclusive right to use the Montauk Cutoff for freight purposes, currently operates on either segment of rail line to be abandoned. Also, according to LIRR, the freight traffic formerly operating over the Montauk Cutoff segment now operates over the LIRR's Lower Montauk/C Secondary line, and neither NYA nor any other freight carrier has used the Mainline Cutoff. An exemption would also foster sound economic conditions and encourage efficient management by more quickly permitting LIRR to abandon the line segments and proceed with the construction of tracks necessary for the ESA project. 49 U.S.C. § 10101(5) & (9). Other aspects of the RTP would not be adversely affected by the use of the exemption process.

We also find that regulation of the proposed transaction is not necessary to protect shippers from an abuse of market power.⁶ As discussed earlier, there are currently no shippers on either of the two segments to be abandoned.

Employee Protection. Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, we will impose on LIRR the employee protective conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho (Oregon Short Line), 360 I.C.C. 91 (1979).

Environmental Review. LIRR submitted an environmental report with its petition and notified the appropriate federal, state, and local agencies of the opportunity to submit information concerning the environmental impacts of the proposed abandonment. See 49 C.F.R. §§ 1105.7 & 1105.11. The Board's Office of Environmental Analysis (OEA) examined the report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment.

OEA issued an Environmental Assessment (EA) on December 11, 2015, recommending that the Board impose one environmental condition to address compliance with the Coastal Zone Management Act in any decision granting abandonment authority. Specifically, OEA recommends a condition requiring that LIRR consult with New York State Department of State – Office of Coastal, Local Government and Community Sustainability to obtain state coastal management consistency certification prior to conducting any activities related to the proposed abandonment (including removal of tracks and ties).

Historic Review. LIRR also submitted a historic report as required by the Board's environmental rules, 49 C.F.R. § 1105.8(a), and served the report on the New York State Office

⁶ Because we find that regulation of the proposed abandonment is not necessary to protect shippers from the abuse of market power, we need not determine whether the proposed abandonment is limited in scope.

of Parks, Recreation and Historic Preservation (SHPO) pursuant to 49 C.F.R. § 1105.8(c). Pursuant to Section 106 regulations of the National Historic Preservation Act, 36 C.F.R. § 800.4(d)(1), and following consultation with the SHPO and the public, OEA has determined that the proposed abandonment would not affect historic properties within the right-of-way of the proposed abandonment listed in or eligible for inclusion in the National Register.

Comments on the EA were due by January 11, 2016. None were filed. OEA issued a Final EA on January 14, 2016. We adopt all of OEA's environmental analysis and will impose the environmental condition recommended in the Final EA.

This action, as conditioned, will not significantly impact the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Under 49 U.S.C. § 10502, we exempt from the prior approval requirements of 49 U.S.C. § 10903 the abandonment by LIRR of the above-described segments of rail line, subject to the employee protective conditions set forth in Oregon Short Line and the following additional condition:

(a) Pursuant to the Coastal Zone Management Act, 16 U.S.C. § 1451 et seq., and the Board's environmental regulations at 49 C.F.R. § 1105.9, LIRR shall consult with the New York State Department of State – Office of Coastal, Local Government and Community Sustainability and obtain state coastal management consistency certification. LIRR may not file its consummation notice or initiate any activities related to abandonment (including removal of tracks and ties) until it reports the results of these consultations in writing to OEA and the Board has removed this condition.

2. An Offer of Financial Assistance (OFA) under 49 C.F.R. § 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by February 1, 2016, subject to time extensions authorized under 49 C.F.R. § 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27(c)(1). Each OFA must be accompanied by the filing fee of \$1,600. See 49 C.F.R. § 1002.2(f)(25).⁷

3. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in boldface on the lower left-hand corner of the envelope: **“Office of Proceedings, AB-OFA.”**

⁷ Consistent with our precedent, and given the apparent lack of need for the line by any shipper, any person seeking to file an OFA must provide evidence that there is some shipper that would make use of common carrier service. See, e.g., CSX Transp., Inc.—Aban. Exemption—in Wash. Cty., Md., AB 55 (Sub-No. 727X) (STB served Oct. 24, 2013); Union Pac. R.R.—Aban. Exemption—in Pottawattamie Cty., Iowa, AB 33 (Sub-No. 300X) (STB served Jan. 20, 2012).

4. Provided no OFA has been received, this exemption will be effective February 21, 2016.

5. Petitions to stay must be filed by February 1, 2016. Petitions to reopen must be filed by February 11, 2016.

6. Pursuant to 49 C.F.R. § 1152.29(e)(2), LIRR shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by LIRR's filing of a notice of consummation by January 22, 2017, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the one-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.