

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35377

NORTH SHORE RAILROAD COMPANY—ACQUISITION AND OPERATION
EXEMPTION—PPL SUSQUEHANNA, LLC

Decided: April 25, 2011

On May 17, 2010, North Shore Railroad Company (North Shore), a Class III rail carrier, filed a verified notice of exemption under 49 C.F.R. § 1150.41 to acquire a rail operating easement over approximately 6 miles of rail line (the Line) in Luzerne County, Pa., that PPL Susquehanna, LLC (PPLS), the owner, had acquired from the Pennsylvania Department of Transportation (PennDOT). The operating easement extends from the eastern terminus of North Shore's existing rail line at M.P. 177.00 at Berwick, Pa., to M.P. 171.00 at the PPLS nuclear power plant at Hicks Ferry, Pa.¹ North Shore stated that it "has provided contract rail service on the Subject line . . ." and that it had reached an "agreement" with PPLS, which was referred to as a "new operating easement," but no relevant documents were submitted.

Because North Shore's filing did not contain sufficient information to permit its proper evaluation, the Board, in a decision served on June 3, 2010, held the publication of the notice and the effectiveness of the exemption in abeyance. The Board directed North Shore to file additional information by June 23, 2010, and said that the notice of exemption would be dismissed in the event North Shore failed to do so.

Specifically, the Board directed North Shore to file the instrument that grants the new operating easement and any other agreement or evidence relevant to its relationship with PPLS. These documents were requested to permit the Board to determine whether North Shore's ability to carry out the common carrier obligation it would acquire over the Line would be safeguarded. Additionally, in response to North Shore's statement that it has been providing contract rail

¹ North Shore's verified notice of exemption states that the Operating Easement extends from its existing line "at Berwick, Pennsylvania at M.P. 171.00 to M.P. 177.00 at the PPL Susquehanna, LLC Beach Haven, PA power plant," and the map accompanying the notice places Beach Haven at a point midway between M.P. 171.00 and M.P. 177.00. In its Supplement at 3, North Shore repeats these mileposts but places the PPLS power plant at Hicks Ferry, the same location cited in Volume II of the Final System Plan (FSP) at pp. 471-74 ("Pennsylvania Power & Light is building two nuclear units at Hicks Ferry, 5 miles north of Berwick.") See *infra* note 5.

service on the Line,² the Board directed North Shore to clarify: (1) whether the Line currently is private track or a regulated line of railroad; and (2) the status of the Line at the time PennDOT conveyed it to PPLS.

On August 13, 2010,³ North Shore responded, filing a copy of the Rail Service Easement Agreement (Agreement) between it and PPLS and a clarification of the Line's status. In the clarification, North Shore asserts that the Line: (1) was not abandoned under the Final System Plan;⁴ (2) has been used continuously to provide common carrier rail service; (3) has remained part of the national rail transportation network; and (4) was never private track. Supplement at 3-4.

According to North Shore, PPLS purchased the Line from PennDOT, acquiring title by quit claim deed. North Shore states that “[n]o STB authorization was sought by PPLS when it acquired the line from PennDOT in 2004.” See Supplement at 4. North Shore further states that it “has continued to provide common carrier rail service to PPLS [, that] PPLS, the line’s owner, has never held itself out to serve the public [, and that t]o date, no rail service has been provided by North Shore for any other party over this line.” Id. Finally, North Shore claims that the parties negotiated and executed the Agreement “[t]o clarify the status of this rail line, under PPLS ownership, and to avoid any assertion that PPLS by its acquisition of this line incurred residual common carrier obligations” Id.

In Maine Dep’t of Transp.—Acquis. & Oper. Exemp.—Maine Cent. R.R., 8 I.C.C.2d 835 (1991) (State of Maine), and in more than 60 subsequent decisions, this agency has held that the sale of the physical assets of a rail line by a carrier to a state or other public agency does not constitute the sale of a railroad line within the meaning of 49 U.S.C. § 10901, if certain conditions are met. The required conditions are that the selling carrier must retain a permanent, exclusive freight rail operating easement, together with the common carrier obligation for the line, and that the terms of the sale must protect the carrier from undue interference with its ability to carry out its common carrier obligation to provide freight rail service.

² See Verified Notice of Exemption at 3 (“Since commencing operation of the rail line owned by the Joint Rail Authority in 1984, [North Shore] has provided contract rail service on the Subject Line when the line was owned by the Pennsylvania Department of Transportation and upon its subsequent conveyance by the Department to PPL Susquehanna, LLC.”).

³ By decisions served on June 23 and July 29, 2010, North Shore was granted 2 extensions of 30 days each to file the requested information.

⁴ The FSP was formulated in the 1970s by the United States Railway Association. It designated which lines were to be retained in active service through transfer to Conrail, a government-created successor railroad to the various northeastern railroads in reorganization, and which lines would be allowed to be abandoned. The FSP was submitted to Congress on July 26, 1975, and was specifically approved in § 601(e) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 127. Lines not included in the FSP could be abandoned without a proceeding under 49 U.S.C. § 10903, formerly § 1(18) of the Interstate Commerce Act.

In Anthony Macrie—Continuance in Control Exemption—N.J. Seashore Lines, Inc., FD 35296, (STB served Aug. 31, 2010) (Macrie), the Board recently addressed the regulatory consequences that arise when a noncarrier-owner leases an abandoned rail line to a rail carrier that seeks to operate the line in common carrier service. The Board found that the owner-lessor did not have an obligation to seek acquisition or operation authority from the Board for leasing the abandoned line to a rail carrier, and that the owner-lessor would not acquire a residual common carrier obligation as long as the lease terms did not allow it to exercise control over or interfere with the lessee's ability to provide common carrier service. The Board emphasized that a rail carrier seeking a certificate or an exemption to operate a line leased from a noncarrier-owner should provide sufficient information and documentation for the Board to determine whether the owner-lessor can exert undue control over the lessee-carrier's operations.

The transaction here has similarities to State of Maine and Macrie. If North Shore were acquiring a freight operating easement in an abandoned rail line or in track that had never been part of the interstate rail network, the Board would examine the easement and related agreements to determine the owner-grantor's degree of control over the line's operation and potential to interfere with the operator's ability to carry out its common carrier obligation to provide rail service over the line. But this case presents threshold issues: (1) whether the Line is a "railroad line" under 49 U.S.C. § 10901; and (2) whether PPLS is a "rail carrier" under 49 U.S.C. § 10102(5). North Shore states that the Line was an active rail line when it was acquired by PPLS. The acquisition of an active rail line requires a license from the Board,⁵ and a Board license imposes a common carrier obligation. PPLS is directed to explain why it did not seek Board authorization or an exemption when it acquired the Line in 2004, and why it believes it does not have a common carrier obligation as to the Line. The Board will continue to hold this proceeding in abeyance pending receipt and consideration of the material requested of PPLS.

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

⁵ See, e.g., S. Pac. Transp. Co.—Aban. Exemp.—Los Angeles County, Cal., 8 I.C.C.2d 495, 501-502 (1992) (footnote omitted) ("The acquisition of a line of railroad is a transaction subject to the [Board's] jurisdiction. Non-carriers require [Board] approval under § 10901 to acquire or operate a rail line in interstate commerce.") Based on this requirement, the ICC found that a rail carrier could not seek authority to abandon a line whose physical assets had been sold to a noncarrier without agency approval. Because the noncarrier acquired ownership of the line, the ICC ruled that it was the proper party to seek abandonment authority and that the rail carrier could only seek discontinuance authority. See S. Pac. Transp. Co.—Discont. of Service Exemp.—in Los Angeles County, Cal., AB 12 (Sub No. 169) et al. (ICC served May 24, 1994). Similarly, in the case of a notice of exemption to acquire and operate that was found void ab initio, the ICC ruled that the original owner of the line retained the common carrier obligation and had to provide rail service notwithstanding that the acquiring entity had consummated the line purchase. See Sagamore Nat'l Corp.—Acquis. & Oper. Exemp.—Lines of Indiana Hi-Rail Corp. Order to Show Cause, FD 32523 (ICC served Sept. 9, 1994).

It is ordered:

1. North Shore is directed to serve a copy of this decision on PPL Susquehanna, LLC, within 5 days of the service date of this decision and to certify within 5 days of service that it has done so.

2. PPLS is directed to respond to the above questions concerning its acquisition of the Line within 30 days of the service date of this decision.

3. The publication of the notice and the effectiveness of the exemption will be continued in abeyance pending responses from the parties and further decision of the Board.

4. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.