

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB-167 (Sub-No. 1151X)

CONSOLIDATED RAIL CORPORATION--ABANDONMENT EXEMPTION--
IN BERGEN AND PASSAIC COUNTIES, NJ

Decided: October 24, 1997

By decision served and notice published in the Federal Register (61 FR 29166) on June 7, 1996, the Board under former 49 U.S.C. 10505 exempted from the prior approval requirements of former 49 U.S.C. 10903-04 the proposed abandonment by Consolidated Rail Corporation (Conrail) of approximately 1.8 miles of rail line, known as the Dundee Spur Track, from milepost 0.0 near Garfield to the end of the track at approximately milepost 1.8 near Monroe Street, in the City of Passaic (Passaic), Bergen and Passaic Counties, NJ.¹ The decision was scheduled to become effective on July 7, 1996.

On June 14, 1996, New York & Greenwood Lake Railway Company (NYGL), a New Jersey Corporation, filed a timely notice of intent to file an offer of financial assistance (OFA) to purchase the line. On July 5, 1996, NYGL timely filed an OFA in which it stated that an agreement with Conrail for the sale of the line had been reached and that it had sufficient qualified manpower, equipment and finances to operate the rail line in a safe and efficient manner. In addition, on August 7, 1996, NYGL submitted a copy of its 1994 and 1995 balance sheets and a list, dated July 1996, of other sources of available funds. On August 8, 1996, Conrail faxed a letter confirming the agreement. By decision served August 14, 1996 (August 14 decision), NYGL was found to be financially responsible and the OFA reasonable and likely to equal the acquisition cost of the line under former 49 U.S.C. 10905(d).² In that decision, NYGL also was authorized to acquire and operate the line and, pursuant to former 49 U.S.C. 10905(e) and former 49 CFR 1152.27(f)(2),³ the exemption was ordered revoked effective on the date the sale was consummated.

On March 3, 1997, the City of Garfield (the City) filed a petition for reconsideration⁴ of the August 14 decision on the grounds that NYGL lacks the financial ability to conduct the necessary repairs and operate the line in a safe manner for the 2-year period prescribed in 49 CFR 1152.27(i)(2). The line, which has been embargoed due to unsafe track conditions, runs along the centerline of a roadway known as Monroe Street. According to the City, this has created practical problems and poses a serious threat to the safety of the community. It notes that, historically, railcars carrying hazardous materials such as chlorine gas have been involved in numerous accidents with vehicles.

¹ The decision applied the law in effect prior to the enactment of the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (ICCTA), because the proceeding was pending with the Interstate Commerce Commission prior to January 1, 1996, the effective date of the ICCTA.

² Under the new statutory provision at 49 U.S.C. 10904(d), only financial responsibility is considered, the other criterion having been eliminated.

³ Revised abandonment regulations were adopted in Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903, STB Ex Parte No. 537 (STB served Dec. 24, 1996, and June 27, 1997).

⁴ Although entitled a petition for reconsideration, the City's pleading is actually a petition to reopen an administratively final action and will be treated as such. See 49 CFR 1121.4(i), 1152.25(e), and 1152.60(a).

The City plans to spend \$1.5 million to completely restructure the roadway and two signalized intersections on Monroe Street. It has applied for and received a grant of \$350,000 from the New Jersey Department of Transportation (NJDOT) to be used for the roadway improvement project. Unless the track is removed, the City claims that the two signals at the intersections cannot be redesigned to meet NJDOT requirements.

The City states that removal of the track in its entirety will also benefit the redevelopment of Passaic, where the line runs through a former industrial area that was destroyed by a fire in 1994. According to the City, reactivation of the line, on the other hand, would result in a significant decrease in the quality of life currently being enjoyed by the Cities of Garfield and Passaic. The City urges us to grant abandonment authority.

In reply, NYGL disputes the City's claim that it lacks the financial ability to repair and operate the line. NYGL states that all necessary repairs to the line have been completed,⁵ and that it continues to be financially capable of operating the line.

In response to the City's concerns about safety and the transportation of hazardous materials, NYGL indicates that on January 23, 1997, it signed a freight car switching contract in which it has designated the services and the rates it will provide to its only customer, Atlantic Coast Fibers (Atlantic).⁶ According to NYGL, Atlantic ships only scrap paper and paperboard which are not hazardous materials. If hazardous materials were to be carried over the line in the future, NYGL contends that rail service is safer than truck service in the handling of such materials. It notes that operations over the short distance down Monroe Street have been conducted without serious mishap for over 70 years. NYGL avers that it will continue to provide a flagman to walk with each train, which is expected to be made up of no more than four cars on any one switch and will traverse the 1,700 feet of Monroe Street in approximately 3½ minutes.

Finally, with regard to the City's redevelopment plans, NYGL submits that rail service will make the area more attractive to prospective tenants and businesses which, according to NYGL, has been the position of the Passaic County Planning Board in the past. As far as the mechanics of the roadway improvement project are concerned, NYGL sees no impediment to redesigning the signals on Monroe Street while its trains are operating, so long as it complies with the existing motor vehicle traffic signals, which it intends to do.

DISCUSSION AND CONCLUSIONS

Under our abandonment rules, a petition to reopen an administratively final action must state in detail whether there is material error, new evidence or substantially changed circumstances to warrant reopening the proceeding. See 49 CFR 1152.25(e)(4). In challenging the finding in the August 14 decision that NYGL is financially responsible, the City is in essence alleging material error, although it does not specifically state as such. Other than asserting that NYGL lacks the financial ability to conduct the necessary repairs and operate the line in a safe manner, the City provides no details to support its contentions. NYGL, on the other hand, submits that it does have the necessary financial resources as demonstrated by the fact that most of the repairs have already been completed. It avers that operations have been conducted safely in the past and promises to continue to use a flagman to walk with each train, which should allay the City's safety concerns.

We find no material error in the August 14 decision finding that NYGL is financially responsible. As correctly stated in that decision, an offeror need only show that it is financially responsible, which NYGL has done and which the City has not refuted. Once a finding is made that an offeror is financially responsible to fulfill its contractual responsibilities, its capability to conduct operations for 2 years is presumed in the absence of evidence to the contrary, which the City has not

⁵ The only additional repairs involve track near the bridge on the line, which NYGL submits are minor and can be completed in one day.

⁶ On August 19, 1997, Vincent Riviello, the president of Atlantic, filed a letter urging the timely resolution of this matter so that rail service can be reestablished to Atlantic's plant.

provided. See Conrail Abandonment of a Portion of the West 30th Street Secondary Track in New York, NY, In the Matter of an Offer of Financial Assistance, Docket No. AB-167 (Sub-No. 493N) (ICC served Jan. 13, 1987), slip op. at 11, n.6 (West 30th Street).

The remainder of the City's challenge to the August 14 decision goes to the merits of continued rail service under the OFA process. The City is opposed to rail service along Monroe Street and is basically seeking to nullify the sale and reestablish the abandonment exemption authority previously granted to Conrail. As justification for abandonment of the line, the City cites various portions of Conrail's petition for exemption alleging operating losses, rehabilitation costs, and the availability of alternative motor carrier transportation for the one active shipper on the line, Atlantic.

The City's attempt to defeat the OFA and force an abandonment of this line is contrary to the applicable law and established precedent. The underlying rationale of the OFA provision in the statutory scheme represents an accommodation of the conflicting interests of railroads that desire to unburden themselves quickly of unprofitable lines and shippers that are dependent upon continued rail service. See Hayfield Northern R. Co. v. Chicago & N.W. Tr. Co., 467 U.S. 622, 630 (1984). Although the statutory scheme does provide for the acquisition of abandoned rights-of-way for public use, an OFA for continued rail service takes precedence over other uses and supersedes public use conditions. See West 30th Street at 13. Indeed, exempting abandonment transactions from the OFA procedures where a government agency either owns or expects to acquire the railroad right-of-way and plans to use the right-of-way for a highway, mass transit or other public purpose is unusual relief and is not granted where there is an overriding need for continued rail service. See Georgia Southwestern Division, South Carolina Central Railroad--Abandonment Exemption--Between Preston and Omaha, GA, Docket No. AB-385 (Sub-No. 2X) (STB served July 25, 1996), slip op. at 5. Thus, the City's roadway improvement plans, although a valid public purpose, must be subordinate to the continuation of rail service. Even if the City had filed for a public use condition under 49 CFR 1152.28, Atlantic's overriding need for continued rail service would take precedence. Accordingly, we will deny the City's petition.

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

It is ordered:

1. The City's petition to reopen is denied.
2. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary