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SERVICE DATE - LATE RELEASE JUNE 22, 2004

## SURFACE TRANSPORTATION BOARD

### DECISION

STB Finance Docket No. 34054

#### MORRISTOWN & ERIE RAILWAY, INC.–MODIFIED RAIL CERTIFICATE

Decided: June 22, 2004

This decision denies the petition of five New Jersey municipalities to reopen a July 2002 Board decision granting a modified certificate of public convenience and necessity to Morristown & Erie Railway, Inc. (M&E), to operate certain railroad lines in New Jersey.

### BACKGROUND

This proceeding involves rail lines formerly owned and operated by the Staten Island Railway (SIRY) and the Rahway Valley Railroad (RVRR). The subject lines extend from a point west of the New Jersey Turnpike in Linden, NJ, to the junction of the former SIRY line with the Raritan Valley Line in Cranford, NJ, and from the Raritan Valley Line in Cranford to a junction with the Morris and Essex Line in Summit, NJ. The Board's predecessor, the Interstate Commerce Commission, approved the abandonment of the SIRY and the RVRR lines in the early 1990s. Staten Island Railway Corporation–Abandonment, Docket No. AB-263 (Sub-No. 3) (ICC served Dec. 5, 1991); Rahway Valley Railroad Company–Abandonment–Between Aldene and Summit in Union County, NJ, Docket No. AB-211 (ICC served Aug. 27, 1992). The New Jersey Department of Transportation (NJDOT) acquired the lines in 1994. On June 23, 2000, NJDOT entered into an agreement with Union County (the County), a political subdivision of the State of New Jersey, whereby NJDOT conferred upon the County responsibility for the rehabilitation of the lines and the reestablishment of rail service. The County selected M&E, a Class III short line railroad, to operate the railroad and signed an operating agreement with M&E on May 9, 2002. On June 5, 2002, M&E filed a notice with the Board under 49 CFR 1150, Subpart C, containing the information required for a modified certificate of public convenience and necessity, and the certificate took effect upon its filing. See Common Carrier Status of States, State Agencies, 363 I.C.C. 132, 138 (1980), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). Notice of the modified certificate was published in the Federal Register at 67 FR 44928-29 on July 5, 2002.

Petitioners filed a petition to reopen on January 2, 2004. Petitioners are five New Jersey municipalities: the Township of Springfield, the City of Summit, the Borough of Kenilworth, the Borough of Roselle, and the Borough of Roselle Park. Petitioners assert changed circumstances due to an alleged change in position by the County. Petitioners claim that, by resolution issued on June 5, 2003, the County breached a commitment to them that M&E would

not implement its operating agreement without the written concurrence of the County, and that the County would not give its concurrence without the express consent of petitioners. Petitioners assert that, because they relied on these assurances from the County, they did not participate in the initial proceeding in which M&E received the modified certificate and, therefore, have not previously presented to the agency their environmental and safety concerns regarding reactivation of the SIRY and RVRT lines. Petitioners further argue that the requirements of the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* (NEPA), are triggered here because: (1) rail service is being initiated, and (2) the extensive rehabilitation of these lines is akin to a new rail line construction project. In light of the changed circumstances, petitioners contend that the Board should reopen to permit a thorough environmental review and the imposition of appropriate mitigation measures. Also, on February 19, 2004, New Jersey State Senator Thomas H. Kean, Jr., and New Jersey State Assemblymen Eric Munoz, M.D., and Jon M. Bramnick urged the Board to reopen the proceeding and expressed their support for the position of the petitioners.

Respondents (the County and M&E) filed separate replies on January 22, 2004. They argue that the Board has no role to play in the parties' dispute, which they view as simply a breach of promise claim. They also argue that environmental review would be inappropriate in this proceeding because: (1) environmental review typically is not required for the commencement or termination of service under a modified certificate; (2) the level of traffic will be below the thresholds in the Board's environmental rules for determining when the preparation of an environmental assessment is warranted; (3) the track rehabilitation work does not constitute the construction of a new rail line; and (4) the Board's role in modified certificate proceedings is largely ministerial. See 49 CFR 1150.23-1150.24.

Petitioners filed a supplement on April 29, 2004, in which they submit that there is a potential for significant additional traffic over the lines at issue, based on the Board's decision served on January 21, 2004, in Port Authority of New York and New Jersey—Petition for Declaratory Order, STB Finance Docket No. 34428, a pending proceeding in The New York City Economic Development Corporation—Petition for Declaratory Order, STB Finance Docket No. 34429, and a public statement made by the County on April 2, 2004, at a Board Conrail Oversight hearing in Trenton, NJ. Petitioners argue that respondents should state on the record that they will never attempt to make a connection with the portion of the SIRY east of the New Jersey Turnpike—the origin of this potential traffic. If respondents do not so clarify, petitioners submit that the Board must consider the potential for additional traffic from that source in its environmental review.

Respondents replied to petitioners' supplement in separate filings on May 11, 2004. They argue that the supplement does not raise any new facts or conditions warranting reopening. They further argue that petitioners' arguments are premature and speculative, as there are no plans to build or otherwise obtain a connection between the lines of the SIRY east and west of the New Jersey Turnpike. They add that, even if someday the parties wanted to make such a

connection, M&E would have to return to the Board for additional authority, which would be the appropriate time for any necessary environmental review considering additional traffic over these lines. Respondents state that petitioners could oppose the connection at that time.<sup>1</sup>

The Board also received two other comments regarding this petition. The mayor of the Borough of Roselle Park, Joseph DeIorio, filed a comment supporting the petition and stating that there are serious environmental, safety, and other vital public concerns that the Board should consider. The American Short Line and Regional Railroad Association (ASLRRA) filed a comment opposing the petition to reopen, arguing that reopening would be contrary to Board and Congressional intent to preserve service over the sort of light density rail trackage the modified certificate program was designed to protect.<sup>2</sup>

### DISCUSSION AND CONCLUSIONS

Under 49 CFR 1115.4, a petition to reopen must state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances. Because none of these criteria has been met in this case, the petition to reopen will be denied.

Petitioners allege a changed circumstance in that the County evidently had initially adopted a resolution stating it would not approve usage of the right-of-way without petitioners' approval, and then allegedly breached its commitment by voting to proceed with implementation of the operating agreement with M&E without that approval. But whether the County had any legal obligation to the municipalities is a private contractual dispute and the Board is not the proper forum to resolve that dispute. Rather, contractual disputes belong in court. See Burlington Northern, Inc.—Trackage Rights, 347 I.C.C. 210, 213 (1974) (agency favors resolution of contractual dispute by courts or arbitrators). Petitioners have already pursued their breach of promise claims against the County and the railroad in New Jersey Superior Court. The Court denied their petition in a decision issued on December 5, 2003, in The Borough of Kenilworth, et al. v. County of Union and Morristown and Erie Railway, Inc., Docket No. UNN-L-2302-03. Therefore, the alleged breach does not constitute a changed circumstance warranting reopening.

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<sup>1</sup> Respondents also raise several procedural arguments for rejecting the supplement. They argue that the supplement was not timely, that there is no provision for such a filing in the Board's Rules of Practice, and that the material therein could have been submitted earlier in related proceedings. However, in the interests of compiling the most complete record possible, the Board will consider the supplement on its merits and also respondents' replies.

<sup>2</sup> ASLRRA also filed a request for a 1-day extension to file its comment. However, because the comment was received before the Board's deadline, an extension is unnecessary.

Nor are the requirements of NEPA triggered here. Under the Board's regulations implementing NEPA, actions are separated into three classes that prescribe the level of documentation required of the agency in the NEPA process. For those actions that may significantly affect the environment, a full Environmental Impact Statement is generally required. 40 CFR 1105.4(f), 1105.6(a). For those actions that would not have a significant environmental impact with appropriate mitigation, a more limited Environmental Assessment is sufficient. 49 CFR 1105.4(d), 1105.6(b). Finally, those categories of actions whose environmental effects are ordinarily insignificant are covered by a "categorical exclusion" from a case-by-case review. 49 CFR 1105.6(c). Recognizing that sometimes a case that falls within one of these three categories presents the possibility of greater or lesser environmental effects than is typical for such a category, the Board's rules also provide that the agency may reclassify or modify these requirements in a particular case. 49 CFR 1105.6(d).

For requests to operate an existing rail line pursuant to 49 U.S.C. 10901, the Board prepares an Environmental Assessment if the operation will result in operational changes that exceed certain thresholds. See 49 CFR 1105.6(b)(4), (c)(2)(i). The Board generally does not undertake a case-specific environmental review in such cases if the operational changes would fall below the threshold at 49 CFR 1105.7(e)(5)(A): an increase of at least eight trains a day on the rail line (or three trains a day in a "nonattainment area" under the Clean Air Act), or an increase of 100 percent over the existing rail traffic level. See Lee's Summit, Mo. v. STB, 231 F.3d 39, 42 (D.C. Cir. 2000) (Lee's Summit) (affirming the Board's finding that, where there had been no recent traffic on a rail line that would be reactivated, the relevant threshold for environmental review is eight trains per day).

M&E states that it will operate three round-trip trains per week on these previously abandoned lines. This traffic level falls well below the threshold warranting environmental review in 49 CFR 1105.7(e), which in this case is three trains per day because the lines are in a nonattainment area.

Petitioners have failed to show a need to modify the normal environmental review requirements pursuant to 49 CFR 1105.6(d) in this case. Petitioners argue that environmental review for reactivation of service over this line is required because the line is near residences and schools, is not fully fenced, and includes at-grade crossings of major roads. In addition, petitioners argue that the poor condition of the line (some rails missing, some bridges removed) means that the reactivation of operations should be treated like the licensing of a new rail line, which would be subject to environmental review by the Board. See 49 CFR 1105.6(a), (b)(1). These same arguments were considered and rejected in Missouri Central Railroad Company—Acquisition and Operation Exemption—Lines of Union Pacific Railroad Company, et al., STB Finance Docket No. 33508 (STB served Apr. 30, 1998), reconsideration denied, (STB served Sept. 14, 1999) (Missouri Central), aff'd sub nom. Lee's Summit, 231 F.3d at 39, which involved service of one train per day. There, both the Board and the reviewing court held that the service level proposed was too insubstantial to warrant environmental reporting and the

preparation of environmental documentation where the frequency of service fell below the eight-trains-per-day threshold. Lee's Summit, 231 F.3d at 42. Applying the same environmental threshold assessment in this modified certificate proceeding as in Missouri Central would yield the same result. Thus, petitioners have not presented convincing arguments that would warrant the Board's undertaking an environmental review in this proceeding.

Nor is there anything in petitioners' supplement that warrants reopening. Petitioners are premature in their concerns about a connection between the portions of the SIRY east and west of the New Jersey Turnpike and the additional traffic such a connection might engender over the lines at issue here. Board authority would be required for any future connection, and in that proceeding the Board would undertake any necessary environmental review to consider additional traffic. If the parties ever seek authority to build or otherwise obtain such a connection, petitioners may oppose the request at that time.

Finally, the County states that its operating agreement with M&E contains a community outreach procedure for affected parties to present their concerns about reactivation of service to respondents. Petitioners may wish to avail themselves of this opportunity to have respondents address their environmental and safety concerns through this procedure. That is particularly appropriate where, as here, the dispute involves an agreement between the municipalities and the County.

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

It is ordered:

1. The petition to reopen is denied.
2. This decision is effective on its service date.

By the Board, Chairman Nober, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A. Williams  
Secretary