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SERVICE DATE – SEPTEMBER 5, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1273X¹

NEW YORK & GREENWOOD LAKE RAILWAY—ABANDONMENT EXEMPTION—IN
BERGEN AND PASSAIC COUNTIES, N.J.

Docket No. FD 36187

PASSAIC STREET PROPERTIES, LLC—ACQUISITION AND OPERATION
EXEMPTION—NEW YORK & GREENWOOD LAKE RAILWAY

Digest:² This decision allows New York & Greenwood Lake Railway to end its common carrier obligation to provide freight rail service over approximately 1.1 miles of rail line in Bergen and Passaic Counties, N.J., subject to environmental, historic preservation, and standard employee protective conditions.

Decided: September 4, 2019

New York & Greenwood Lake Railway (NYGL) has filed a petition in Docket No. AB 1273X under 49 U.S.C. § 10502 for an exemption from the prior approval requirements of 49 U.S.C. § 10903 to abandon 1.1 miles of rail line extending between milepost 0.0 and milepost 1.1 in Bergen and Passaic Counties, N.J. (the Line).³ Notice of NYGL's petition was served and published in the Federal Register on June 10, 2019 (84 Fed. Reg. 26,929). No comments were filed in response to NYGL's petition. The Board will grant the exemption, subject to environmental, historic preservation, and standard employee protective conditions.

¹ These proceedings are not consolidated. A single decision is being issued for administrative purposes.

² 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. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

³ NYGL initially submitted its petition on April 24, 2019 but supplemented it on May 10 and May 21, 2019. The petition therefore is deemed to have been filed on May 21.

BACKGROUND

In 2017, Passaic Street Properties, LLC (PSP), a real estate developer, purchased the Line and other property through a tax foreclosure sale due to NYGL's failure to pay federal taxes. (NYGL Pet. 3, Apr. 24, 2019, AB 1273X.) PSP filed a notice of exemption in 2018⁴ to acquire the Line and other property,⁵ which NYGL opposed and which the Board ultimately rejected. See Passaic Street Props., FD 36187, slip op. at 3. NYGL states that, following the Board's rejection of PSP's notice, NYGL and PSP reached a settlement in which NYGL agreed to abandon the Line.⁶ (NYGL Pet. 4.) NYGL asserts that there are no shippers on the Line, there is no current traffic moving over the Line, and about eight carloads of traffic have moved over the Line since around 2009. (Id. at 2, 4, 7.) According to NYGL, "PSP and the local governments wish to reclaim the right of way for urban redevelopment." (Id. at 4.) NYGL states that the abandonment "will allow PSP and the community to redevelop the property for residential and commercial purposes, and NYGL supports those goals." (Id. at 7.)

NYGL also requests an exemption from the Board's offer of financial assistance (OFA) procedures because the submission of an OFA could defeat the purpose of the petition. (Id. at 7-8).

⁴ According to NYGL, PSP was initially unaware that a party acquiring an active rail line was required to obtain Board acquisition authority. (NYGL Pet. 3, Apr. 24, 2019, AB 1273X.)

⁵ PSP's purchase and notice of exemption also included an additional 0.65-mile portion of previously abandoned rail line. See Passaic Street Props., LLC—Acquis. & Operation Exemption—N.Y. & Greenwood Lake Ry., FD 36187, slip op. at 2 (STB served July 18, 2018); see also N.Y. & Greenwood Lake Ry.—Aban. Exemption—in Passaic, Passaic Cty., N.J., AB 1006X, slip op. at 1 (STB served May 17, 2007); NYGL Letter, Feb. 20, 2008, N.Y. & Greenwood Lake Ry., AB 1006X (confirming the abandonment had been consummated). Upon consummation, that portion ceased to be a rail line subject to the Board's jurisdiction. See Preseault v. ICC, 494 U.S. 1, 5 n.3 (1990); Birt v. STB, 90 F.3d 580, 585 (D.C. Cir. 1996).

⁶ On July 27, 2018, PSP filed in Docket No. FD 36187 a request for reconsideration and/or clarification of the Board's July 18, 2018 decision in that docket. On February 6, 2019, PSP filed a letter stating that NYGL and PSP expected that NYGL would file a notice of exemption for abandonment of the Line. PSP also stated that it "expects that its pending [r]equest for [r]econsideration and/or [c]larification will soon be moot." PSP Letter, Feb. 6, 2019, Passaic Street Properties, LLC—Acquis. & Operation Exemption—N.Y. & Greenwood Lake Ry., FD 36187. In light of PSP's February 6 filing and this decision, the Board will deny as moot PSP's request for reconsideration and/or clarification in Docket No. FD 36187.

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 from regulation 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.

Detailed scrutiny of the proposed abandonment under 49 U.S.C. § 10903 is not necessary to carry out the RTP in this case. There are no shippers on the Line, and only eight carloads of traffic have moved over the Line since around 2009. (NYGL Pet. 2, 4, 7, Apr. 24, 2019, AB 1273X.) Granting an exemption would expedite regulatory decisions, reduce regulatory barriers to exit, and provide for the expeditious handling of this proceeding. See 49 U.S.C. § 10101(2), (7), & (15). Other aspects of the RTP would not be adversely affected. Additionally, regulation of the proposed abandonment is not necessary to protect shippers from the abuse of market power because, as discussed above, there are no shippers on the Line.

The Board will not consider OFAs in this case because no formal expressions of intent to file an OFA were filed by the June 20, 2019 deadline. See 49 C.F.R. § 1152.27(c)(1)(i). NYGL's request for an exemption from the OFA procedures therefore will be denied as moot.

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, the Board will impose on NYGL the employee protections set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979).

Environmental Review. NYGL submitted a combined environmental and historic report with its petition in Docket No. AB 1273X 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. §§ 1105.7-1105.8, 1105.11. The Board's Office of Environmental Analysis (OEA) has examined the report, verified the data it contains, and analyzed the potential effects of the proposed action on the quality of the human environment.

On July 19, 2019, OEA issued an Environmental Assessment (EA) in which it recommended that the Board impose three conditions on any decision granting abandonment authority. First, OEA determined that the City of Passaic is located within New Jersey's inland coastal boundary and that, therefore, a determination is required from the New Jersey Coastal Management Program (NJCMP) that the proposed abandonment is consistent with the state's enforceable policies pursuant to the Coastal Zone Management Act, 16 U.S.C. §§ 1451-1465.

Because OEA had not yet received comments from NJCMP as of the issuance of the EA, OEA recommended a condition requiring NYGL to consult with NJCMP and obtain the necessary approvals prior to initiating the salvage process.

Second, the Bergen County Department of Planning and Engineering requested that the removal of rail, track materials, and cross ties extend from the bridge spanning the Passaic River eastward across River Drive and through the intersection of River Drive and Monroe Street. Bergen County stated that the removal would improve vehicular and pedestrian safety and flow through the intersection, which it plans to realign and resignal. Because, as of the issuance of the EA, OEA had not yet received a response from NYGL to its inquiry regarding this request, OEA recommended a condition that would require NYGL to consult with the Bergen County Department of Planning and Engineering prior to initiating salvage.

Third, although NYGL had served the historic report on the New Jersey Department of Environmental Protection's Historic Preservation Office (SHPO) pursuant to 49 C.F.R. § 1105.8(c), OEA had not heard from the SHPO by the time the EA was issued. Therefore, OEA was not able to consider the SHPO's opinion before determining if the Line may be potentially eligible for listing on the National Register of Historic Places (National Register). OEA accordingly recommended a condition requiring NYGL to retain its interest in and take no steps to alter the historic integrity of all historic properties, including sites, buildings, structures and objects within the project right-of-way (referred to as the Area of Potential Effect) eligible for listing or listed in the National Register until completion of the Section 106 process of the National Historic Preservation Act, 54 U.S.C. § 306108. OEA also recommended that NYGL be required to report back to OEA regarding any consultations with the SHPO and the public, and that NYGL be prohibited from filing its consummation notice or initiating any salvage activities related to abandonment (including removal of tracks and ties) until the Section 106 process has been completed and the Board has removed this condition.

Comments on the EA were due by August 19, 2019. In its Final EA, issued on August 20, 2019, OEA states that it received two comments.

First, on August 1, 2019, NYGL's counsel sent OEA a copy of a letter that the SHPO had sent to NYGL's counsel on April 24, 2019. The SHPO commented that there are numerous late nineteenth and early twentieth century industrial buildings located in the area, and that the area is potentially eligible for inclusion in the National Register. As of the April 24, 2019 letter, the SHPO had not yet formulated an opinion about the effect the proposed abandonment would have on these resources, and OEA has not received any additional information from the SHPO. OEA continues to recommend the Section 106 condition proposed in the draft EA.

Second, on August 19, 2019, OEA received an email from the New Jersey Department of Environmental Protection's Office of Policy and Coastal Zone Management (OPCZM). The email confirmed that the area of the proposed abandonment is located in the coastal zone, that

OPCZM is in the process of determining what permits may be needed for salvage, and that OPCZM will provide that information when it becomes available. OEA therefore continues to recommend the coastal zone condition described in the draft EA.

OEA did not receive any comments regarding the draft EA's recommended condition requiring NYGL to consult with the Bergen County Department of Planning and Engineering prior to initiating salvage activities, and OEA continues to recommend that condition.

The Board agrees with OEA's analysis and will impose all three recommended conditions.

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, the Board exempts from the prior approval requirements of 49 U.S.C. § 10903 NYGL's abandonment of the Line, subject the employee protective conditions set forth in Oregon Short Line and the following conditions:

(a) NYGL shall consult with the New Jersey Coastal Management Program and obtain state coastal management consistency certification. NYGL shall not file its consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties) until it reports in writing to OEA the results of the consultation and the Board has removed this condition.

(b) NYGL shall consult with the Bergen County Department of Planning and Engineering prior to initiating salvage activities to discuss where salvage would occur in relation to future road improvements.

(c) NYGL shall retain its interest in and take no steps to alter the historic integrity of all historic properties, including sites, buildings, structures and objects within the project right-of-way (the Area of Potential Effect) eligible for listing or listed in the National Register until completion of the Section 106 process of the National Historic Preservation Act. NYGL shall report back to OEA regarding any consultations with the SHPO and the public and shall not file its consummation notice or initiate any salvage activities related to abandonment

(including removal of tracks and ties) until the Section 106 process has been completed and the Board has removed this condition.

2. This exemption will be effective on October 5, 2019.
3. NYGL's request for an exemption from the OFA procedures is denied as moot.
4. Petitions to reopen and stay the effectiveness of the exemption must be filed by September 20, 2019.
 5. Pursuant to 49 C.F.R. § 1152.29(e)(2), NYGL 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 NYGL's filing of a notice of consummation by September 5, 2020, 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 the satisfaction, expiration, or removal of the legal or regulatory barrier.
6. PSP's request for reconsideration and/or clarification in Docket No. FD 36187 is denied as moot.

By the Board, Board Members Begeman, Fuchs, and Oberman.