

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35020

NORTHERN AND BERGEN RAILROAD, L.L.C.—ACQUISITION EXEMPTION—A LINE
OF RAILROAD OWNED BY NEW YORK & GREENWOOD LAKE RAILWAY

Decided: May 25, 2007

This decision stays the effective date of the exemption in this proceeding.

BACKGROUND

This proceeding involves the acquisition (by purchase) of approximately 1.1 miles of track, beginning in the Borough of Garfield, Bergen County, NJ, and ending at or near the intersection of South and Fourth Streets in the City of Passaic, Passaic County, NJ. On April 26, 2007, Northern and Bergen Railroad, L.L.C. (NBR), a noncarrier, filed a verified notice of exemption under 49 CFR 1150.31 to acquire the line from New York & Greenwood Lake Railway (NYGL). NBR states that it plans to provide rail transportation service to three shippers along the line and to develop a transload business for hauling finished wood products. In addition, NBR states that it will haul cars to an interchange with Norfolk Southern Railway Company. The effective date of the exemption is May 26, 2007.

On May 16, 2007, the New Jersey Department of Environmental Protection (NJDEP) filed a petition asking the Board to stay the effective date of the exemption until NBR provided certain information.¹ NJDEP claims that further development of facts is necessary in order to determine whether NBR will become a rail carrier as defined by 49 U.S.C. 10102(5) or whether its proposed operations are in reality those of a solid waste processing facility. On May 18, 2007, NBR filed a reply in opposition to a stay, wherein NBR argues that it is seeking to acquire an existing common carrier railroad and an existing transload facility, and that NJDEP's allegations that NBR's transaction is a "sham" are unfounded. NBR also asserts that it has provided to NJDEP the information that NJDEP requested.

On May 23, 2007, NJDEP filed a supplemental pleading to its request for a stay, further explaining its concerns regarding NBR's pending acquisition of the line. In its supplement, NJDEP stresses the environmental implications of the pending transaction and the projected effect that the transaction could have on the surrounding community. NJDEP also appears to

¹ By letter dated May 17, 2007, New Jersey Transit Corporation (NJT) states that it supports NJDEP's petition to stay pending receipt of further information regarding the proposed operations by NBR, which could impact NJT trackage.

seek in this proceeding a Board pronouncement about the preemptive effect of Board jurisdiction regarding an existing solid waste transfer station proposed to be conveyed to NBR by NYGL. NBR responded to this supplemental pleading on May 24, 2007, further supporting its position that it will operate as a legitimate rail carrier. In its reply to the supplemental pleading, NBR, while maintaining that this is not the proper proceeding for consideration of NJDEP's request for a ruling on preemption, nonetheless expressed its intention to meet with NJDEP to assure that the solid waste facility will operate in compliance with all health and safety regulations that apply to rail facilities.

DISCUSSION AND CONCLUSIONS

The May 18 and May 24 replies filed by NBR to the stay petition and the supplemental request for stay, respectively, provide additional information sought by NJDEP regarding the nature of the proposed operations. While NJDEP has stressed and continues to stress its public interest and environmental concerns surrounding the exemption at issue, it has not raised sufficient doubts about the validity of applying the class exemption to this transaction for the Board to find at this time that the class exemption is not available to NBR. Moreover, NJDEP's apparent request for a ruling at this stage of this proceeding about what activities NBR may conduct if it acquires the rail facilities is not the proper subject of a stay request. However, because NJDEP continues to have questions, and a further exchange of information could prove useful, a short stay of the effective date of the exemption is appropriate. The effective date of the exemption will therefore be stayed until June 26, 2007.

Additional time will allow the parties to meet, as offered by NBR, to discuss NJDEP's concerns about the rail facility's compliance with health and safety regulations. The delay in the effectiveness of the exemption also will provide NJDEP with an opportunity to file any additional comments in response to the information provided so far by NBR, or to seek a stay of the exemption by making the showing discussed below. NJDEP shall have until June 1, 2007 to file any supplemental pleading. Should NJDEP do so, NBR will have until June 8, 2007 to reply.

In the event that NJDEP seeks any further stay of the effective date of the notice, it is reminded that any interested party seeking a stay from the Board must establish that: (1) there is a strong likelihood that it will prevail on the merits of any challenge to the action sought to be stayed; (2) it will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be substantially harmed; and (4) the public interest supports the granting of the stay. Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958). A party seeking a stay carries the burden of persuasion on all of the elements required for such extraordinary relief. Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974).

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

It is ordered:

1. The effective date of the exemption in this proceeding is stayed until June 26, 2007.
2. NJDEP may file further comments or a new petition for stay, as described above. Any such pleading must be filed by June 1, 2007.
3. NBR may file, by June 8, 2007, a reply to any further comments or stay request filed by NJDEP.
4. This decision is effective on its date of service.

By the Board, Charles D. Nottingham, Chairman.

Vernon A. Williams
Secretary