

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34649

NEW YORK & GREENWOOD LAKE RAILWAY—FEEDER LINE ACQUISITION—
A LINE OF NORFOLK SOUTHERN RAILWAY COMPANY

Decided: July 27, 2005

We are affirming a decision rejecting the feeder line application of New York & Greenwood Lake Railway (Greenwood or appellant).

BACKGROUND

On January 6, 2005, Greenwood filed an application under the Feeder Railroad Development Program, 49 U.S.C. 10907 and 49 CFR Part 1151, to acquire from Norfolk Southern Railway Company (NS) a 6.2-mile segment of the Boonton line extending between milepost WD-2.2 in or near Jersey City and milepost WD-8.4 in or near Newark, and the contiguous 3.8-mile Newark Industrial Track extending between milepost NK-4.3 in or near Secaucus and milepost NK-8.1 in or near Kearny in Essex and Hudson Counties, NJ. Prior to that filing, this line was the subject of a notice of exemption filed by NS on December 29, 2004. Norfolk Southern Railway Company—Discontinuance of Service Exemption—Between Newark, and Kearny, NJ, in Essex and Hudson Counties, NJ, STB Docket No. AB-290 (Sub-No. 242X) (STB served and published in the Federal Register Jan. 18, 2005) (70 FR 2923). NS used the notice-of-exemption procedures to discontinue service because there had been no local traffic over the line for at least 2 years, overhead traffic could be rerouted, no service complaints were pending, and appropriate notice of the proposed discontinuance had been given.

In a decision served February 4, 2005, in this proceeding, the Board, through the Director of the Office of Proceedings, rejected Greenwood's application for failing to meet the criteria at 49 U.S.C. 10907(b)(1)(A) and 49 CFR 1151.1.¹ Greenwood relied exclusively on 49 U.S.C. 10907(b)(1)(A)(ii) and the portion of 49 CFR 1151.1, which provides, in pertinent part, that a rail line is eligible for a forced sale if it appears in category 1 or 2 of the owning carrier's system diagram map (SDM). The Director determined that Greenwood did not make the required showing that the rail line it sought to acquire appeared in category 1 or 2 of the owning railroad's SDM. Category 1 of the SDM includes lines as to which an abandonment or discontinuance application is anticipated within 3 years. Category 2 includes all lines "potentially subject to abandonment." 49 CFR 1152.10(b)(1) and (2). Even though a legal notice published in The Star Ledger of Newark, NJ, appeared to indicate NS's intent to discontinue service over the line at

¹ As a consequence, a related request for discovery by Greenwood was also denied.

issue through the application process, the Director found that it did not represent NS's actual SDM. Rather, he concluded that the notice merely signified NS's tentative plan, as of September 2003, to eventually discontinue service over the line pursuant to application—a plan that was never acted upon, as service over the line was in fact properly discontinued under the notice-of-exemption procedures. On February 14, 2005, Greenwood appealed the Director's decision. NS filed a reply on February 23, 2005.

POSITIONS OF THE PARTIES

On appeal, Greenwood argues that the Director's decision must be reversed to correct a clear error of judgment and to prevent manifest injustice. Although it recognizes that the only SDM NS has filed with the Board was in May 1997, appellant asserts that the newspaper publication can fairly be read only as a revision of NS's SDM, and thus that the legal notice published in The Star Ledger on September 20, 2003, constitutes an actual amended SDM. Greenwood further argues that NS will have flouted the Board's regulations if it is permitted to apply for discontinuance authority by notice of exemption after having unambiguously declared in the legal notice its intent to file a discontinuance application and thereafter failing to amend its SDM. Appellant asks that we reverse the Director's decision and conditionally accept its feeder line application.

NS replies that the Director correctly found that a carrier's operative and legally effective SDM is the one on file with the Board, not maps of a portion of the carrier's system published in a newspaper. NS contends that the newspaper publication was merely a legal notice (albeit, an erroneous one) rather than a SDM. NS asserts that, in March 2004, it filed with the Board its actual, amended SDM, which did not include the subject line in category 1 or 2.

DISCUSSION AND CONCLUSIONS

The statute at 49 U.S.C. 10907 establishes two avenues for a party to obtain the forced sale of a rail line. The first avenue provides that the Board may order the rail carrier owning the line to sell it to the applicant when the Board finds that the public convenience and necessity require or permit the sale. 49 U.S.C. 10907(b)(1)(A)(i). The public convenience and necessity factors generally look to the impact of the sale on the owning carrier and whether the owning carrier has been providing adequate service to shippers that use the line. The second avenue provides for such a sale when the line in question “. . . is on a system diagram map as required under section 10903 . . . but the rail carrier has not filed an application to abandon such line. . . .” 49 U.S.C. 10907(b)(1)(A)(ii). In both cases, the Board may direct the owning carrier to sell the line to the applicant at the constitutional minimum value.

Greenwood has made no argument that the public convenience and necessity supports the forced sale of the line. Indeed, there has been no service on the line, and no complaints about failure to serve, for at least 2 years, and Greenwood concedes that it does not believe it can meet

the public convenience and necessity criteria. Rather, Greenwood argues that its application meets the second test based on the SDM. As discussed in this decision, it does not.

The Board has delegated to the Director the authority to accept or reject feeder line applications. 49 CFR 1011.7(b)(8). The Board has reserved to itself for consideration and disposition all appeals of initial decisions issued by the Director under the authority delegated by section 1011.7(b). See 49 CFR 1011.2(a)(7). Appeals of initial decisions must be based on one or more of the following grounds: (1) that a necessary finding of fact is omitted, erroneous, or unsupported by substantial evidence of record; (2) that a necessary legal conclusion or finding is contrary to law, Board precedent, or policy; (3) that an important question of law, policy, or discretion is involved which is without governing precedent; and (4) that prejudicial error has occurred. Chelsea Property Owners—Abandonment—Portion of the Consolidated Rail Corporation’s West 30th Street Secondary Track in New York, NY, Docket No. AB-167 (Sub-No. 1094)A, et al. (STB served June 13, 2005).

Greenwood argues that the Director’s decision should be reversed. However, Greenwood merely reiterates the assertion in its application that the legal notice from The Star Ledger constitutes NS’s actual SDM and that the line segments contained therein qualify under the feeder line provisions at 49 U.S.C. 10907(b)(1)(A)(ii) and 49 CFR 1151.1. As correctly explained by the Director, however, the newspaper notice did not represent the railroad’s actual SDM and Greenwood has not shown that the line it seeks to acquire was ever included in an actual SDM filed with the Board. In fact, the record shows that, when NS filed amendments to its SDM with the Board in March 2004, neither of the segments at issue here was included in category 1 or 2 for the reason that NS had subsequently decided that any filing with respect to these segments would be a notice or petition for exemption, rather than an application. Appellant has presented no evidence that would justify reversing the Director’s determination.

The fact that service over this line has been discontinued does not mean that the line ought to be made available to a third party under the more summary procedures of 49 U.S.C. 10907(b)(1)(A)(ii). As noted, under the plain language of the statute, those provisions are engaged only when a line appears on a carrier’s SDM. Here, the discontinuance authorized in this case involved a line over which no shippers have required service for over 2 years. If a shipper did need service that NS was unwilling to provide, a financially responsible person would be able to apply to use the feeder line provisions to acquire the line—even though service has been lawfully discontinued—through the public convenience and necessity standard at 49 U.S.C. 10907(b)(1)(A)(i) and the procedures at 49 CFR 1151.2. Thus, any line for which rail service is needed can, under those procedures, be put into the hands of a ready, willing, and suitable buyer.

In sum, Greenwood has not met the criteria for our granting this appeal. Appellant can point to no necessary finding of fact by the Director that was omitted, erroneous, or unsupported by the record. Moreover, there is no evidence that the Director’s legal conclusions or findings were contrary to law, Board precedent, or policy. To the contrary, the decision accurately

assessed the evidence Greenwood provided and came to a correct legal conclusion. Moreover, the decision did not involve an important question of law, policy, or discretion that was without governing precedent. Lastly, there is no evidence of prejudicial procedural error here. Greenwood submitted a defective application, which the Director properly rejected. For these reasons, we will affirm the Director's decision rejecting Greenwood's application and deny Greenwood's appeal.

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

It is ordered:

1. Greenwood's appeal of the Director's decision served February 4, 2005, is denied.
2. This decision is effective on its date of service.

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

Vernon A. Williams
Secretary