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SERVICE DATE – FEBRUARY 4, 2005

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: February 3, 2005

On January 6, 2005, New York & Greenwood Lake Railway (Greenwood or applicant), a Class III railroad,¹ filed an application under the Feeder Railroad Development Program. See 49 U.S.C. 10907; 49 CFR Part 1151. Greenwood seeks 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.² Applicant also filed discovery requests against NS as provided for by 49 CFR 1151.2(d). On January 21, 2005, NS responded with a motion to reject Greenwood's feeder line application and to deny Greenwood's associated request to allow discovery. Greenwood filed a reply to NS's motion to reject on February 2, 2005.

Under 49 U.S.C. 10907(b)(1)(A)(ii) and 49 CFR 1151.1, the Board is directed to require the sale of a rail line to a financially responsible person if the owning carrier has identified the line in category 1 or 2 of its system diagram map (SDM) as a candidate for abandonment, but has not yet applied for abandonment authority. Greenwood contends that the proposed sale is required under these provisions. Applicant asserts that the line it seeks to acquire is in category 1 of NS's SDM and submits a copy of a legal notice appearing in The Star Ledger of

¹ Greenwood states that it is subject to the Board's jurisdiction as a result of having acquired a line of railroad pursuant to an offer of financial assistance (OFA) approved by the Board in Consolidated Rail Corporation–Abandonment Exemption–In Bergen and Passaic Counties, NJ, STB Docket No. AB-167 (Sub-No. 1151X) (STB served Aug. 14, 1996) (OFA decision).

² This line is the subject of a notice of exemption filed by NS on December 29, 2004. Norfolk Southern Railway Company–Discontinuance of Service Exemption–Between Newark, NJ, and Kearny, NJ, in Essex and Hudson Counties, NJ, STB Docket No. AB-290 (Sub-No. 242X).

Newark, NJ, on September 20, 2003, in which NS provided notice of an amendment to its SDM to include the Boonton segment.

Greenwood states that it is a financially responsible person, as evidenced by the Board's finding that it was financially responsible in OFA decision. The applicant maintains that discovery is necessary here because it cannot submit a complete application without information that is primarily or exclusively within the knowledge of the owning railroad (NS). That includes information regarding the line's going concern value and net liquidation value.

Greenwood indicates that it will initially offer on-demand service to shippers, with the frequency to increase as freight traffic volumes increase. Applicant acknowledges that it currently does not have any rate agreements or contracts with shippers that it would serve, but maintains that potential shippers have expressed interest in rail service on this line. Applicant adds that it would also like to reinstate passenger service over the line.

NS asks the Board to reject Greenwood's application. The railroad says that Greenwood's statement that the line is listed on NS's SDM is incorrect. NS asserts that the legal notice that applicant submits as evidence of the line's inclusion in NS's SDM was erroneous.³ In a verified statement, Jani Marie Lipps, Manager-Strategic Planning for Norfolk Southern Corporation, who prepares NS's SDM and the amendments thereto, states that, although an amendment to the SDM regarding the Boonton segment had been considered, NS subsequently decided not to make it. NS further claims that applicant was aware that the legal notice was incorrect because, in March 2004, Mr. J.R. Wilson, President of Greenwood, asked NS for a copy of its SDM, which Ms. Lipps sent to him on March 23, 2004. NS states that the SDM did not include any part of the line at issue here in category 1 or 2.⁴

DISCUSSION

Under section 10907(b)(1)(A)(ii) and the Board's feeder line regulations at section 1151.1, a rail line is eligible for a forced sale if: (1) it appears in category 1 or 2 of the owning

³ NS also points out that the legal notice pertained only to the Boonton segment and not the Newark Industrial Track.

⁴ NS presents several additional arguments in support of its rejection request, including: (1) the application fails to allege that the sale of the line under 49 U.S.C. 10907 is alternatively permitted or required by the public convenience and necessity, (2) use of the feeder line provisions is inappropriate here because the line is the subject of a previously filed NS notice of exemption to discontinue service, (3) applicant has failed to demonstrate that it is a financially responsible person, and (4) applicant has failed to include a detailed operating plan. Greenwood responds to these arguments in its reply. In light of the subsequent findings made here, however, these issues need not and will not be addressed.

railroad's SDM, but the railroad has not filed an application to abandon the line; or (2) the public convenience and necessity, as defined in 49 U.S.C. 10907(c)(1), permits or requires the sale of the line. Greenwood relies exclusively on the first criterion here. But the line has never been shown to have been included in NS's SDM. Greenwood has filed no SDM showing either the 6.2-mile segment of the Boonton segment or the Newark Industrial Track. NS asserts that no SDM filed here ever listed either line in category 1 or 2. In reply, Greenwood provides no evidence to counter NS's assertion that the SDM filed with the Board did not include the lines at issue here.

In support of its argument that the line was included in category 1 of NS's SDM, Greenwood provides only a copy of the legal notice published in The Star Ledger. But Greenwood is incorrect that the information included in that notice represented the carrier's actual SDM. That notice merely signified NS's plan, as of September 2003, to eventually discontinue service over the line pursuant to application—a plan that was never acted upon. NS has indicated that the newspaper notice was incorrect because it subsequently decided not to place the Boonton segment in either category 1 or 2 of its SDM, and the absence of that segment from the amended SDM filed with the Board in March 2004 supports NS's claim. Category 1 includes "all lines or portions of lines which the carrier anticipates will be the subject of an abandonment or discontinuance application" to be filed within 3 years (49 CFR 1152.10(b)(1)), and category 2 includes "all lines or portions of lines which are potentially subject to abandonment..." (49 CFR 1152.10(b)(2)). Because NS decided to discontinue service over these lines by means of a notice of exemption, which it subsequently filed, NS was correct in not amending category 1 or 2 of its SDM to include the line at issue here. And it is the diagram of the carrier's system filed with the Board that is its actual SDM. Greenwood is thus incorrect that the line qualifies under the feeder line provisions at section 10907(b)(1)(A)(ii) and section 1151.1.

Greenwood's application will therefore be rejected for failing to meet the criteria at 49 U.S.C. 10907(b)(1)(A) and 49 CFR 1151.1. Accordingly, applicant's related request to allow discovery will also be denied.

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

It is ordered:

1. Greenwood's feeder line application is rejected.
2. Greenwood's related request for discovery is denied.

3. This decision is effective on the date of service.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary