

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: June 22, 2007

This decision denies a request for a further stay of the effective date of the exemption in this proceeding.

BACKGROUND

On April 26, 2007, Northern and Bergen Railroad, L.L.C. (NBR), a noncarrier, filed a verified notice of exemption, pursuant to 49 CFR 1150.31, seeking to acquire (by purchase from New York & Greenwood Lake Railway (NYGL)) 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. (All parties have referred to this line segment as the Dundee Spur.) 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. NBR states that it will transport cars to an interchange with Norfolk Southern Railway Company (NSR) on the Bergen County Line in Bergen County, NJ, as NYGL has done in the past. The Bergen County Line, as explained in part by letters submitted by New Jersey Transit Corporation (NJT) on May 17 and 31, 2007, is a rail line that connects with the Dundee Spur and extends at both ends to a main line that continues into the State of New York. According to NJT, NSR holds an operating easement over the line. The State of New Jersey now owns the line, with NJT owning the interchange area.

Notice of the exemption was served and published in the Federal Register at 72 FR 26865 on May 11, 2007. The exemption was scheduled to become effective on May 26, 2007. On May 11, 2007, the New Jersey Department of Environmental Protection (NJDEP) asked the Board to stay the effective date of the exemption until NBR provided certain information. NJDEP claimed that further development of facts was necessary in order to determine whether NBR would become a rail carrier, as defined by 49 U.S.C. 10102(5), or whether NBR's proposed operations would instead be those of a solid waste processor. That stay request was followed by a reply from NBR, a supplemental pleading from NJDEP and a letter from NJT. After considering the additional information provided in those various submissions regarding the nature of the proposed operation, the Board concluded in a decision served May 25, 2007, that NJDEP had not raised sufficient doubts to warrant a finding that the class exemption is not available to NBR. However, the Board stayed the effective date of the exemption until June 26,

2007, to (1) 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 and (2) provide NJDEP with an opportunity to file any additional comments or to seek a further stay of the exemption under the established criteria for a stay as set out in the May 25 decision.

On May 31, 2007, NJDEP filed additional comments, in which NJDEP requests that the Board continue to stay the effective date of the exemption for an indefinite period of time. In comments submitted on May 31, 2007, and June 13, 2007, NJT supports such a continuation of the stay.¹ NJT, as owner of the sidetrack and interchange connecting the Dundee Spur to the Bergen County Line, asserts that NBR would need to enter into a lease agreement with NJT in order to connect to the Bergen County Line. According to NJT, NBR has not yet expressed an interest or intent to enter into a lease for use of the interchange area. NJT suggests that it may be unwilling to lease the track by which NYGL has interchanged with NSR in the past. On June 8, 2007, NBR replied, opposing a further stay.

DISCUSSION AND CONCLUSIONS

As all parties were reminded in the May 25 decision, an interested party seeking a Board-ordered stay 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). On a motion for stay, "it is the movant's obligation to justify the . . . exercise of such an extraordinary remedy." Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 978 (D.C. Cir. 1985). The parties seeking a stay carry 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).

Neither NJDEP nor NJT has made the showing necessary for a further stay of the exemption's effective date. First, NJDEP has not shown a likelihood of prevailing on the merits. NJDEP has not demonstrated that NBR's original verified notice of exemption was filed in error or that it contains false or misleading information. Both NJDEP and NJT have expressed doubts as to whether NBR will become a rail carrier. However, NBR seeks to acquire an existing common carrier line of railroad and an existing transload facility to become a common carrier and provide rail service. (That is not to say, however, that all activities that may be contemplated by NBR would necessarily be part of the rail transportation that it would provide.) With respect to the rail transportation it seeks to provide, the fact that NBR does not yet have a lease agreement with NJT does not mean that NBR cannot now obtain the Board authority it would need to provide rail service. The Board authority issued in this proceeding would permit, but not require, NBR to become a rail carrier and to provide rail service. Moreover, NBR maintains that

¹ Comments in this proceeding were also submitted by James Riffin on June 8, 2007.

NJT, a noncarrier, cannot lawfully prevent NBR and NSR from entering into a reasonable switch connection agreement or from using track that is part of the interstate rail network.

Second, neither NJDEP nor NJT has shown that allowing the exemption to go into effect will present irreparable harm. NJDEP and NJT primarily raise concerns about dust, noise, and fire control, as well as waste continuing to be tipped outside of the facility. However, as NBR explains, all of the concerns raised relate not to its proposal but to the activities of the previous owner, NYGL. Should NBR conduct similar activities, the parties are reminded that allowing NBR to conduct rail operations does not mean that all state and local environmental laws will be preempted. Notwithstanding the Board's exclusive jurisdiction over rail transportation in 49 U.S.C. 10501(b), the states' police powers are not preempted entirely. Rather, it is well settled that railroads can be required to comply with some health and safety rules, such as fire and electrical codes, that would not interfere with rail transportation. States and localities also can require a railroad to allow the locality to inspect the facility and to notify the locality when the railroad is undertaking an activity for which a non-railroad entity would require a permit.² And Federal environmental programs that are implemented in part by the states, including the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act and the regulation of railroad safety under the Federal Railroad Safety Act, continue to apply.³ Furthermore, should NBR conduct activities that go beyond transportation by rail carrier, those activities would not be protected by preemption in section 10501(b).

Third, NJDEP and NJT also have not shown that other parties would not be substantially harmed by a stay. A stay would harm NBR, by delaying its ability to implement this transaction. Issues regarding the extent to which NBR's activities would be considered part of rail transportation can be presented to the Board in the ordinary course of business without delaying NBR's ability to provide rail service. Finally, the public interest does not support a stay because a stay would postpone substituting NBR, a new carrier, for NYGL, an existing carrier with a history of health and safety violations.

In short, NJDEP and NJT have not shown that NBR's acquisition of the 1.1-mile line of rail track does not qualify for the class exemption or that the necessary elements for stay have been met. Therefore, NJDEP's request for a further stay of the effective date of the exemption will be denied.

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

² See e.g., Flynn v. Burlington N. Santa Fe Corp., 98 F. Supp. 2d 1186 (E.D. Wash 2000).

³ See Friends of the Aquifer et al., STB Finance Docket No. 33966 (STB served Aug. 15, 2001).

It is ordered:

1. NJDEP's petition for a further stay is denied.
2. This decision is effective on its date of service.

By the Board, Charles D. Nottingham, Chairman.

Vernon A. Williams
Secretary