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BEFORE THE  
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34649



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

ENTERED  
Office of Proceedings

FEB - 4 2005

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**REBUTTAL OF NORFOLK SOUTHERN RAILWAY COMPANY  
TO REPLY OF NEW YORK GREENWOOD LAKE RAILWAY**

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By accompanying motion, Norfolk Southern Railway Company ("NSR") seeks leave to file this brief rebuttal to the February 2, 2005 Reply of New York & Greenwood Lake Railway ("NYGL") to NSR's motion to reject NYGL's feeder line application.

NYGL's Reply makes two claims, both of which are incorrect.

1. First, NYGL claims that it is entitled to base its feeder line application on NSR's System Diagram Map ("SDM"), which NYGL claims was the map published in the Newark Star Ledger on September 20, 2003, not the color-coded map NSR filed with the Board on March 26, 2004. This claim is incorrect, and if accepted by the Board would have mischievous consequences.

The feeder line statute, 49 U.S.C. §10907, allows a "financially responsible person" to file an application to purchase a rail line in only two circumstances: (1) when that person has demonstrated "public convenience and necessity" ("PC&N") or (2) "when the railroad line is on a system diagram map as required under section 10903, but

the rail carrier had not filed an application to abandon such line. . .” Section 10903(c)(2) provides in pertinent part: “Each rail carrier shall maintain a complete diagram map of [its] system” and requires that map to “identify each railroad line for which the rail carrier plans to file an application to abandon or discontinue. . . .” The Board’s implementing regulations specify the contents of a carriers “system diagram map,” including a requirement that lines in different categories be color coded, and require that such maps and amendments and updates thereto be filed with the Board. 49 C.F.R. §§ 1152.10, 1152.12 and 1152.13. The feeder line regulations further provide that a “rail line is eligible for forced sale if it appears in category 1 or 2 of the owning railroad’s system diagram map . . . .”

Under the statute and regulations, the operative and legally effective SDM is necessarily the one on file with the Board, not maps of a portion of the carrier’s system that may be published in a newspaper. This is clearly necessary to ensure proper public notice and certainty. For example, a carrier could hardly file an abandonment application and avoid rejection pursuant to 49 C.F.R. §1152.13(c) as to a line that at one time in the past was the subject of a published notice and map in a newspaper, but which did not appear in a SDM filed with the Board subsequent to the newspaper publication. If it were otherwise, the public would have no reliable way to determine what a railroad’s effective and operative SDM is.

In this case, neither the Boonton Line nor the Newark Industrial Track have ever appeared in Categories 1 or 2 on NSR’s SDM on file at the Board or on any filed amendments or supplements thereto. Although NSR in 2003 considered amending its SDM to show the Boonton Line as a potential candidate for a discontinuance application,

it later decided that if it sought to discontinue that line, it would do so by notice of exemption, which would not require listing the line in Category 1 or 2 of the SDM. *Rail System Diagram Maps*, Ex Parte No. 494, decided August 15, 1991 (declining to extend SDM requirements to exemption proceedings). Accordingly, the SDM that NSR filed with the Board on March 26, 2004 did not include the Boonton Line in Category 1 or 2. Thus, even if a previously effective SDM had listed in Boonton Line in Category 1 or 2, which none did, this SDM would have superseded any such map, and for purposes of NYGL's feeder line application, filed on January 6, 2005, that SDM was the legally operative SDM.

NYGL is wrong in contending that the color-coded map NSR filed with the Board on March 26, 2004 "could not have been the correct system diagram map" because it failed to identify the Boonton Line in red (*i.e.*, in Category 1) and because "by NSR's Petition [sic] for Exemption, filed only eight months later, on December 29, 2004, NSR sought Board authorization to discontinue serving." NYGL Reply at 4-5. As noted above, the Board's SDM regulations do not apply to lines that the carrier expects to seek *exemption* from the application requirements. *Rail System Diagram Maps*, Ex Parte No. 494. The regulations require carriers to place in Category 1 "[a]ll lines or portions of lines which the carriers anticipates will be the subject of an abandonment or discontinuance *application* to be filed within the 3-year period [etc.]" and in Category 2 "[a]ll lines or portions of lines which . . . the carrier has under study and believes may be the subject of a future abandonment *application* . . ." *Emphasis supplied.* Thus, the exemption regulations (see 49 C.F.R. §1152.50(d)(2)) specifically exclude from the

information that must be included in a notice of exemption the requirement (see 49 C.F.R. § 1152.22(a)(5)) that the line has been listed in Category 1 of the SDM.

Moreover, NYGL can make no claim to have been misled, since, pursuant to his specific request, NSR sent Mr. Wilson a copy of that map on March 23, 2003. Furthermore, the letter by which NSR's transmitted its SDM to the Board, which was part of the filing and appeared on the Board's website, specifically noted: "We have changed the map from our original draft in order to leave three lines in Category 5 that we had first planned to move to Category 1. Newspaper notices for these lines were published on various dates. We now expect that any filings with respect to these lines will be notices or petitions for exemption rather than applications, and that the exemption sought for one or more of the lines will be for discontinuance or service, not abandonment. Thus, we do not wish to file an official, operative system diagram map listing these lines in Category 1." Exhibit A. This letter gave notice to all interested persons that previously published newspaper notices were not necessarily operative and that the filed SDM should be consulted.

2. NYGL is also incorrect in contending (NYGL Reply at 7) that a party can force the sale of a line under 49 U.S.C. §10907 over which the carrier is seeking authority, whether by exemption or application, to discontinue service. Contrary to NYGL's claim, NSR correctly pointed out in its motion to reject that "the offer of financial assistance ('OFA') procedures under 49 U.S.C. §10904 provide a fully adequate means for NYGL or any other interested party to preserve rail service if they wish" -- namely, by offering to subsidize NSR's continued provision of that service. Also contrary to NYGL's assertion, that proposition is in no way inconsistent with what NSR

said in its Notice of Exemption. The Notice of Exemption merely pointed out that because it seeks exemption for discontinuance, not abandonment, “the Board need not consider offers of financial assistance (OFAs) *to acquire* the line for continued rail service.” Notice of Exemption at 8 (emphasis supplied). As the Board has consistently stated, in discontinuance cases, only OFAs to subsidize service will be considered; OFAs to acquire the line will not. *See, e.g. CSX Transportation, Inc.—Discontinuance—at Memphis, in Shelby County, TN, STB Docket No. AB-55 (Sub No. 618); Perry County Port Authority d/b/a/ Hoosier Southern Railroad—Discontinuance Exemption—In Spencer County, IN, STB Docket No. AB-554X, served October 19, 1998.*

**CONCLUSION**

The Board should reject NYGL’s Application and deny NYGL’s request to serve discovery on NSR.

Respectfully submitted,

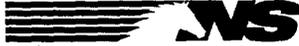


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February 3, 2005



2/10/04  
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March 26, 2004



**VIA AIRBORNE EXPRESS**

Mr. Vernon A. Williams, Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D. C. 20423-0001

Re: STB Docket No. AB-290 - Abandonment of Rail Lines and Discontinuance of Service -  
Norfolk Southern Railway Company and  
STB Docket No. AB-859 - Abandonment of Rail Lines and Discontinuance of  
Service - Pennsylvania Lines, LLC  
Amendment to the System Diagram Map

Dear Mr. Williams:

In accordance with the Board's regulations published at 49 CFR § 1152.10 et seq.,  
Norfolk Southern Railway Company and operating subsidiaries and Pennsylvania Lines, LLC are  
amending their System Diagram Map.

NSR expected to file this map at an earlier date and thus labeled it "September 2003."  
We encountered unexpected delays in completing and receiving certifications for all the required  
newspaper notices and postings. We have changed the map from our original draft in order to  
leave three lines in Category 5 that we at first had planned to move to Category 1. Newspaper  
notices for these lines were published on various dates. We now expect that any filings with  
respect to these lines will be notices or petitions for exemption rather than applications, and that  
the exemption sought for one or more of the lines will be for discontinuance of service, not  
abandonment. Thus, we do not wish to file an official, operative system diagram map listing  
these lines in Category 1.

Enclosed are three copies of the amended system diagram map and the updated line  
descriptions. Also enclosed is a copy of the service list as well as an Affidavit of Service and  
Publication. Please date-stamp the duplicate copy of this letter and return it in the self-  
addressed, stamped envelope.

Very truly yours,

James R. Paschall

JRP:kch  
Enclosures  
cc(w/encl.): Mr. Joseph H. Dettmar  
Deputy Director  
Rail Section, Office of Proceedings  
Surface Transportation Board  
Washington, D. C. 20423

ENTERED  
Office of Proceedings

MAR 30 2004

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**CERTIFICATE OF SERVICE**

I certify that on February 3, 2005, a true copy of the foregoing "Rebuttal of Norfolk Southern Railway Company To Reply of New York Greenwood Lake Railway" was served by facsimile and first class U.S. Mail, postage prepaid, upon:

Fritz R. Kahn  
Fritz R. Kahn, P.C.  
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Richard A. Allen