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May 10, 2018

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Office of Proceedings
May 10, 2018
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Public Record

BY E-FILING

Ms. Cynthia T. Brown
Chief of Administration
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Re: FD 36187, Passaic Street Properties, LLC-Acquisition of New York & Greenwood Lake Railway, Inc., Operation Exemption

Dear Ms. Brown:

I am submitting on behalf of New York & Greenwood Lake Railway, Inc., the public version of its Petition to Reject the above-captioned notice of exemption along with a Motion for A Protective Order. A confidential version will be submitted under separate cover.

Sincerely yours,

CLARK HILL STRASBURGER



John D. Heffner
Attorney

Enclosure

cc: John K. Fiorilla, Esq.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36187

**PASSAIC STREET PROPERTIES, LLC
ACQUISITION OF NEW YORK & GREENWOOD LAKE RAILWAY, INC.
OPERATION EXEMPTION**

**VERIFIED NOTICE OF EXEMPTION
PURSUANT TO 49 CFR §1150.31**

**PETITION TO REJECT
OF
NEW YORK & GREENWOOD LAKE RAILWAY, INC.**

Submitted by
John D. Heffner
ClarkHillStrasburger
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Suite 717
Washington, D.C. 20036
(202) 742-8607
Counsel for Petitioner

Dated: May 10, 2018

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36187

**PASSAIC STREET PROPERTIES, LLC
ACQUISITION OF NEW YORK & GREENWOOD LAKE RAILWAY, INC.
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NEW YORK & GREENWOOD LAKE RAILWAY, INC.**

**I.
INTRODUCTION**

On May 1, 2018, an entity identified as Passaic Street Properties, LLC (“PSP”) filed a notice of exemption under 49 U.S.C. §10902 (sic) and 49 CFR §1150.31 to acquire a line of railroad owned and operated by New York & Greenwood Lake Railway, Inc. (“NYGL”) with the *sole* intent of abandoning it shortly after purchase.¹ PSP’s notice should be rejected because this transaction is controversial and therefore ineligible for an expedited class exemption. Moreover,

¹ NYGL recognizes that the Board has allowed acquisition filings where the transaction would result in two carriers being on the line. *See, Ohio River Partners LLC- Acquisition and Operation Exemption-Hannibal Development, LLC*, FD 35984 (STB served April 1, 2016). NYGL asks the Board to confirm that its rights will continue to exist even after PSP’s notice takes effect should it be accepted.

PSP's notice of exemption is void *ab initio* as it contains materially false and misleading information. Moreover, the Board should recognize this transaction for what it is, the first step towards an attempt to adversely abandon a line of railroad by evading the congressionally mandated public convenience and necessity standard essential to the Board's consideration of an abandonment request. Accordingly, the Board should require PSP to reconvey the subject line of railroad back to the Internal Revenue Service ("IRS") from whom PSP had acquired it for failure to obtain prior acquisition approval.

II. STATEMENT OF FACTS

The facts of this dispute are very simple. In 1996 NYGL originally acquired the subject line of railroad ("the Line") extending between MP 0.0 and MP 1.8, a distance of about 1.8 miles, in the City and County of Passaic and the City of Garfield in Bergen County, NJ.² Prior to the 2008-2009 recession NYGL enjoyed a good level of traffic and revenue. On January 23, 2009, NYGL's major customer suddenly went out of business leaving the railroad with a substantial unpaid invoice for transportation charges. As a result, NYGL lacked the funds to pay

² The line had originally been owned and operated by Consolidated Rail Corporation. NYGL purchased it from Conrail by means of an offer of financial assistance filed in an abandonment proceeding. *Consolidated Rail Corporation-Abandonment Exemption in Bergen and Passaic Counties, NJ*, AB-167, Sub-No. 1151X (STB served Aug. 14, 1996).

income taxes on past profitable operations. So the taxes due continued to accumulate with interest and penalties until it totaled about \$70,000.

In October 2017, NYGL's owner executed a contract to sell the Line to another short line buyer. But before that transaction could take place, the IRS seized the Line for nonpayment of back taxes and on Sept. 13, 2017, held a foreclosure sale at which PSP bought the Line. Upon being informed by NYGL's counsel that PSP's purchase was void for failure to obtain Board acquisition authority, PSP engaged counsel with railroad expertise and filed the instant class exemption notice.

PSP's would have the Board believe that the Line is currently out of service, NYGL has not operated over it in more than five years, and there are no prospective rail customers. PSP Notice at 1. PSP is sufficiently honest to state that its *sole* purpose in the acquisition is to abandon the property so it "can develop the property in conjunction with its plans with the City of Passaic, including making a portion of the property in conjunction with its plans with the City of Passaic, including making a portion of the property a city park and recreation area." *Id* at 1-3. PSP makes no bones about the fact that it intends to file for abandonment within six months of the effective date of its Notice of Exemption. *Id* at 3.

III. ARGUMENT

PSP's notice should be rejected on multiple grounds. First, the Board has long held that class exemption notices are not to be used for controversial transactions. *FPN-USA, INC.—Operation Exemption-Tijuana-Tecate Shortline*, FD 35155 (STB served Aug. 8, 2008)("Notices of exemption are intended to be used for routine and non-controversial cases"), citing *Northeast Interchange Railway, LLC—Lease and Operation Exemption—Line in Croton-On-Hudson, NY*, FD 34734 (STB served Nov. 17, 2005); *James Riffin d/b/a the Northern Central Railroad—Acquisition and Operation Exemption—In York County, PA*, FD 34501 (STB served Feb. 23, 2005); and *Pro-Go Corp.—Operation Exemption—in Suffolk County, NY*, FD 35120 (STB served Mar. 13, 2008). Were the Board to consider PSP's proposal at all, it should be required to file an individual petition for exemption or a full application for a certificate of public convenience and necessity. *A,B,C & D Recycling, Inc., Lease and Operation Exemption-Ware, MASS*, FD 35397 (STB served Jan. 20, 2011). This transaction is controversial in two respects. It is clear that PSP acquired the Line without obtaining prior authority from the Board as required under 49 U.S.C. §10901. Further, PSP is misusing Board procedures in an attempt to undertake an adverse abandonment of the Line by evading the public convenience and necessity standard that 49 U.S.C. §10903 requires for evaluating requests for cessation of rail service.

PSP's stated intention to abandon the Line shortly after acquisition contravenes Board policy. Allowing PSP's exemption to become effective would contravene long established Board policy against allowing parties that have recently purchased lines of railroad from abandoning them shortly after acquisition. *See, The Land Conservancy of Seattle and King County-Acquisition and Operation Exemption-Burlington Northern and Santa Fe Railway Company*, FD 33389 (STB slip op. served Sept. 26, 1997, reconsideration denied Sept. 13, 2008) where the Board held:

The policy underlying the governing acquisition exemption procedures is to support the continued operation of rail lines in lieu of abandoning them. There is no set period of time during which a line must be operated before abandonment authority can be sought. However, when an acquiring noncarrier initiates abandonment proceedings within days after consummating the acquisition of the line, and there are no extenuating circumstances, our processes are being abused. The facts here support the conclusion that TLC never had any intention of reinstituting rail service on the line. It appears, rather, that TLC has put into effect a plan to convert the line to trail use as soon as possible following its acquisition of the line. This constitutes a misuse of our procedures, which envision that a party that acquires an active rail line does so to continue to provide rail service. Manifestly, TLC never had any such intent. At 3.

Third, Board precedent requires that the notice be rejected insofar as it contains materially false and misleading information. *Class Exemption-Acq. & Oper. Of R. Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810, 817 (1985); *Rail Switching Services, Inc.-Operation Exemption – Pemiscot County Port Authority*, FD 35685 (STB served Jan. 8, 2013). While PSP should be commended for its

forthrightness in disclosing the true purpose of its acquisition – abandonment so the property can be redeveloped for a more attractive social use – some of its assertions are materially false. Simply stated, the Line is an active piece of railroad with customers. NYGL is attaching a short verified statement from its President James R. Wilson attesting to the traffic that NYGL has been handling recently. Bills of lading dated March 20, 2018, identifies no fewer than 8 cars that have moved over the line and for interchange to Norfolk Southern Railway. He notes that there is one car on the Line with cargo waiting to be unloaded for a customer. However, PSP is refusing to allow NYGL or its customer access to the car which is accumulating demurrage charges.

The fact that PSP has acquired the Line without seeking prior Board authority does not prevent the agency from taking action to unscramble this transaction. Section 10901(a)(4) clearly states as relevant that a person may not acquire a railroad line absent a certificate (or an exemption) authorizing such activity. In *Land Conservancy* the Board then went on to require TLC to reconvey that Line back to BNSF.³

The essence of PSP's notice is to misuse Board acquisition procedures to accomplish more easily and cheaply a result for which there is a proper procedure, known as an adverse abandonment. PSP's stated goal is to acquire NYGL's line

³ On reconsideration the Board found that BNSF had never conveyed title to the Land Conservancy and therefore there was nothing to reconvey. Reconsideration decision at 11.

for the *sole* purpose of abandoning rail service and so it in its own words “develop the property in conjunction with its plans with the City of Passaic, including making a portion of the property in conjunction with its plans with the City of Passaic, including making a portion of the property a city park and recreation area.”

In that regard, NYGL points to the Board’s recent decision in *Alloy Property Company, LLC-Adverse Abandonment-Chicago Terminal Railroad in Chicago, IL*, AB-1258 (STB served April 30, 2018) as the correct way for parties adverse to the railroad to acquire a line for nonrail uses. There Alloy wanted to abandon a rail line serving a neighborhood whose character had changed from industrial to residential and commercial and the City of Chicago wanted to acquire some of the right of way for addition to its trail system. So after Alloy filed an adverse abandonment application, it negotiated a monetary settlement with the railroad and obtained its cooperation to allow the adverse abandonment to proceed unopposed.

To the extent relevant here, the adverse abandonment process provides a procedure where all interested parties can be heard and the Board can make a reasoned decision on a more complete record than the limited one afforded by a class exemption.

As the Board stated in *Alloy*,

Under 49 U.S.C. § 10903(d), the standard that applies to any application for authority to abandon a line of railroad is whether the present or future public

convenience and necessityrequire or permit the proposed abandonment. In applying this standard in a third-party or adverse abandonment context, the Board considers whether there is a present or future public need for rail service over the line and whether that need is outweighed by other interests. [citations omitted].

...

The Board has exclusive and plenary jurisdiction over rail abandonments to protect the public from an unnecessary discontinuance, cessation, interruption, or obstruction of available rail service...Accordingly, the Board typically preserves and promotes continued rail service where a carrier has expressed a desire to continue operations and has taken reasonable steps to acquire traffic. [citations omitted].

NYGL has an executed contract with a short line operator that was prepared to acquire the Line before the IRS' foreclosure and rebuild the rail traffic that has atrophied. That purchaser is willing to satisfy the amount of the IRS' claim and to meet customer traffic demand. Requiring PSP to reconvey the Line back to the IRS and then seek an adverse abandonment that would allow all interested parties an opportunity to address the future disposition of the Line including the needs of any present or potential rail customers and the interest of the community in using the right of way for public purposes. The Board's public convenience and necessity mandate requires no less.

Instead of contacting NYGL to negotiate an acquisition, PSP tried to misuse Board procedures to accomplish its goal "on the cheap." The Board should see through and not allow this charade.

IV.
CONCLUSION

The Board should reject PSP's notice for failure to comply with agency precedent and policy. It is controversial. It contains materially false and misleading information about the Line. It attempts to authorize retroactively an acquisition for which a prior STB approval is required. It is a misuse of STB acquisition procedures to facilitate the future adverse abandonment of a rail line. The Board should not condone PSP's actions but should require the Line to be reconveyed back to the IRS pending a properly authorized transaction.

Respectfully submitted,


John D. Heffner
Clark Hill Strasburger
1025 Connecticut Ave., N.W.
Suite 717
Washington, D.C. 20036
(202) 742-8607
Counsel for Petitioner

Dated: May 10, 2018

VERIFIED STATEMENT
OF
JAMES R. WILSON

James R. Wilson, being duly sworn, deposes and states as follows:

My name is James R. Wilson and I am the president and owner of a Class III common carrier short line railroad, the New York & Greenwood Lake Railway, Inc. My principal place of business is 16 Upper Main St., in Callicoon, N.Y. 12723. I am intimately familiar with the facts discussed in the accompanying Petition to Reject.

NYGL was established in 1996 when it acquired 1.8 miles of railroad that Consolidated Rail Corporation was abandoning. At the time of the acquisition the Line had several customers on it and was modestly profitable. However, with the 2008-9 recession, NYGL suddenly lost its major customer leaving behind a series of unpaid invoices for rail transportation and creating serious cash flow problems from which NYGL never recovered. As a result, NYGL deferred paying certain obligations. Among them, NYGL failed to pay federal income taxes owing during the railroad's profitable operations. Those taxes accrued interest and penalties in the ensuing years. The Internal Revenue Service imposed a first lien on the railroad's property and then sold it at an auction on Sept. 13, 2017, to an entity identified as Passaic Street Properties, LLC ("PSP").

I have read PSP's Notice of Exemption filed with the Surface Transportation Board on May 1, 2018. It contains numerous falsehoods. PSP wants the Board to believe that the Line has handled no traffic during the past 5 years. In fact NYGL has a car on the property at this time that has only been partially unloaded because PSP will not allow NYGL or its customer to have access to that car in violation of federal law. PSP also represents falsely that "there are no prospective customers on the Line." There is currently one customer, Railmark Rail Services, which is using the Line to transload traffic for J Carpenter Environmental. Eight cars have moved or are moving for this customer as evidenced by bills of lading attached to my statement. The attached emails also reflect requests in 2017 to move bentonite clay from points on the Rapid City, Pierre & Eastern Railway to NYGL as well as rate requests for moving additional transload traffic originating on the Union Pacific Railroad. So much for no traffic!

Prior to the IRS foreclosure, I had negotiated and executed an agreement to sell the railroad to a prospective short line operator. The sale was delayed while the purchaser obtained financing.

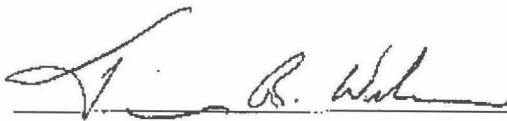
Despite its cleverness in attempting to use Board acquisition procedures to authorize its purchase of the Line, PSP's real motivation is not continued rail service. It will scrap the Line and use it for expensive real estate development.

VERIFICATION

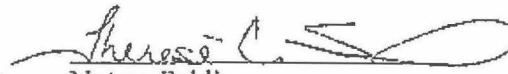
STATE OF New York)

CITY OF Sullivan)

James R. Wilson being duly sworn according to law, hereby deposes and states that (s)he holds the position of President with applicant/petitioner, is authorized to make this Verification, had read the foregoing document, and knows the facts asserted therein are true and accurate as stated, to the best of (her)his knowledge, information, and belief.

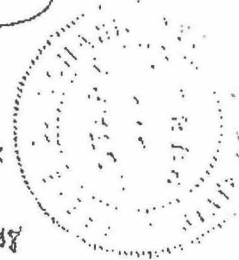


Subscribed to and sworn to before me, a Notary Public, in and for the County of Sullivan in the State of NY, this 10th day of May 2018.


Notary Public

My Commission expires: 7-03-18

THERESE C. SCHANIL
NOTARY PUBLIC-STATE OF NEW YORK
No. 01SC6149237
Qualified in Sullivan County
My Commission Expires July 03, 2018

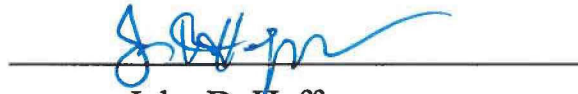


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CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certify that a copy of "Petition to Reject of New York & Greenwood Lake Railway, Inc." dated May 10, 2018, was sent by electronic mail to all parties of record in this proceeding.

John K. Fiorilla, Esq.
Capehart Scatchard
8000 Midlantic Drive
Suite 300S
P.O. Box 5016
Mount Laurel, NJ 08054-5016



John D. Heffner

Dated: May 10, 2018