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SERVICE DATE – AUGUST 16, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36295

SNOHOMISH COUNTY, WASH.—PETITION FOR DECLARATORY ORDER

Docket No. FD 35151

GNP RLY INC.—MODIFIED RAIL CERTIFICATE—IN SNOHOMISH COUNTY, WASH.

Digest:¹ This decision grants a request from Snohomish County, Wash., for an order declaring that the operating rights of GNP Rly Inc. over approximately 0.2 miles of County-owned rail line are terminated.

Decided: August 15, 2019

On April 25, 2019, Snohomish County, Wash. (the County), a noncarrier, filed a petition seeking a declaratory order terminating the operating rights held by GNP Rly, Inc. (GNP), pursuant to a modified certificate of public convenience and necessity over a County-owned rail line extending from milepost 39.1 to milepost 39.3, a distance of approximately 0.2 miles (the Line). For the reasons discussed below, the Board will grant the County's petition.

BACKGROUND

The Line is a segment of rail line that was previously authorized for abandonment by the Board's predecessor agency, the Interstate Commerce Commission, in Burlington Northern Railroad—Exemption—Abandonment in Snohomish County, Wash., AB 6 (Sub-No. 280X) (ICC served Mar. 3, 1986). On October 20, 1992, the County acquired the Line and, on May 23, 2008, entered into a lease and operating agreement with GNP (the Agreement). GNP Rly Inc.—Modified Rail Certificate—in Snohomish Cty., Wash., FD 35151, slip op. at 2 (STB served Aug. 13, 2008). The initial term of the Agreement began on January 1, 2008, and ends on December 31, 2039. Id. As part of the Agreement, GNP agreed, among other things, to provide commuter rail service and common carrier freight rail service over the Line. Id. (See also Snohomish Cty. Pet. 2, 13, V.S. Teigen 2, V.S. Stowe 3-4 & Ex. B at 4, art. 2.1.) On August 18, 2008, the Board provided notice in the Federal Register of GNP's application for a modified certificate of public convenience and necessity (modified certificate) to lease and operate the

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

Line and found that the Line qualified for a modified certificate (73 Fed. Reg. 48,277). GNP Rly Inc., FD 35151, slip op. at 3-4.

On April 25, 2019, the County petitioned the Board “for a declaratory order determining that [GNP’s] modified rail certificate . . . is terminated.” (Pet. 1.) In support of its petition, the County first argues that, as the owner of the Line that is operated under a modified certificate, it can seek the termination of the operating rights of GNP (and any successor in interest) even when the operator is silent or opposes the termination. (Id. at 15-16.) The County also asserts that, as owner, it is entitled to termination of GNP’s operating rights because the underlying Agreement has been terminated and there is no harm to the shippers. (Id.)² The County further argues that the modified certificate must be vacated because the Line was severed from the national rail network in July 2008 when the abandonment of a connecting line was consummated.³ (Id. at 17-18.) The County claims that the Board, therefore, lost jurisdiction over the Line a month before it issued the modified certificate in August 2008. (Id.) Lastly, the County argues that as a result of a bankruptcy proceeding “there is no longer a lawful operator” on the Line “duly licensed under the modified rail certificate[,]” and the County should, as the Line owner, “be treated as the party to give notice of termination under 49 C.F.R. [§] 1150.24” (Id. at 18-19.)

On June 20, 2019, Douglas Engle (Engle) late-filed a letter commenting on this proceeding on behalf of Eastside Community Rail, LLC (ECR).⁴ (Engle Letter 2.) In the letter, Engle states that he “offer[s] no contest to releasing all rights by [ECR] and [GNP] via bankruptcy court north of MP 38.25 . . . in Snohomish County.” (Id.)

² Specifically, the County claims that GNP breached part of the Agreement, and that such breach authorized the County to terminate the Agreement unilaterally by providing the requisite notice to GNP, which it claims to have done in February and April 2019. (Id. at 13-15, V.S. Stowe, Ex. B at 11-12, arts. 9.1-9.3.)

³ The County states that the Line, milepost 39.1 to milepost 39.3, was “severed” from the national rail network when “BNSF . . . consummated [the] abandonment of MP 38.25 to MP 39 by filing a letter of consummation in accordance with 49 C.F.R. [§] 1152.29(e)(2) in July 2008.” (Pet. 17.) See also BNSF Notice 1, July 21, 2008, BNSF Ry.—Aban. Exemption—in Snohomish Cty., Wash., AB 6 (Sub-No. 422X).

⁴ In a separate proceeding, the Board noted unresolved issues relating to GNP and ECR following the purported transfer of certain GNP assets to ECR in a bankruptcy court proceeding. See Eastside Community Rail—Acquis. & Operation Exemption—GNP RLY Inc., FD 35692 et al., slip op. at 7 (STB served Dec. 13, 2018), recons. denied FD 35692 et al. (STB served May 17, 2019). Engle was one of the principals of GNP at the time the modified certificate was obtained, (see GNP RLY Inc. Modified Certificate Appl., Ex. B, July 14, 2008, GNP Rly Inc., FD 35151), and was one of the parties whom the County served with its communications regarding termination of the Agreement, (see Pet., attached Agreement termination correspondence).

According to the petition, there are no shippers on the Line and the last rail traffic moved over the Line in June 1984. (Pet. 2, 7-8.) See also Burlington N. R.R., AB 6 (Sub-No. 280X), slip op. at 1-2.

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to eliminate controversy or remove uncertainty in a matter related to the Board's subject matter jurisdiction. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989).

The Board has special rules for operations over rail lines that have been approved for abandonment and acquired (through purchase or lease) by states, including political subdivisions of states and instrumentalities through which states can act. 49 C.F.R. pt. 1150 subpart C; see also Common Carrier Status of States, State Agencies & Instrumentalities, & Political Subdivisions, 363 I.C.C. 132 (1980), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). The acquisition of such a line is exempted from the Board's regulation; however, an operator that contracts with the state entity to provide rail service over the line incurs a common carrier obligation. 49 C.F.R. § 1150.22. These operators are exempted from the statutory requirements governing the start-up and termination of operations (49 U.S.C. §§ 10901 and 10903, respectively), but they must apply to the Board for a modified certificate. 49 C.F.R. § 1150.22.

Operators under a modified certificate may terminate service after providing 60 days' notice to the state entity, the Board, and all persons that have used the line within the six months preceding the date of the notice. 49 C.F.R. § 1150.24. Additionally, the Board has held that a line owner may petition the Board for a declaratory order to remove an operator that declines to file a 60-day termination notice.⁵ South Dakota—Pet. for Declaratory Order, FD 36096, slip op. at 3 (STB served June 14, 2017).

Under the circumstances of this case, the Board will grant the County's request for a declaratory order terminating the modified certificate. Here, the County, as the owner of the Line, seeks the termination of GNP's operating rights under the modified certificate. The County asserts that it has terminated the Agreement between itself and GNP, and no one has disputed that assertion. Although the Board's regulations only provide the operator itself with a mechanism to terminate its operating rights (i.e., by filing a 60-day notice), the regulations specifically state that the duration of service to be provided by the operator under a modified certificate "may be determined in the contract between the State and the operator." 49 C.F.R. § 1150.24. No party, including GNP, has filed any opposition to the County's request for a

⁵ The Board has also accepted a termination notice filed by the line owner on behalf of an operator that could not file itself because it no longer existed as a corporate entity. See, e.g., S.D. Ry.—Notice of Interim Trail Use & Termination of Modified Rail Certificate, FD 31874, slip op. at 2 (STB served July 17, 2007); Chesapeake R.R.—Certificate of Interim Trail Use & Termination of Modified Certificate, FD 32609 et al., slip op. at 1 n.2 (STB served Jan. 9, 2006).

declaratory order to terminate GNP's operating rights or otherwise attempted to explain why GNP's operating rights should not be terminated. In addition, granting the proposed termination would not result in any adverse impact on shippers or the community because there are no shippers on the Line and no rail traffic has moved on the Line since 1984. For these reasons, the modified certificate and the operating rights of GNP (and any successor in interest) over the Line are terminated.⁶

It is ordered:

1. The County's petition for declaratory order is granted; the modified certificate of public convenience and necessity of GNP is terminated.
2. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.

⁶ Because the Board is granting the petition on these grounds, there is no need to address the County's other arguments.