

SERVICE DATE - JULY 18, 2018

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36187

PASSAIC STREET PROPERTIES, LLC—ACQUISITION AND OPERATION
EXEMPTION—NEW YORK & GREENWOOD LAKE RAILWAY

Decided: July 17, 2018

On May 2, 2018, Passaic Street Properties, LLC (PSP), a noncarrier, filed a verified notice of exemption under 49 C.F.R. § 1150.31¹ to acquire and operate approximately 1.75 miles of rail line, known as the Dundee Spur, extending from milepost 0.0 in Garfield, N.J., to milepost 1.75 in Passaic, N.J. (the Line). PSP states that it has already purchased the track and land, after the Internal Revenue Service put the property up for bid because New York & Greenwood Lake Railway (NYGL) failed to pay federal income taxes. (PSP Verified Notice of Exemption 2.) PSP states that, upon obtaining acquisition and operating authority, it intends to file for abandonment to develop the property for housing, other non-industrial uses, and a park area. (*Id.* at 4.)

On May 10, 2018, NYGL filed a petition to reject PSP's verified notice on grounds that the transaction is controversial and that the verified notice contains materially false and misleading information. (NYGL Pet. to Reject 2-3.) On May 30, 2018, PSP responded to the petition to reject.

The exemption was scheduled to become effective on June 1, 2018, but the Board imposed a housekeeping stay of the effective date to fully consider the arguments presented. Passaic St. Props.—Acquis. & Operation Exemption—N.Y. & Greenwood Lake Ry., FD 36187 (STB served May 31, 2018).

PSP filed a supplemental letter on June 15, 2018, informing the Board of a resolution of the City of Passaic Planning Board. On June 19, 2018, NYGL filed a motion to supplement its petition to reject and/or strike statements in PSP's reply. On June 21, 2018, the mayor and the city manager of Garfield, N.J., filed letters, and the city manager filed a revised letter on June 22, 2018. On July 11, 2018, PSP filed a reply to NYGL's motion to supplement and/or strike.

¹ The class exemption under 49 C.F.R. § 1150.31 applies to acquisitions and operations under 49 U.S.C. § 10901, including acquisitions of rail lines by noncarriers. 49 U.S.C. § 10901(a)(4).

The verified notice will be dismissed in part and rejected in part, for the reasons discussed below.²

PRELIMINARY MATTERS

Concurrent with its petition to reject filed on May 10, 2018, NYGL also filed a motion for protective order. On June 6, 2018, the Board, by order of the Director of Proceedings, granted NYGL's motion, but directed NYGL to submit public, redacted versions of confidential documents included with its petition to reject. NYGL responded that it was "impossible" to redact the confidential information in the documents without inadvertently disclosing the information, (NYGL Letter 1, June 7, 2018), and instead provided a page that read, "REDACTED DOCUMENTS." (NYGL Pet. to Reject 14, June 7, 2018 (re-filed).)

NYGL's submission failed to comply with the Board's order. While the documents include "proprietary information such as rates, origins and destinations, numbers of car loads, and commodities," (NYGL Letter 1, June 7, 2018), the Board has ordered the redaction of similar information despite a party's claim that such information warranted redaction of the whole document. See Consol. Rail Corp.—Aban. Exemption—in Hudson Cty., N.J., AB 167 (Sub-No. 1189X) et al., slip op. at 5 (STB served Nov. 2, 2015). However, this decision does not rely on any of the confidential documents; accordingly, rather than direct NYGL once again to submit public versions, the confidential documents submitted with NYGL's petition to reject will be stricken from the record for failure to comply with the Board's June 6 decision.

NYGL's June 19 motion to supplement and/or strike, which will be denied as moot, see supra note 2, contains the same failure—NYGL simply stated that the confidential information in the documents could not be redacted and submitted the same "redacted documents" page. (NYGL Letter 1, June 19, 2018; NYGL Mot. to Supplement 17.) Those confidential documents will also be stricken from the record.

DISCUSSION AND CONCLUSIONS

The verified notice will be dismissed in part, as the 0.65-mile portion of the Line between milepost 1.1 and milepost 1.75 has already been abandoned. See N.Y. & Greenwood Lake Ry.—Aban. Exemption—in Passaic, Passaic Cty., N.J., AB 1006X (STB served May 17, 2007) (modifying prior Board notice of exemption to reflect that NYGL was authorized to abandon the rail line between milepost 1.1 and milepost 1.75, not milepost 1.8); NYGL Letter, Feb. 20, 2008, N.Y. & Greenwood Lake Ry., AB 1006X (confirming that the abandonment had been consummated). Upon consummation of abandonment, that portion of the Line ceased to be a rail line subject to the Board's jurisdiction. See Preseault v. ICC, 494 U.S. 1, 5 n.3 (1990); Birt v. STB, 90 F.3d 580, 585 (D.C. Cir. 1996).

² Because the verified notice is being rejected in part and dismissed in part, and because this decision does not rely on the contents of NYGL's motion to supplement and/or strike, NYGL's motion will be denied as moot. Consequently, PSP's July 11 reply to NYGL's motion will be denied as moot, as well.

As to the remainder of the Line, between milepost 0.0 and milepost 1.1, the verified notice will be rejected. The notice of exemption process is an expedited means of obtaining Board authority in certain classes of transactions, defined in the Board's regulations, that ordinarily do not require greater regulatory scrutiny under the Board's more robust authorization procedures. Notices of exemption are intended to be used for routine and non-controversial cases. See N. Interchange Ry.—Lease & Operation Exemption—Line in Croton-On-Hudson, N.Y., FD 34734 (STB served Nov. 17, 2005); Riffin—Acquis. & Operation Exemption—in York Cty., Pa., FD 34501 (STB served Feb. 23, 2005).

Board authority to acquire a rail line, once consummated, confers the obligation to operate common carrier service over the line upon reasonable request. The Board has found that acquiring a line of railroad for the purpose of abandoning rather than operating over it constitutes a misuse of the Board's acquisition exemption procedures. See Land Conservancy of Seattle & King Cty.—Acquis. & Operation Exemption—Burlington N. & Santa Fe Ry., FD 33389, slip op. at 3 (STB served Sept. 26, 1997) (notice of exemption revoked where party filed for abandonment within two months of acquiring the line), pet. for judicial review dismissed, 238 F.3d 429 (9th Cir. 2000). Here, PSP has acknowledged that it has no intention of operating the Line and, in fact, intends to abandon the Line upon acquiring operating rights.

Moreover, the record indicates that this matter is not routine and non-controversial. See Rail Switching Servs., Inc.—Operation Exemption—Pemiscot Cty. Port Auth., FD 35685 et al., slip op. at 4 (STB served Jan. 8, 2013). PSP, a noncarrier, seeks Board authority to acquire the Line not to operate it but to abandon it, and NYGL, which retains the common carrier obligation to provide service on the Line,³ opposes the acquisition. The facts of this case preclude the use of the expedited notice of exemption process here.

Accordingly, the verified notice will be dismissed with respect to the previously abandoned portion of the Line, between milepost 1.1 and milepost 1.75, and rejected with respect to the remainder of the Line, between milepost 0.0 and milepost 1.1.

It is ordered:

1. The notice of exemption is dismissed in part and rejected in part, as indicated above.
2. The confidential documents submitted by NYGL on May 10 and June 19 are hereby stricken from the record.
3. NYGL's June 19 motion to supplement and/or strike is denied as moot.

³ Once an operator acquires a common carrier obligation to provide rail service over a line, that common carrier obligation remains unless and until the operator consummates Board-granted discontinuance or abandonment authority. 49 U.S.C. § 10903; Chicago & Nw. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 320 (1981); Pittsburgh & Shawmut R.R.—Aban. Exemption—in Armstrong & Jefferson Ctys., Pa., AB 976X, slip op. at 1 (STB served Sept. 15, 2005).

4. PSP's July 12 reply is denied as moot.
5. This decision is effective on its service date.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.