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BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D C

ENTERED
Office of Proceedings

FEB 14 2005

Part of
Public Record

Finance Docket No 34649

NEW YORK & GREENWOOD LAKE RAILWAY
- FEEDER LINE ACQUISITION -
A LINE OF NORFOLK SOUTHERN RAILWAY COMPANY



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FEB 14 2005

SURFACE
TRANSPORTATION BOARD

APPEAL
OF
NEW YORK & GREENWOOD LAKE RAILWAY

FILED

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FACE
NOTION

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NEW YORK & GREENWOOD LAKE RAILWAY

Due and dated February 14, 2005

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D C.

Finance Docket No 34649

NEW YORK & GREENWOOD LAKE RAILWAY
- FEEDER LINE ACQUISITION -
A LINE OF NORFOLK SOUTHERN RAILWAY COMPANY

APPEAL
OF
NEW YORK & GREENWOOD LAKE RAILWAY

Applicant, New York & Greenwood Lake Railway of Glen Ridge, New Jersey ("NYGL"), pursuant to 49 C F R 1115.1(c), appeals from the Decision of the Board, Director, Office of Proceedings, served February 14, 2005, and in support of its appeal states, as follows

1 NYGL is most reluctant to file this appeal. It is well aware of the admonition that appeals from the decisions of employees acting under authority delegated to them by the Chairman are not favored, and that they will be granted only in exceptional circumstances to correct clear error of judgment or to prevent manifest injustice. NYGL has the greatest respect for the Director, Office of Proceedings, and, by appealing from his Decision, NYGL does not wish to be taken as in any way impugning his integrity or impartiality.

2. NYGL, however, is at a loss to know how else to bring to the Board's attention the evident absence from the Board's records of the Norfolk Southern Railway Company's amended System Diagram Map which the Director's Decision says was filed with the Board in March

2004 and which the Director's Decision finds to be the railroad's actual System Diagram Map. Counsel for NYGL inquired of the Board's staff well in advance of the January 6, 2005, filing by NYGL of its feeder line Application and, again, following the service of the Director's Decision, and he was assured that the only System Diagram Map which NSR had filed with the Board was one which it filed in May 1997

3 At page 4 of its Rebuttal, tendered February 3, 2005,¹ NSR contends that the letter by which NSR, on March 26, 2004, transmitted its amended System Diagram Map to the Board appeared on the Board's website. No such letter, however, appears on the Board's website.² Again, there is nothing in the Board's records to support the Decision's finding that NSR's amended System Diagram Map was filed with the Board in March 2004

4 NSR attached to its Motion, filed January 21, 2005, a copy of the color-coded map, together with a verbal listing of the lines in Categories 1 and 2, which NSR claims were the documents it filed with the Board on March 26, 2004.³ The map itself was dated August 26, 2003, although its title page was dated September 2003. The verbal listing of lines in Categories 1 and 2, was revised as of September 15, 2003. Neither the color-coded map nor the listing included NSR's Boonton line segment. If, as appears to be the case, NSR subsequently decided to file an application with the Board for authority to discontinue serving its Boonton Line

¹ NYGL has not yet replied to, nor has the Board approved, NSR's Motion for leave to file its Rebuttal, and, hence, for the time being, NSR's Rebuttal is an impermissible reply to the Reply filed by NYGL on February 2, 2005. See, 49 U.S.C. 110413(c)

² NSR attached to its Rebuttal a date-stamped copy of its March 26, 2004, letter of transmittal, but the letter cannot be retrieved from the Board's website.

³ Copies, also, were mailed to Mr James R. Wilson, President of NYGL, on March 23, 2004

segment, then, NSR would have been required, pursuant to 49 C.F.R. 1152.12(c)(1), to publish in a local newspaper a black-and-white map depicting the line proposed for abandonment. As the Interstate Commerce Commission noted in its Decision in Ex Parte No. 494, Rail System Diagram Maps, served August 15, 1991, "Generally, if the status of a line is changed to Category 1, 2, or 3, notice must be published in a newspaper of general circulation, and copies of the newspaper notice must be posted in each station on the line."

5 The Director's Decision, however, dismisses the black-and-white map which NSR caused to be published in The Star Ledger on September 20, 2003, as merely noting NSR's plan eventually to discontinue service over the line by application.⁴ That, however, is not how the text of the Legal Notice read. The Legal Notice was worded, as follows:

Pursuant to federal regulations published at 49 Code of Federal Regulations §1152.12(c), Norfolk Southern Railway Company (NSR) hereby gives notice that it has amended its system diagram map to show that NSR and Pennsylvania Lines LLC (PRR) anticipate filing with the Surface Transportation Board within three years an application for authority to discontinue rail operations over the Boonton, New Jersey rail line between Milepost WD-2.2 and Milepost WD-8.4. The involved line lies in Hudson and Essex Counties, New Jersey, and is shown on the accompanying map segment. Agency service for point on the line is handled through the Arlington, New Jersey, agency.

NSR has prepared a color-coded system diagram map showing all of the lines of its rail subsidiaries and leased lines. Copies of the map are available upon request from Strategic Planning, Norfolk Southern Corporation, Three Commercial Place, Norfolk, Virginia 23510-2191.

The foregoing fairly can be read only as the revision of NSR's System Diagram Map. In the vernacular, if it looks like a duck, waddles like a duck and quacks like a duck, it must be a duck.

⁴ The wording of a newspaper notice of the proposed discontinuance of service on a railroad line is specified at 49 C.F.R. 1152.21, and NSR's Official Notice as published in The Star Ledger on September 20, 2003, did not come close to being such a notice.

So, too, the foregoing looks like an amendment of NSR's System Diagram Map and reads like an amendment of NSR's System Diagram Map, and, therefore, it must be an amendment of NSR's System Diagram Map.

6. At page 3 of its tendered Rebuttal, NSR notes that the requirement that a railroad update its system diagram map to include in Categories 1 or 2 railroad lines proposed for abandonment or discontinuance within three years' time does not apply if the line is to be the subject of a notice or petition for exemption, rather than the subject of an application. That may be all well and good, however, when it caused the Official Notice to be published in The Star Ledger on September 20, 2003, NSR unambiguously declared that it intended to file an "application" for the Board's authorization to discontinue rendering service on its Boonton Line segment.⁵ Therefore, NSR at the time needed to publish and post its revised System Diagram Map; it would have been in violation of the Board's regulations if it had failed to do so.

7. The Director's Decision concludes that, because NSR subsequently decided to discontinue service over its Boonton Line segment by means of a notice of exemption, NSR would have been correct in not amending its System Diagram Map. In other words, a breach by NSR of the Board's regulations by failing to revise its System Diagram Map to reflect the fact that it intended within three years time to apply for authority to discontinue service on the Boonton Branch segment can be vitiated retroactively by NSR's later change of mind and effectuation of the abandonment by a Notice of Exemption. NYGL does not believe that that

⁵ The letter from NSR to the Mayor of Kearney, NJ, attached as Exhibit C to NYGL's Reply of February 2, 2005, similarly stated that "Norfolk Southern plans to file an application with the Surface Transportation Board" for authority to discontinue service on its Boonton Line segment.

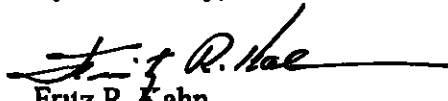
was what the Interstate Commerce Commission had intended by its Decision in Ex Parte No 494, Rail System Diagram Maps, supra Such flouting of the Board's regulations would set a bad precedent and make for poor regulatory policy

WHEREFORE, Applicant, New York & Greenwood Lake Railway asks that the Decision of the Director, Office of Proceedings, served February 4, 2005, be reversed to correct clear error of judgment and to prevent manifest injustice and that the Board conditionally accept Applicant's feeder line Application.

Respectfully submitted,

NEW YORK & GREENWOOD LAKE RAILWAY

By its attorney,



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Dated February 14, 2005

CERTIFICATE OF SERVICE

I certify that I this day have served a copy of the foregoing Appeal upon Norfolk Southern Railway Company by facsimile transmitting and mailing copies thereof by prepaid first-class mail to its attorney, Richard A Allen, Esq

Dated at Washington, DC, this 14th day of February, 2005


Fritz R. Kahn