

219376

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35020

**NORTHERN AND BERGEN RAILROAD, L.L.C.
—ACQUISITION EXEMPTION—
A LINE OF RAILROAD OWNED BY NEW YORK & GREENWOOD LAKE RAILWAY**

**NORTHERN AND BERGEN RAILROAD LLC
REPLY TO SUPPLEMENTAL REQUEST FOR STAY
BY THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION**

Northern and Bergen Railroad, L.L.C. ("NBRR") hereby files this Reply to the "Supplemental Request for Stay by the New Jersey Department of Environmental Protection," ("NJDEP") filed May 23, 2007 ("Supplemental Request").¹

NJDEP's Supplemental Request does not raise issues with NBRR's proposed acquisition of rail assets from the New York & Greenwood Lake Railway ("NYGLR"). Rather, it raises much broader issues concerning the present operation of a solid waste transfer station by the NYGLR that will be conveyed to NBRR. Putting aside the different assertions of fact by NJDEP and NYGLR, those issues will exist whether or not the Board grants the requested stay.² Because a stay of this exemption will not address any concern raised by NJDEP, it should be denied.

¹ Although NJDEP styles this as a "Supplemental Request," it really is a reply to NBRR's reply to NJDEP's May 16, 2007 "Request for Stay," which is prohibited by 49 C.F.R. 1104.13(c). Moreover, even as a Supplemental Request, it is untimely because it has been filed fewer than seven days before the exemption is scheduled to become effective, on May 26, 2007. See 49 C.F.R. 1150.32. Rather than file a Motion to Strike, however, NBRR requests that the Board accept this reply to NJDEP's Supplemental Request.

There can be no dispute that NYGLR and, upon consummation of this transaction, NBRR will engage in legitimate rail operations.³ NYGLR has no fewer than eight active shippers on the line, of which only one is Hudson Logistics, Inc., the railroad's contract operator of the solid waste facility.⁴ NBRR also has stated that it would haul all shipments to the interchange with Norfolk Southern, just as NYGLR currently does and with the very same employees.⁵ The issue raised by NJDEP is whether the operation of the solid waste transfer facility should be considered within the scope of those otherwise clearly legitimate rail operations.

But that issue, which NJDEP has raised for the first time in its May 16th Request for Stay despite having inspected the NYGLR facility on a monthly basis for over a year, does not mean that NYGLR does not, or that NBRR will not, also operate as a legitimate rail carrier. NJDEP could have taken up the issue of the transfer station's status at any time with NYGLR, but inexplicably has not chosen to do so. Instead, NJDEP seeks to hang the issue upon NBRR by staying exemption authority for its acquisition of NYGLR's assets. The effectiveness of the exemption, however, simply grants NBRR the authority to acquire the legitimate rail operations of NYGLR, whatever they may be.

If NJDEP questions the *bona fide* rail status of the solid waste facility, it should do so in a proper proceeding where the requested remedy in fact will address the alleged problem. Instead, NJDEP seeks to convert NBRR's request for exemption to acquire NYGLR's assets into a

² For example, NJDEP attaches a news article (Supplemental Request, Ex. B) that alleges problems between the City of Passaic and NYGLR. While NYGLR has conceded problems in the past, the Mayor of Passaic submitted a letter to NJDEP earlier this year expressing support for NYGLR's solid waste facility. Ex. I, attached hereto.

³ NJDEP wrongly states that NYGLR also became a railroad using the Board's summary notice of exemption procedures. Supplemental Request at 2. That is not true. NYGLR became a rail carrier through the offer of financial assistance procedures in Docket No. AB-167 (Sub-No. 1151X), *Consolidated Rail Corp. — Abandonment Exemption—In Bergen and Passaic Counties, NJ* (served Aug. 14, 1996).

⁴ NBRR May 16, 2007 Reply at 2 and Attachments A and B.

declaratory order proceeding on the current status of one of those assets. Procedurally, that is both improper and unfair to NBRR.

NJDEP asks the Board to “establish a procedural schedule for NBRR to provide responsive information that demonstrates: (1) that it is a bona fide railroad; (2) that it will serve the public as a common carrier; (3) that it will in fact control and receive the financial benefit of all activities that are conducted at the waste facility in its name; (4) that it will not attempt to misuse the section 10501 preemption provision in order to avoid or evade legitimate environmental, health and safety regulation by NJDEP and other state agencies; and (5) that the solid waste facility will immediately come into absolute compliance with the regulations in N.J.A.C. 7:26-2D.1 if NBR intends to claim ownership and control of this facility.” Supplemental Request at 5.

NBRR asserts that it already has made the first and second demonstrations through its May 18, 2007 Reply, including the letters to NJDEP in Attachment B. Those responses indicate that NBRR will provide rail transportation services (e.g. the hauling of loaded and empty rail cars) for eight existing shippers on the line and at least three different commodities. Although NJDEP asserts that this information is not sufficient, it has not demonstrated why. NJDEP’s requests for even more information are grossly overreaching and irrelevant to whether a stay should be granted in this proceeding.⁶ Indeed, some of NJDEP’s questions would not be relevant even in a non-exempt proceeding. These first two demonstrations are all that is necessary to demonstrate a *bona fide* rail operation that is entitled to an exemption.

⁵ *Id.* at 2-3 and Attachment B, Reply to Request Nos 3, 12, 13, 15 and 20.

⁶ Although NJDEP’s additional requests are irrelevant to this proceeding, NBRR intends to meet with NJDEP in response to its requests, because it is important to NBRR to reassure NJDEP of its intent to operate the solid waste facility in compliance with all health and safety regulations that apply to rail facilities

Although NJDEP's third request is irrelevant to its request for stay, NBRR in fact has demonstrated that it will maintain sufficient control over the operation of the solid waste facility through contractual requirements that Hudson Logistics, as the operator of the facility on the railroad's behalf, comply with all applicable regulations. This has allowed NYGLR, and will allow NBRR, to ensure that all operations comply with N.J.A.C. 7:26-2D.1.

NJDEP's suggestion that only NBRR receive any financial benefit from the solid waste facility is absurd. No entity is going to operate the facility at cost. Just like NBRR, Hudson Logistics is in business to earn a profit. To suggest that any agent of the railroad would act otherwise is both unrealistic and unnecessary to establish *bona fide* rail operations.

NJDEP's fourth and fifth requests also have nothing to do with whether NBRR will provide *bona fide* rail service. NBRR has no intention of misusing federal rail preemption. However, what does or does not constitute misuse is still subject to much debate in the courts and before the Board. Thus, any such promise by NBRR would depend ultimately upon what constitutes misuse. NBRR has represented both to the Board and to NJDEP that NBRR fully intends to comply with N.J.A.C. 7:26-2D 1.

WHEREFORE, for the foregoing reasons, the Northern and Bergen Railroad LLC respectfully requests that the Board deny NJDEP's Supplemental Request for Stay.

Respectfully submitted,



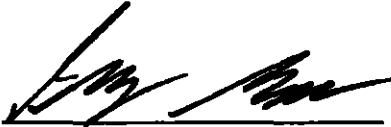
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May 24, 2007

Attorneys for Northern and Bergen Railroad, L L C

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May 2007, copies of the foregoing "Reply to Supplemental Request for Stay " were served via electronic mail upon Ruth E. Carter, Deputy Attorney General of New Jersey, at Ruth.Carter@dol.lps.state.nj.us, D. C. Agrawal, Assistant Executive Director of New Jersey Transit, at dcagrawal@njtransit.com and Kevin P. Auerbacher, Deputy Attorney General of New Jersey, at Kevin.auerbacher@dol.lps.state.nj.us.



Jeffrey O. Moreno

EXHIBIT 1

CITY OF PASSAIC

PASSAIC STREET
P.O. BOX 1000
PASSAIC, NEW JERSEY 07055

OFFICE OF THE MAYOR
SAMUEL "SAMMY" RIVERA

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COPY

January 9, 2007

Mr. John Castner
New Jersey Department of Environmental Protection
County Environmental and Waste Enforcement
401 East State Street
Trenton, New Jersey 08625

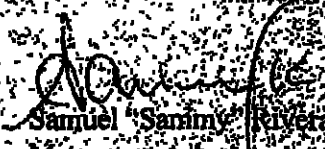
Re: New York Greenwood Lake Railroad/Hudson Logistics Transload Facility

Dear Mr. Castner:

I am offering this letter of support for the above referenced facility that operates in the City of Passaic. We have been working cooperatively with the management of both the NYGL and Hudson Logistics to insure that the facility does not have a negative impact on the residents of our City. To date, our experience has been positive. The management has been responsive to our needs and they have addressed any questions or concerns that have been raised. We anticipate maintaining a positive relationship with them in the future and consider them to be a responsible corporate citizen. We look forward to having them supply service in the City of Passaic for years to come.

Please contact me if you have any questions.

Sincerely,


Samuel "Sammy" Rivera
Mayor

SR/ca