

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-1035

LAKE COUNTY, OREGON—ADVERSE DISCONTINUANCE OF RAIL SERVICE—
MODOC RAILWAY AND LAND COMPANY, LLC AND MODOC NORTHERN
RAILROAD COMPANY

Decided: June 12, 2009

By petition filed on May 18, 2009, Lake County, OR (County), seeks waiver of certain Board regulations and exemption from certain statutory provisions in connection with its proposed filing of a third-party or “adverse” discontinuance application. The County will soon file its submission seeking to discontinue the service provided by Modoc Railway and Land Company, LLC (MR&L) and Modoc Northern Railroad Company (MNRR) over a 55.41-mile rail line between milepost 456.89 at or near Alturas, CA, and milepost 512.30 at or near Lakeville, OR. As discussed below, the waiver requests and exemptions will be granted to the extent warranted.

BACKGROUND

According to the County, the line was constructed and operated for many years by Southern Pacific Transportation Company (SP). In 1985, the Board’s predecessor, the Interstate Commerce Commission, authorized SP to abandon the line.¹

The County acquired the line from SP after its abandonment. Through its Railroad Commission, the County contracted with The Great Western Railway Company (GWR) to operate the line pursuant to a modified certificate of public convenience and necessity.² The

¹ See Southern Pac. Transp. Co.—Aband.—in Modoc County, CA and Lake County, OR, Docket No. AB-12 (Sub-No. 84) (ICC served Oct. 20, 1985).

² A modified certificate is a type of operating permit created by the Board’s predecessor, the Interstate Commerce Commission (ICC), in a decision entitled Common Carrier Status of States, State Agencies, 363 I.C.C. 132 (1980), aff’d sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). In that decision, the ICC used its exemption authority at 49 U.S.C. 10505 (now 49 U.S.C. 10502) to permit states and state agencies to acquire rail lines that had been approved for abandonment. The exemption also provided for modified certificates, which operators over these state-owned lines could obtain and relinquish by providing notice to the agency. See The Great Western Railway Co.—Modified Rail Certificate, Finance Docket No. 30777 (ICC served

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County terminated rail operations by GWR, effective November 1, 1997. Thereafter, the County obtained its own modified certificate and commenced operation of the line through its Lake County Railroad division.³

In 2007, the County leased the line to MR&L and MNRR.⁴ In 2009, according to the County, MR&L and MNRR materially breached their lease agreement with the County. The County further claims that, after the breach was not cured within the notice period required by that lease, it terminated the lease, effective May 7, 2009. The County has resumed operation of the line pursuant to its modified certificate, with Lake Railway (Lake Ry.) acting as the County's agent for the provision of rail service on the line.⁵

The County now intends to seek Board permission through an adverse discontinuance proceeding to terminate the regulatory authority of MR&L-MNRR to lease and operate the line so that it can proceed to remove them from the line. To facilitate the filing of its application, the County has filed the waiver petition. The County claims that its waiver request is justified because it does not have the information necessary to comply with a number of the regulations and because other such regulations are not pertinent to this case. MR&L-MNRR have not opposed the petition for waivers and exemptions.

DISCUSSION AND CONCLUSIONS

The Board's regulations require that abandonment and discontinuance applications conform to the requirements of 49 CFR 1152, Subpart C. In appropriate instances, however, such as the filing of a third-party or adverse abandonment or discontinuance application, the Board will waive inapplicable and unneeded provisions.⁶

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Feb. 26, 1986); 49 CFR 1150 Subpart C—Modified Certificate of Public Convenience and Necessity.

³ See Lake County Railroad—Modified Rail Certificate, STB Finance Docket No. 33581 (STB served Apr. 24, 1998).

⁴ See Modoc Railway and Land Company, LLC—Acq. & Oper. Exempt.—in Lake County, OR, STB Finance Docket No. 34995 (STB served Feb. 28, 2007); and Modoc Northern Railroad Co.—Acq. & Oper. Exempt.—in Lake County, OR, STB Finance Docket No. 34996 (STB served Feb. 28, 2007).

⁵ We note that the modified certificate issued to the County in STB Finance Docket No. 33581 is for a 54.45-mile line of railroad extending from milepost 458.60 in Alturas to milepost 513.05 in Lakeview, rather than from milepost 456.89 to milepost 512.30 as stated here. The County should explain this slight discrepancy in mileage and milepost numbers in its discontinuance application.

⁶ See, e.g., Chelsea Property Owners—Abandonment—Portions of the Consolidated Rail Corporation's West 30th Street Track in New York, NY, Docket No. AB-167 (Sub-No. 1094) (ICC served July 19, 1989); City of Rochelle, Illinois—Adverse Discontinuance—Rochelle Railroad Company, STB Docket No. AB-549 (STB served June 5, 1998); and CSX

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System Diagram Map. The County seeks an exemption from 49 U.S.C. 10903(c)(2), a provision in the statute which requires carriers to maintain a system diagram map and to identify on that map rail lines planned for abandonment or discontinuance of service. Likewise, the County seeks a waiver of all requirements in 49 CFR 1152.10 to 1152.14, and 49 CFR 1152.24(e)(1). These provisions require a carrier to maintain, file, and publish a system diagram map, and require a line to appear on the map for at least 60 days before an abandonment application can be filed for the specific line. The County also seeks waiver of 49 CFR 1152.22(a)(5), which requires inclusion of the rail line on the map, the date upon which the line was first listed on the map, and a copy of the line description which accompanies the carrier's map. The County claims that waiver is appropriate because it does not have access to the current system diagram map of MR&L-MNRR, and it does not possess, nor is it able to obtain this information.

We will exempt the County from the requirements of 49 U.S.C. 10903(c)(2). Exemption and waiver of the system diagram map requirements are customary in adverse proceedings because a third party generally does not have access to the system diagram map,⁷ as is the case here. Application of 49 U.S.C. 10903(c)(2) here is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101. Rather, the exemption will promote that policy by eliminating unnecessary procedures, and thus will expedite regulatory decisions [49 U.S.C. 10101(2)], foster sound economic conditions in transportation [49 U.S.C. 10101(5)], and encourage efficient management of railroads [49 U.S.C. 10101(9)]. Other aspects of the rail transportation policy will not be adversely affected. Additionally, regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. The County has already resumed operations on the line through its agent, and a discontinuance of MR&L-MNRR service will therefore not result in a disruption of service. For these reasons, we will also grant the County's requests for waiver of the requirements of 49 CFR 1152.10 to 1152.14, 49 CFR 1152.24(e)(1), and 49 CFR 1152.22(a)(5).

Line Attributes. The County requests a waiver of the requirements at 49 CFR 1152.22(b)-(d), which require a description of the present physical condition of the line, estimated deferred maintenance and rehabilitation costs, a description of service performed on the line during the prior year, and a computation of the revenues attributable and avoidable costs for the line to be abandoned. The County states that, as a third party, it is unable to provide this information. Because the County lacks information as to prior service, revenues, and avoidable costs, and because that information generally is not available to a third-party applicant, the request for waiver from 49 CFR 1152.22(c) and (d) is reasonable and will be granted. With

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Transportation—Adverse Abandonment—in Shelby County, TN, STB Docket No. AB-1010 (STB served Oct. 10, 2007).

⁷ See Norfolk Southern Railway Company—Adverse Abandonment—St. Joseph County, IN, STB Docket No. AB-290 (Sub-No. 286), slip op. at. 4 (STB served Oct. 26, 2006).

regard to the information required by 49 CFR 1152.22(b), the County not only owns the line but is currently operating the line through its agent, so the County should have information as to the line's physical condition. That information, however, does not appear to be particularly relevant here, where the County is attempting to terminate the operating authority of the former operator of its line due to the breach of the lease agreement. For this reason, the waiver request from 49 CFR 1152.22(b) will be granted as well.

Environmental and Historic Review. The County seeks a waiver of the Board's regulations requiring environmental and historic reporting in this matter. Alternatively, the County requests clarification that such regulations do not apply to the County's application because the County through Lake Ry. will continue to operate the rail line after discontinuance of the rail service of MR&L-MNRR. The County adds that, should the forthcoming adverse discontinuance be granted, Lake Ry. will file a notice of exemption to lease and operate the line.

We will grant this waiver. It is unlikely that the discontinuance would result in any environmental impacts. The rail service provided by MR&L-MNRR has now been taken over by the County's agent, Lake Ry. Therefore, there would be no diversion of rail traffic to truck as a result of this action. Also, should the Board grant this discontinuance, the agency's decision would not result in any salvage.

Notice of Consummation. The County requests a waiver of the abandonment consummation notice requirement at 49 CFR 1152.24(f) and the 1-year authorization limit at 49 CFR 1152.29(e)(2).

This waiver is not necessary. These requirements are only applicable to an abandonment, and here the applicant is only attempting to force a discontinuance of service.

Public Use, Trail Use, and OFAs. The County seeks an exemption from the requirements of 49 U.S.C. 10904 and 10905 and a waiver of the provisions for offers of financial assistance (OFA), public use procedures, and interim trail use and rail banking requirements of 49 CFR 1152.27 through 1152.29. The County claims that these provisions are not necessary in this proceeding.

We will grant an exemption from 49 U.S.C. 10904. In the event that the County prevails in its adverse discontinuance application, service will continue to be provided by Lake Ry., so an OFA is not warranted. Application of 49 U.S.C. 10904 to the proposed transaction, therefore, is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101. Rather, the exemption will promote that policy by eliminating unnecessary procedures, and thus will expedite regulatory decisions [49 U.S.C. 10101(2)], foster sound economic conditions in transportation [49 U.S.C. 10101(5)], and encourage efficient management of railroads [49 U.S.C. 10101(9)]. Other aspects of the rail transportation policy will not be adversely affected. Additionally, regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. For these reasons, we will also grant the request for waiver of the OFA regulations at 49 CFR 1152.27.

Because the County is only seeking to force the discontinuance of service rather than force the abandonment of the line, we would not impose public use or trail conditions. Therefore, we need not grant the County's request for an exemption from 49 U.S.C. 10905, or waiver of 49 CFR 1152.28 or 1152.29.

Notice. In light of the various waivers and exemptions it seeks in its petition, the County further requests that the form of the draft Federal Register notice, as required by 49 CFR 1152.22(i) be waived. The County proposes instead to use the form of draft Federal Register notice it has attached to its petition. Similarly, the County requests that it be allowed to substitute the notice of intent required at 49 CFR 1152.21 with one that it has created.

These requests are reasonable and will be granted. The Federal Register notice provided by the County is generally acceptable. The County uses the form and substance of the notice of intent found at 49 CFR 1152.21, but has removed information not necessary for this proceeding. The same holds true for the proposed Federal Register notice when it is compared to the sample found at 49 CFR 1152.22(i). However, both proposed notices are deficient in the respect that they fail to mention that the interests of railroad employees will be protected by the appropriate labor conditions. With this addition, we find the substituted notices acceptable and allow the County to use them.

The County also requests a waiver of 49 CFR 1152.20(a)(2)(xii), which requires service of the notice of intent upon the headquarters of all duly certified labor organizations that represent employees on the affected rail line. The County explains that it does not believe that the railroad employees of M&RL-MNRR were represented by a labor organization. We will not grant this request. If the employees were not represented by a labor organization, then the service requirement would not apply. If they were represented, then the County must provide the required notice. Determining whether the employees were represented should not be unduly burdensome on the County.

It is ordered:

1. The petition for waivers and exemptions is granted to the extent described above. The County is directed to amend its proposed notice of intent and Federal Register notice as discussed above.
2. This decision is effective on its service date.

By the Board, Acting Chairman Mulvey, and Vice Chairman Nottingham.

Anne K Quinlan
Acting Secretary