

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-1044

INDIANA BUSINESS RAILROAD, INC—ADVERSE DISCONTINUANCE OF RAIL
SERVICE—PORTION OF NORFOLK SOUTHERN RAILWAY COMPANY’S ROCKPORT
BRANCH

Decided: November 30, 2009

By petition filed on August 14, 2009, Indiana Business Railroad, Inc. (IBR) seeks waivers of certain Board regulations and exemptions from certain statutory provisions in connection with its proposed filing of a third-party or “adverse” discontinuance application. IBR states in its petition that it will file an application seeking to discontinue the service of Norfolk Southern Railway Company (NSR) over 6.5 miles of rail line in Spencer County, IN, between milepost 6.5, a short distance south of the plant of AK Steel Corporation near Chrisney, and milepost 0.0 at the end of the track in Rockport.¹ As discussed below, the waiver requests and exemptions will be granted to the extent warranted.

BACKGROUND

According to its petition, IBR is incorporated as a railroad company under Indiana law, but does not currently operate as a rail carrier subject to Board jurisdiction. If the Board grants this adverse discontinuance for a segment of NSR’s Rockport Branch, IBR plans to acquire the section by condemnation in Indiana state court and then file a notice of exemption with the Board for acquisition and operation of the segment.

IBR asserts that NSR has not operated over the 6.5 mile segment for more than ten years and that it has not been properly maintained by NSR. According to IBR, NSR is unwilling to rehabilitate the line and provide service, and refuses to allow IBR to lease it for those same purposes. IBR believes that rail service along the segment would promote economic development, and that the public convenience and necessity require this adverse discontinuance so that IBR can provide service over the segment.²

¹ The entire Rockport Branch runs for 17 miles between Lincoln City, IN and Rockport, IN.

² By letter filed November 20, 2009, and served on NSR on November 25, 2009, the City of Rockport, IN voices its support for the prospective application of IBR. If and when IBR files such an application, the City will have the opportunity to comment.

PRELIMINARY MATTERS

On September 3, 2009, NSR filed a reply to IBR's petition. NSR asks the Board to reject or deny the petition as the precursor to a "fatally defective" adverse discontinuance application IBR plans to file. In an October 9, 2009 filing, IBR characterizes NSR's reply as a motion to dismiss the prospective adverse discontinuance application and asks us for permission to respond. IBR's request will be denied, as NSR has not filed a motion to dismiss, nor could it prior to the filing of IBR's application.

While not a motion to dismiss, NSR's reply asks us to effectively preclude IBR from filing its application. This we will not do. Neither NSR nor anyone else knows what IBR's application will say until IBR files it. NSR may, at that time, comment on it and ask us to dismiss it or deny it, and we will address any such request. Further, while we will consider each of IBR's waiver and exemption requests here, IBR should not conclude from the grant of its waiver requests that the Board would necessarily approve the sort of application that IBR has described.

Finally, we will not address in this decision any arguments IBR makes in its October 9 filing in this proceeding, or in a response filed October 9, 2009 by NSR, relating to the substantive aspects of this matter.

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.³

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

We will grant these reasonable requests. The Federal Register notice provided by IBR is generally acceptable. IBR 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 we compare it to the sample found at 49 CFR 1152.22(i). However, IBR must remove the phrase "long-dormant" from the first paragraph of both notices. The purpose of the notices is to inform the public about this case, not to provide a

³ See, e.g., City of Rochelle, Illinois—Adverse Discontinuance—Rochelle Railroad Company, STB Docket No. AB-549 (STB served June 5, 1998); and CSX Transportation—Adverse Abandonment—in Shelby County, TN, STB Docket No. AB-1010 (STB served Oct. 10, 2007).

vehicle for the applicant's arguments. Also, IBR must add language in both notices stating that the interests of railroad employees will be protected by the labor conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979). With these changes, we find the substituted notices acceptable and will allow IBR to use them.

Service of Notice on Significant Users. IBR seeks a waiver from 49 CFR 1152.20(a)(2)(i) and an exemption from 49 U.S.C. 10903(a)(3)(D), both of which require notice to significant users. The Board will waive the requirement of 49 CFR 1152.20(a)(2)(i) and exempt IBR from 49 U.S.C. 10903(a)(3)(D) because neither IBR nor NSR has identified any significant users.

Notice at Stations. IBR requests a waiver from 49 U.S.C. 10903(a)(3)(B) and 49 CFR 1152.20(a)(3), both of which require notice to be posted at all stations along a line to be abandoned. IBR states that there are no stations along the segment, a statement that NSR does not dispute. The Board will therefore grant the exemption from 49 U.S.C. 10903(a)(3)(B) and the waiver from 49 CFR 1152.20(a)(3).

Service of Notice on Labor Organizations. IBR requests a waiver from 49 CFR 1152.20(a)(2)(xii), which requires that applicants serve notice on the headquarters of all duly certified labor organizations that represent employees on the line. IBR asserts that there are no employees on the line, but does not support this assertion. The line has not been abandoned and is under the control of NSR. This proposed transaction might involve some of NSR's represented employees. Accordingly, we will deny the 49 CFR 1152.20(a)(2)(xii) waiver request.

System Diagram Map. IBR seeks an exemption from 49 U.S.C. 10903(c)(2), which requires carriers to maintain a system diagram map identifying lines planned for abandonment or discontinuance of service. Likewise, IBR seeks a waiver of 49 CFR 1152.10 through 49 CFR 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 that line. IBR also requests a waiver from 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 that accompanies the carrier's map.

The Board will exempt IBR from the requirements of 49 U.S.C. 10903(c)(2) and waive the above regulations. 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,⁴ 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)).

⁴ 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).

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. NSR is not currently operating on the segment and, therefore, discontinuance will not result in a disruption of service.

Line Attributes. IBR 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. IBR states that, as a third party, it is unable to provide this information. Because IBR lacks this information, and because such information generally is not available to a third-party applicant, the request for waiver from 49 CFR 1152.22(b)-(d) is reasonable and will be granted.

One Year Authorization Limit for Notice of Consummation of Abandonment. IBR requests that the Board waive 49 CFR 1152.29(e)(2), which requires a notice of consummation of abandonment. The waiver is unnecessary because 49 CFR 1152.29(e)(2) only applies to abandonments, while IBR's proposed application is for discontinuance. Consequently, we will deny the waiver request.

Environmental and Historic Report. IBR seeks a waiver of 49 CFR 1152.22(f), which requires environmental and historic reports. It is unlikely that this discontinuance would result in any environmental impacts. As NSR is not currently providing service over the line, an adverse discontinuance here would not divert rail traffic to truck. Finally, as only discontinuance is proposed here, the agency's decision would not result in any salvage. We will grant the waiver of 49 CFR 1152.22(f).

Public Use and Trail Use. IBR seeks an exemption from the requirements of 49 U.S.C. 10905 (public use provisions) and a waiver of 49 CFR 1152.29 (trail use regulations). These requests are unnecessary because public use and trail use requirements do not apply to an adverse discontinuance. Consequently, these requests will be denied.

Offer of Financial Assistance. IBR seeks an exemption from the statute governing offers of financial assistance (49 U.S.C. 10904). We will grant an exemption from 49 U.S.C. 10904. In the event that IBR prevails in its adverse discontinuance application, IBR plans to resume service, 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. Finally, although IBR did not request a waiver from 49 CFR 1152.27, which addresses OFA requirements, we grant a waiver from that related regulation for consistency.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition for waivers and exemptions is granted to the extent described above. IBR 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, Chairman Elliott, Vice Chairman Nottingham, and Commissioner Mulvey.