

SERVICE DATE – AUGUST 20, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 550 (Sub-No. 3X)

R.J. CORMAN RAILROAD COMPANY/ALLENTOWN LINES, INC.—ABANDONMENT
EXEMPTION—IN LEHIGH COUNTY, PA.

Digest:¹ This decision allows R.J. Corman Railroad Company/Allentown Lines, Inc. to end its common carrier obligation to provide freight rail service over approximately 3.5 miles of rail line in Lehigh County, Pa., subject to conditions.

Decided: August 20, 2015

By petition filed on May 1, 2015, R.J. Corman Railroad Company/Allentown Lines, Inc. (RJC) seeks an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10903 to abandon approximately 3.5 miles of rail line extending between milepost 93.18 in Allentown, Pa., and milepost 96.709, in or near Whitehall, Pa. (the Line). The Line is located in Lehigh County, Pa. Notice of the exemption was served and published in the Federal Register on May 21, 2015 (80 Fed. Reg. 29,390). Replies to the petition for exemption were filed and are discussed in this decision. We will grant the exemption from 49 U.S.C. § 10903, subject to conditions.

BACKGROUND

RJC states in its petition that it acquired the Line in 1996 from the Consolidated Rail Corporation (Conrail) pursuant to an Offer of Financial Assistance (OFA).² The Line constitutes the northernmost end of the Lehigh Industrial Track and is a single-track, stub-ended line segment connecting at its southern end with the RJC network. RJC states that if it receives Board authority to abandon the Line, it intends to salvage the rails, ties, and other track material, and then convey its right, title and interest, if any, in the right-of-way to Trestle Redevelopment Partners (Trestle). According to RJC, Trestle plans to use the corridor that RJC conveys as part of a multi-faceted riverfront redevelopment project.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² See R.J. Corman R.R.—Acquis. & Operation Exemption—Lines of Consol. Rail Corp., FD 32987 (STB served July 18, 1996).

RJC states that the Line serves one shipper, American Carbonation (AC), that leases property adjacent to the right-of-way to conduct a transload operation.³ RJC asserts that AC does not object to RJC's abandonment of the Line and that RJC and AC have worked to relocate AC's transloading operation to a nearby RJC yard track not included within the scope of the proposed abandonment. RJC adds that it does not foresee new traffic developing on the stub-ended Line.

James Riffin (Riffin) filed a reply to the petition for exemption on May 21, 2015. In his reply, Riffin alleges that RJC made a misrepresentation in its petition for exemption when RJC states that it "acquired the subject Line pursuant to an Offer of Financial Assistance (OFA)" in Consolidated Rail Corp.—Abandonment Exemption—in Erie County, N.Y., AB 167 (Sub-No. 1164X) (STB served Sept. 30, 1996), which is a proceeding that involved a line of railroad in Erie County, N.Y., and not the Line at issue here. Riffin states that the Line here was actually part of a longer rail line segment once designated as United States Railroad Administration Line Code 0503A (Line 0503A), which extends between milepost 93.3 in Allentown, Pa., and milepost 119.1 in Lehigh, Pa. In addition, Riffin argues that Delaware & Hudson Railway Company, Inc. (D&H) still retains trackage rights over Line 0503A pursuant to a 1979 operating agreement with Conrail. Riffin claims that, although Conrail was granted abandonment authority on a 21-mile portion of Line 0503A in 1982, D&H still retains trackage rights over the portion of Line 0503A, at issue here.⁴

RJC filed a reply to Riffin's comments on June 10, 2015. RJC acknowledges that it erred in stating that RJC acquired the Line pursuant to an OFA in Consolidated Rail Corp.—Abandonment Exemption—in Erie County, N.Y., AB 167 (Sub-No. 1164X). RJC clarifies that it acquired the Line, along with other portions of rail line, as part of a larger transaction in R.J. Corman Railroad Company/Allentown Lines, Inc.—Acquisition & Operation Exemption—Lines of Consolidated Rail Corp., FD 32987 (STB served July 18, 1996).

³ RJC served a copy of its petition for exemption on AC.

⁴ On March 11, 1982, Conrail was granted authority to abandon its rail line between milepost 98.0 and milepost 119.3, a total distance of 21.3 miles. Consol. Rail Corp.—Aban.—Between Catasauqua & Leighton, Pa., AB 167 (Sub-No. 451N) (ICC served Mar. 11, 1982). D&H formally discontinued its trackage rights over this 21.3 mile portion in 1984. Del. & Hudson Ry.—Discontinuance of Trackage Rights Exemption—in Lehigh & Carbon Cties., Pa. (D&H 1984 Discontinuance), FD 30334 (ICC served Apr. 20, 1984). Additionally, in 1984, the ICC granted Conrail authority to abandon another segment of Line 0503A, from milepost 96.6 to milepost 98.0. Consol. Rail Corp.—Aban.—in Lehigh Cty., Pa., AB 167 (Sub-No. 623N) (ICC served July 19, 1984). The Line at issue in this abandonment proceeding (between milepost 93.18 and milepost 96.709) has not been included in any previous abandonment or discontinuance of trackage rights proceedings.

RJC also acknowledges that the Line was once part of Line 0503A and that D&H did have trackage rights over Line 0503A. However, it argues that those trackage rights were legally terminated for the 21-mile portion of Line 0503A when Conrail received authority to abandon that portion on March 11, 1982.⁵ RJC's argument is based on its interpretation of Section 308 of the Regional Rail Reorganization Act of 1973 (3-R Act), enacted as part of the Northeast Rail Service Act of 1981 (NERSA). Specifically, RJC states that Section 308 provided that any abandonment filed by Conrail under that Act would be granted by the Interstate Commerce Commission (ICC) unless a timely OFA was filed and that the Act makes no mention of independent termination of trackage rights.⁶ According to RJC, in 1982, Conrail acknowledged D&H's trackage rights on Line 0503A in its application to abandon, but the ICC did not address the trackage rights in its abandonment decision. RJC asserts that because the ICC permitted the abandonment, despite knowing of the existence of the trackage rights, the trackage rights were legally terminated.

In his reply, Riffin also claims that his interest in the alleged D&H trackage rights here is related to a pending proceeding in which D&H is seeking to discontinue 670 miles of trackage rights in New York, New Jersey, Pennsylvania, Maryland, Virginia, and the District of Columbia. See Del. & Hudson Ry.—Discontinuance of Trackage Rights—in Broome Cty., N.Y., AB 156 (Sub-No. 27X) (STB served July 10, 2015). On July 13, 2015, Riffin filed a Notice of Intent to File an OFA in that proceeding to subsidize continued rail service on portions of D&H track where there would be a remaining carrier or, in the event that D&H is the only remaining carrier, to purchase those portions of D&H's trackage rights.⁷

Riffin also filed a Notice of Intent to File an OFA and a Motion for Condition in this proceeding on July 14, 2015. In that filing, Riffin gives notice of his intent to file an OFA to acquire D&H's trackage rights, but does not give notice of his intent to file an OFA to continue

⁵ See Consol. Rail Corp.—Aban.—Between Catasauqua & Leighton, Pa., AB 167 (Sub-No. 451N) (ICC served Mar. 11, 1982).

⁶ See 45 U.S.C. § 748. No OFA was filed in the 1982 NERSA abandonment case. See Consol. Rail Corp.—Aban.—Between Catasauqua & Leighton, Pa., AB 167 (Sub-No. 451N) (ICC served Mar. 11, 1982).

⁷ D&H filed a verified notice of exemption to discontinue its overhead and local trackage rights, which was served and published in the Federal Register on April 8, 2015 (80 Fed. Reg. 18,937). Riffin filed a Notice of Intent to File an OFA on April 20, 2015. However, a supplemented notice of exemption was served and published in the Federal Register on July 2, 2015 containing corrected information (80 Fed. Reg. 38,273). Pursuant to the procedural schedule contained in that notice of exemption, Riffin filed a new Notice of Intent to File an OFA on July 13, 2015.

RJC's rail service. Furthermore, Riffin requests a condition that RJC be ordered not to salvage any of the track infrastructure, nor encumber the right-of-way in any way that would restrict the continued use of the right-of-way for freight rail purposes until the question of D&H's remaining trackage rights, if any, over Line 0503A has been resolved.

On July 30, 2015, RJC filed a Motion for Leave to Supplement the Record in response to Riffin's Notice of Intent to File an OFA and Motion for Condition. RJC points to an ICC decision suggesting (contrary to RJC's position in its prior filing) that D&H may in fact have retained trackage rights over Conrail line segments authorized for abandonment under NERSA until the ICC authorized the discontinuance of those rights.⁸ But RJC states that even if this is so, D&H formally discontinued its trackage rights over that portion in 1984.⁹

In addition, RJC argues that cessation of service over this 21-mile portion of Line 0503A and Conrail's subsequent salvage of that trackage rendered D&H's remaining overhead trackage rights (if any) a practical nullity. According to RJC, D&H's discontinuance of its overhead rights on any portion of Line 0503A would constitute discontinuance of D&H's overhead rights over the entire line.

We will deny RJC's motion for leave to supplement the record. Under the Board's regulations, abandonments are subject to tight deadlines so that the Board can comply with its statutory requirements. 49 U.S.C. §§ 10903, 10904. By opening the door to further commentary, RJC's motion undercuts the statutory and regulatory provisions designed to expedite the abandonment process. The supplemental material RJC sought to file is also unnecessary because the issue of whether D&H's trackage rights survived Conrail's NERSA abandonment had been developed prior to the filing of RJC's petition. See Riffin's May 21st comments, RJC's June 10th reply, and Riffin's July 14th notice of intent to file an OFA. Because we are denying RJC's motion to supplement, we will also reject the "Notice of Intent to Participate with Comments", which was filed by CNJ Rail Corporation and Eric Strohmeyer on August 14, 2015 "[i]n response to R J Corman's pleading of July 30th, 2015" and the Supplement filed by Riffin on August 14, 2105. Finally, as we are rejecting the CNJ/Strohmeyer Notice, we will also reject Riffin's submissions filed on August 18, 2015, in reply to the CNJ/Strohmeyer August 14 Notice.

⁸ See Guilford Transp. Indus.—Control—Del. & Hudson Ry., 366 I.C.C. 396, 417 (1982).

⁹ See Mot. to Suppl. R., at 7 (citing D&H 1984 Discontinuance).

DISCUSSION AND CONCLUSIONS

The Exemption Criteria

Under 49 U.S.C. § 10903, a rail carrier may not abandon a rail line without the prior approval of the Board. Under 49 U.S.C. § 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny of the proposed abandonment is not necessary to carry out the RTP in this case. By minimizing the administrative expense of the application process, an exemption would expedite regulatory decisions and reduce regulatory barriers to exit. 49 U.S.C. §§ 10101(2) & (7). An exemption would also foster sound economic conditions and encourage efficient management by allowing RJC to abandon a line on which there will soon be no shippers (once AC's transloading operation is relocated to a nearby track). 49 U.S.C. §§ 10101(5) & (9). Other aspects of the RTP would not be adversely affected by the use of the exemption process.

We also find that regulation under 49 U.S.C. § 10903 is not necessary to protect shippers from the abuse of market power.¹⁰ AC, the Line's sole shipper, has been provided notice of the petition and has not opposed the proposed abandonment. The record indicates that RJC is relocating AC's transload operations to another RJC rail-served location. Nevertheless, to ensure that AC is informed of our action here, we will direct RJC to serve a copy of this decision on AC within five days of the service date of this decision, and to certify to the Board contemporaneously that it has done so.

Employee Protection. Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, we will impose upon RJC the employee protective conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho (Oregon Short Line), 360 I.C.C. 91 (1979).

Environmental Review. RJC submitted a combined environmental and historic report and notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the environmental impacts of the proposed abandonment. See 49 C.F.R. §§ 1105.7 & 1105.8. Based on RJC's environmental and historic report and independent

¹⁰ Given our market power finding, we need not determine whether the proposed abandonment is limited in scope.

analysis, the Board's Office of Environmental Analysis (OEA) prepared an Environmental Assessment (EA) that was issued for public review and comment on June 30, 2015. The EA recommended that two conditions be imposed on any decision granting abandonment authority. Because the Line appears to pass through 100-year floodplains, OEA recommended a condition requiring RJC to consult with the U.S. Army Corps of Engineers (Corps) prior to commencing salvage activities and to comply with the reasonable requirements of the Corps.

The other recommended condition addressed comments received from the Pennsylvania Department of Transportation (PennDOT). PennDOT states that it retains a property interest in at-grade crossings along the Line and requests consultation with RJC prior to any project work within these PennDOT-owned rights-of-way. Accordingly, OEA recommends such a condition requiring RJC to consult with PennDOT prior to the commencement of any salvage work that may take place in or near PennDOT-owned rights-of-way.

Comments on the EA were due by July 30, 2015. OEA issued a Final EA on August 4, 2015, that did not recommend any additional environmental conditions. We agree that the conditions in the EA are reasonable, and they will be imposed. Based on OEA's analysis, the Board concludes that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

D&H Trackage Rights

Based on the record, it appears that D&H may still hold trackage rights over the Line. As noted above, the Line at issue in this abandonment proceeding (between milepost 93.18 and milepost 96.709) has not been included in any previous abandonment or discontinuance of trackage rights proceedings.

Also as noted, in Docket No. AB 156 (Sub-No. 27X), D&H filed a verified notice of exemption to discontinue overhead trackage rights on approximately 670 miles of rail line, including Line 0503A.¹¹ On August 13, 2015, the Board denied a stay of the effective date of that notice, thus authorizing D&H's discontinuance of trackage rights to become effective on August 14, 2015. Our regulations do not require D&H to notify the Board when D&H exercises that authority and discontinues those trackage rights.¹² Therefore, the Board will direct RJC to contact D&H to determine whether discontinuance authority has been exercised. Riffin's

¹¹ We note that Riffin's Notice of Intent to File an OFA states that Riffin intends to acquire D&H's trackage rights through an OFA. D&H's trackage rights, however, are not the subject of this proceeding. Thus, such an OFA could not be filed in this proceeding.

¹² In Docket No. AB 156 (Sub-No. 27X), petitions to revoke the exemption remain pending before the Board.

Motion for a Condition requesting that RJC be ordered not to salvage any of the track infrastructure nor encumber or restrict the use of the right-of-way is granted to the extent that RJC may discontinue service but shall not consummate this abandonment or conduct any related salvage operations until D&H has confirmed to RJC that D&H has exercised its authority to discontinue its trackage rights over the Line.¹³

It is ordered:

1. Under 49 U.S.C. § 10502, we exempt from the prior approval requirements of 49 U.S.C. § 10903 the abandonment by RJC of the above-described line, subject to the employee protective conditions set forth in Oregon Short Line, and subject to the conditions that prior to beginning any salvage activities, RJC shall:

- (a) consult with the Corps prior to commencement of any salvage activity and comply with the Corps' reasonable requirements; and
- (b) consult with PennDOT prior to commencement of any project work within PennDOT-owned rights-of-way at at-grade crossings.

2. RJC is directed to serve a copy of this decision on AC within five days after the service date of this decision and to certify contemporaneously to the Board that it has done so.

3. RJC may discontinue service but shall not consummate the abandonment or conduct any salvage activities until D&H has confirmed to RJC that D&H has exercised its authority to discontinue its trackage rights over the Line.

4. RJC's motion for leave to supplement the record is denied, CNJ Rail Corporation's and Eric S. Strohmeyer's August 14, 2015 Notice of Intent to Participate with Comments and the Supplement filed by Riffin on August 14, 2015 are rejected, and Riffin's August 18, 2015 filing in reply to the CNJ/Strohmeyer August 14 Notice is also rejected.

5. An Offer of Financial Assistance (OFA) under 49 C.F.R. § 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by August 28, 2015, subject to time extensions authorized under 49 C.F.R. § 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27(c)(1). Each OFA must be accompanied by the filing fee of \$1,600. See 49 C.F.R. § 1002.2(f)(25).

¹³ See, e.g., Mo. Pac. R.R.—Aban. Exemption—in Osage, Lyon & Morris Ctys., Kan., AB 3 (Sub-No. 111X) (ICC served Nov. 19, 1993).

6. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in boldface on the lower left-hand corner of the envelope: “Office of Proceedings, AB-OFA.”

7. Provided no OFA has been received, this exemption will be effective September 18, 2015..

8. Petitions to stay must be filed by August 31, 2015. Petitions to reopen must be filed by September 9, 2015.

9. Pursuant to 49 C.F.R. § 1152.29(e)(2), RJC shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the Line. If consummation has not been effected by RJC’s filing of a notice of consummation by August 20, 2016, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the one-year period, the notice of consummation must be filed no later than 60 days after the satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Miller.