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SERVICE DATE - OCTOBER 16, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-548

TACOMA EASTERN RAILWAY COMPANY—ADVERSE DISCONTINUANCE OF
OPERATIONS APPLICATION—A LINE OF CITY OF TACOMA, IN PIERCE, THURSTON
AND LEWIS COUNTIES, WA

Decided: October 15, 1998

On June 23, 1998, the City of Tacoma, WA (City), filed an application under 49 U.S.C. 10903 requesting that the Surface Transportation Board (Board) find that the public convenience and necessity require and permit the discontinuance of the operations by the Tacoma Eastern Railway Company (TE)¹ on 131.5 miles of City rail line in Pierce, Thurston, and Lewis Counties, WA (line).² We will grant the application.

Pursuant to an operating agreement (the Operating Agreement or the Contract) entered into by the City and TE on December 30, 1994, TE became the exclusive operator of the line for 25 years. Under the Contract, the City could terminate the Operating Agreement for material default if, after notice, TE failed to cure the default. According to the City, the Contract has been terminated because TE has not satisfactorily performed its obligations. Specifically, the City states that TE has failed to (1) develop freight traffic on the line, (2) respond in a timely manner to the City's request for information concerning its operation of the line, (3) provide the City with financial information regarding its operation of the line, and (4) cooperate in the City's grant funding efforts. Because TE is unwilling to cease operations, the City filed for relief in the form of an adverse discontinuance of operations.³

¹ TE was authorized to operate the line by lease in Tacoma Eastern Railway Co.--Lease and Operation Exemption--City of Tacoma, Washington, Finance Docket No. 32591 (ICC served Nov. 3, 1994).

² The line extends (1) from milepost 2192.0, at Tacoma, to milepost 17.7, at Chehalis, and (2) from milepost 2192.0, at Tacoma, to milepost 64.2, at Morton.

³ The City intends to replace the operations of TE with operations by the Belt Line Division of the City of Tacoma Department of Public Utilities (Belt Line).

On application by the City, an adverse discontinuance proceeding was instituted on July 13, 1998. TE filed its statement in opposition to the application on August 7, 1998. The City replied on August 27, 1998.⁴

EVIDENCE

The City's Application.

The City filed 6 verified statements in support of its application, from individuals familiar with the operation of the line by TE. The first is from Martha Anderson, Division Manager, Economic Development Division of the Planning and Development Services Department for the City (Anderson),⁵ who testifies that the City acquired the line from the Weyerhaeuser Company with the expectation of development of both passenger and freight service for the purpose of economic development. Gray Line of Seattle (GLS), a subsidiary of Holland America Line-Westours, Inc., and TE were selected based on representations that, as a team, they could provide a strong marketing, tourism promotion and business development expertise that would develop freight and passenger service on the line. TE was selected based on the representations of its president, Edward M. Berntsen (Berntsen), that he possessed extensive railroad operating experience. Anderson notes that the City has invested approximately \$5 million in the line for purposes of economic development but that after 3 years of experience with TE, the City realizes it will never achieve its objective. Anderson offers its impression that Berntsen is not capable of operating a business. Anderson states that the marketing and business development expertise that was supposed to have been provided never materialized. The City, on December 31, 1997, notified TE that it was terminating the Operating Agreement on 60 days' notice.

The second verified statement is from Peter Huffman, Economic Development Specialist, Economic Development Division for the City (Huffman),⁶ who testifies that TE has failed to develop significant business on the line, with its only regular freight customer being The Boeing Company (Boeing). Huffman says that Berntsen has been uncooperative with the City in its efforts to complete grant money applications. Huffman avers that Berntsen's failure to provide the City with information concerning existing traffic, potential shippers currently on the line, efforts made to develop traffic from those shippers, or other information required by state and Federal grant

⁴ Replies were due August 24, 1998. On August 24, 1998, the City, through its counsel, requested an extension of time until August 28, 1998, to file its reply. The extension was required because, due to absences of key client personnel from the office, the reply could not be completely assembled. TE's counsel had no objection. The extension of time will be granted.

⁵ Anderson's responsibility includes developing the Train to the Mountain excursion and encouraging development of traffic on the line operated by TE.

⁶ Huffman's responsibility includes developing the Train to the Mountain excursion service and developing traffic on the line operated by TE.

administrators jeopardized the City's ability to apply for grants in the amount of approximately \$4.5 million. Huffman notes that Berntsen has shown a reluctance toward marketing the railroad by failing to respond, or delaying in responding, to inquiries from potential existing industries on the line. Huffman further notes that Berntsen's failure to accept traffic from prospective shippers on the line has inhibited the City's ability to market and develop the line. Huffman echoes Anderson's expressed impressions of Berntsen's abilities to meet the City's objectives for the line.

The third verified statement is from Dan Handa, Principal Professional Civil Engineer and Assistant Engineering Division Manager, Public Works Department for the City (Handa). Handa states that the City contracted with TE to initially provide and develop increased freight service, with an eventual goal of providing passenger excursion service from the City to Mount Rainier National Park. One of Handa's primary objectives is to find outside sources of grant money for upgrading the City's railroad. As part of the application process to receive grant money from the Washington State Department of Transportation, Handa says he attempted to obtain data from Mr. Berntsen on TE's revenue, and amounts and types of freight moved. Because of Mr. Berntsen's failure to provide the data in a timely manner, Handa says that the City was delayed in submitting its grant application and received substantially less than was initially available. Handa avers that, because of the City's concern that it was not receiving revenue it was contractually entitled to, the City conducted an audit by an outside certified public accountant (CPA) under contract to the City. The CPA was assertedly unable to conduct an audit of TE's revenues and expenditures because TE's financial records were unorganized and largely missing. According to Handa, TE has defaulted on the Contract with the City by failing to keep financial records accessible to the City using generally accepted accounting principles. Handa maintains that TE has not been successful in developing more than occasional business from past railroad customers along the line, that TE is slow to respond to prospective customer requests for rate quotes, and that TE has failed to manage and control agreements and permits in accordance with its Contract with the City. Handa expresses his belief that Berntsen is undercapitalized as demonstrated by his inability to timely pay TE debts and company payroll. Finally, Handa points out that, without the capitalization and business management resources of GLS,⁷ he believes TE cannot correct its current regrettable situation.

The fourth verified statement is from Mitchell McCalvin, Senior Financial Analyst, Finance Department for the City (McCalvin),⁸ who testifies that the Contract requires TE to keep financial records using generally accepted accounting principles. McCalvin states that the City initiated an independent audit of TE's records and that the independent auditor's report indicated that there were

⁷ According to Huffman, although TE and GLS submitted a joint proposal whereby Holland would participate and support TE in the operation of the line, GLS did not sign its name to the City/TE Contract and it appears that GLS is no longer supporting TE.

⁸ McCalvin is responsible for processing funds from the Public Works Department and the Planning and Development Services Department for the City relative to various contracts concerning the line.

no financial records available for 1997. He notes that TE is required to pay 5% of the net income earned on the line to the City. According to McCalvin, TE has not kept any financial records or made any payments to the City.

The fifth verified statement is from Jack Anderson (Anderson), who is the owner/operator of the scenic railroad business known as the Mount Rainier Scenic Railroad (MRSRR). Anderson operates his excursion trains from spring through the summer and into the fall each year in addition to special excursions. Anderson notes that his operations on the rail system were smooth and without any difficulty for 18 years until 1994, when the City obtained ownership of the railroad and contracted with TE to operate the City's entire system, including the portion of the line over which Anderson operates his business. Anderson cites several examples to support his contention that Berntsen has employed "extortion-like tactics" to create numerous serious problems which have greatly hindered Anderson's continued operation of his passenger business. Anderson states that on several occasions Berntsen has refused access to the MRSRR until it complied with some non-railroad related demand or signed temporary agreements with TE. Anderson reports that he has had constant problems with Berntsen's interpretation of Federal Railroad Administration rules and regulations concerning track maintenance, noting that Berntsen uses a lower standard for maintenance on the portion of the railroad that TE operates versus the portion of the railroad that MRSRR operates. Finally, Anderson notes that MRSRR has consistently maintained the track in operable conditions despite Berntsen's efforts to stop its operation. Anderson supports the City's efforts to have Belt Line take over the operation of the line.

The sixth verified statement is from Lynne Brady, Traffic Administrator, Boeing Rail Car Program, The Boeing Company (Brady). Boeing, at Frederickson, produces wings for commercial aircraft manufactured in the Puget Sound area. Boeing is TE's largest shipper and uses TE to transport the cars carrying the materials used in the construction of the aircraft wings from Tacoma to Frederickson. Brady states that it is essential to have the items delivered by TE to Boeing in strict accordance with its production schedules. Brady testifies that, in the three years that TE has been providing service between Tacoma and Frederickson, "we have some delivery delays which have come close to interrupting our production operations." Brady attributes the delays to the fact that TE appears to have very limited resources for operation and maintenance of the line. Boeing supports the efforts of the City to substitute Belt Line for TE.

TE's Statement in Opposition.

In opposition, TE states that the application should be dismissed for lack of jurisdiction because the Operating Agreement remains in effect despite the City's purported attempts to terminate the Operating Agreement for material default on December 31, 1997. TE further argues that the Contract continues to govern the rights of the parties in regard to the line, and that the City is not entitled to cancel the Contract until the mediation arbitration process is completed as provided for in the Contract.

TE states that it has been instrumental in developing freight traffic, in contrast to the City's unsupported allegations. Berntsen testifies in his verified statement that there are 4 active shippers on the line: (1) Boeing; (2) James Hardie Building Products, Inc. (Hardie); (3) Rainier Veneer, Inc. (Rainier); and (4) GFN Utilization & Marketing, Inc. (GFN). Hardie, a new shipper, became operational in May 1998.⁹

As to the alleged material defaults that TE failed to respond in a timely manner to the City's request for information concerning TE's operation of the line, to provide the City with financial information regarding its operation of the line, and to cooperate in the City's grant funding efforts, TE replies that delayed compliance of this nature is not a material default under Washington state contract law. TE argues that its delays in furnishing information are excused because they were attributable to the City's own material defaults, which included failure to reimburse TE for necessary maintenance, failure to fund necessary capital improvements, diversion of fees for various permits or licenses which belong to TE, and numerous breaches of the City's obligation of good faith and fair dealing. (Appendix 2(b)). Because of being deprived of substantial revenue, TE states that it was unable to hire adequate staff and thus was unable to act in a timely manner to provide operating and financial information and to cooperate in the City's grant funding efforts.

If the application is not dismissed, TE states that it should be denied, as there is no basis for a finding that public convenience and necessity require or permit discontinuance of rail service by TE. In support of its position, TE notes that, of the four active shippers on the line, only one shipper, Boeing, supported discontinuance.¹⁰ TE also noted that Boeing failed to provide specific evidence of any service failures on the part of TE. Berntsen reports that rail freight traffic has increased, noting that, for Boeing, TE transported 59 cars in 1996, 110 cars in 1997, and 91 cars in the first 7 months of 1998. Berntsen states that TE has provided high quality service for Boeing and that it provides service to Boeing promptly upon being notified that cars are available for transportation. Further, Berntsen states that TE derives substantial revenues from storing cars on its line for Union Pacific Railroad Company. TE contends that it can provide more economical service for Boeing than Belt Line. TE states that there is a strong potential for continued operation of the line and increased revenue, noting that, in the near future, a commuter rail operation and Amtrak passenger trains will use a portion of the line. Finally, TE asserts that a local passenger operation, Train to the Mountain,¹¹ would further increase revenue for the line.

⁹ According to Berntsen, TE has transported 36 carloads of logs for Rainier and 1 shipment for GFN since September 1997. TE has transported 17 carloads for Hardie since its operations began in May 1998.

¹⁰ TE has provided letters in support of its continued operation of the line from Hardie and GFN. According to TE, Rainier has remained neutral.

¹¹ Berntsen notes that the reference on page 5 of the application to the Train to the Mountain being the only passenger service on the line is false. According to a verified statement of David E. (continued...)

The City's Reply to TE's Statement in Opposition.

In reply, the City states that it has made clear its position that the Contract under which TE has been permitted to operate on the line has been terminated for cause.

The City notes that not a single shipper has intervened in opposition of its application to displace TE and replace it with the Belt Line. The City further notes that neither Hardie nor GFN disclosed in their letters included in TE's opposition what, if any, traffic they have tendered to TE or what, if any, traffic they propose to tender in the future. (Hardie has since stated that it would be supportive of TE providing further service but that it would be open to receiving service from the Belt Line; Attachment A to Handa's reply verified statement.) While Bernsten's verified statement portrayed Rainier as being neutral, the City responds that Rainier's experience with TE had been less than satisfactory and if it had it to do over again it would not use TE to ship products. Huffman reply verified statement at 2.

The City maintains that TE never had a realistic business plan for operating the line and that TE's current financial condition is such that it is not likely to survive. The City says that TE's financial troubles began as soon as it began operation in December 1994, noting that the Internal Revenue Service (IRS) has contacted the City advising that TE owed the IRS more than \$45,000 in unpaid taxes and penalties for the years 1995 and 1996. Handa reply verified statement at 3.

While Bernsten noted that additional revenue would be generated from the future commuter rail and Amtrak operations on the City line, the City states that those revenues would pass to it, not to TE. Huffman verified statement at 3. In response to Beagle's allegation that the City has not rebuilt the track for the Train to the Mountain, the City responds that it has been successful in receiving over \$5 million in grant funds with no assistance from TE. The City notes that money has been invested in the railroad, and the City says it continues to aggressively seek funding for further track restoration from both private and public sources.

Finally, the City argues that TE has thwarted its goals of promoting economic development. The City further argues that nothing could more effectively stifle the willingness of public bodies to continue to make substantial investments in rail facilities to permit continued rail service than the

¹¹(...continued)

Beagle (Beagle), who represented GLS at the time the joint proposal was made to the City for the operation of the line, the City was to seek funding to rebuild the trackage for the start of the Train to the Mountain passenger service, and after the trackage was rebuilt, GLS would start passenger service over the line. Beagle states that he made it clear during the proposal presentation that TE would handle all freight service operations. To date, Beagle states that the City has not rebuilt the track for passenger service so as to enable GLS to carry out its plan to provide the passenger service. Finally, Beagle states that the City has never officially requested GLS' involvement to assist with the freight operator.

knowledge that they can be saddled with an incompetent operator who can effectively deny them the benefit of their investment.

DISCUSSION AND CONCLUSIONS

The statutory standard governing discontinuance of operations is whether the present and future public convenience and necessity require or permit the proposed discontinuance. In making the finding, the Board shall consider whether the discontinuance will have a serious, adverse impact on rural and community development. 49 U.S.C. 10903(d)(2). In an adverse discontinuance, the burden of proof is on the moving party. See Cheatham County Rail Authority “Application and Petition” for Adverse Discontinuance, Docket No. AB-379X (ICC served Nov. 4, 1992).

The former Interstate Commerce Commission and now the Board have found that a finding that the public convenience and necessity requires or permits abandonment or discontinuance terminates our exclusive and plenary abandonment jurisdiction over the line, enabling interested parties to undertake other legal remedies to effectively remove a carrier from a line. See Modern Handcraft, Inc.—Abandonment, 363 I.C.C. 969 (1981), Fore River RR. Corp.—Discon. Exempt.—Norfolk County, MA, 8 I.C.C.2d 307, 310 (1992); Grand Trunk Western Railroad Incorporated—Adverse Discontinuance of Trackage Rights Application—a Line of Norfolk and Western Railway Company in Cincinnati, Hamilton County, OH, STB Docket No. AB-31 (Sub-No. 39) (STB served May 13, 1998).

The public convenience and necessity support the requested grant for discontinuance authority. Of the four shippers on the line, three support replacement of TE by the Belt Line. The fourth says it “would be open” to the services of Belt Line. Allowing TE to discontinue operations will not result in a serious adverse impact on the shippers and the community. The Belt Line will provide, without interruption, all of the services currently being provided by TE. The evidence supports a finding that the four shippers and the MRSRR would welcome the opportunity to be served by a new operator. TE’s lack of financial reporting to the City and its inability to work effectively with the City have imposed a significant burden on the City. TE’s inability to provide information on a timely basis has interfered with the City’s ability to raise funds to further the economic development. Discontinuing TE’s operations on the line and replacing it with Belt Line, which has proven its ability to provide high quality service, will afford the City an opportunity to receive revenue from the operation of the line and thus a return on its investment. We see no need to perpetuate TE’s unwanted, unneeded operations. The City has met its burden of proof, and we will grant its application.¹²

¹² Any disputes arising out of TE’s alleged failure to fulfill its contractual obligations under the Operating Agreement and the City’s alleged termination of the Operating Agreement can be resolved in other appropriate forums.

In approving this application, we must ensure that affected rail employees will be adequately protected. 49 U.S.C. 10903(b)(2). We have found that the conditions imposed in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979), satisfy the statutory requirements, and we will impose those conditions here.

Because considering an offer of financial assistance (OFA) to subsidize TE's continued operations would frustrate our findings that our jurisdiction should not be permitted to shield TE from the legitimate operation of state law, we will not entertain any OFAs, requests for trail use/rail banking, or requests for public use. This proceeding is exempted from the environmental and historic reporting requirements of 49 CFR 1105 by virtue of 49 CFR 1105.6(c)(6) and 1105.8(b)(3).

We find:

1. The present and future public convenience and necessity require and permit the discontinuance of operations by TE over the above-described line of railroad, subject to the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979).
2. Discontinuance of operations will not result in an adverse impact on rural and community development.
3. This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The City's request for an extension of time is granted.
2. The City's application for the adverse discontinuance of operations as described above is granted.
3. This decision is effective on November 15, 1998.
4. Petitions to stay must be filed by October 26, 1998.

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5. Petitions to reopen must be filed by November 5, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary