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SERVICE DATE – LATE RELEASE MAY 26, 2009

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-167 (Sub-No. 1190X)

CONSOLIDATED RAIL CORPORATION—ABANDONMENT EXEMPTION—IN HUDSON  
COUNTY, NJ

STB Docket No. AB-55 (Sub-No. 690X)

CSX TRANSPORTATION, INC.—DISCONTINUANCE OF SERVICE EXEMPTION—IN  
HUDSON COUNTY, NJ

STB Docket No. AB-290 (Sub-No. 313X)

NORFOLK SOUTHERN RAILWAY COMPANY—DISCONTINUANCE OF SERVICE  
EXEMPTION—IN HUDSON COUNTY, NJ

Decided: May 26, 2009

This decision denies a motion to dismiss or reject a notice of intent to file an offer of financial assistance (OFA) because the deadline to file OFAs in this proceeding has not lapsed.

BACKGROUND

Consolidated Rail Corporation (Conrail), CSX Transportation, Inc. (CSXT), and Norfolk Southern Railway Company (NS) jointly filed a verified notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments and Discontinuances of Service for Conrail to abandon, and for CSXT and NS to discontinue service over, a 2.27-mile portion of a line of railroad known as the Lehigh Valley Main Line (the line), between railroad milepost 2.90± and railroad milepost 5.17±, in Jersey City, Hudson County, NJ. Notice of the exemption was served and published in the Federal Register on December 9, 2008 (73 FR 74801-02). The exemption was scheduled to become effective on January 8, 2009, unless stayed by the Board or unless a formal expression of intent to file an offer of financial assistance (OFA) under 49 U.S.C. 10904 and 49 CFR 1152.27(c)(2) was filed by December 19, 2008.

On December 19, 2008, CNJ Rail Corporation (CNJ) filed a formal expression of intent to file an OFA to purchase the line and a request to toll the time period for filing an OFA.<sup>1</sup> In the

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<sup>1</sup> This filing automatically stayed the effective date of the exemption for 10 days, until January 18, 2009. See 49 CFR 1152.27(c)(2)(i).

filing, CNJ requested that Conrail provide it with the information set forth in 49 CFR 1152.27(a), as well as certain additional information relating to Conrail's present, prior, or future use of the line, including all valuation maps for the line. By decision served on January 7, 2009, the Board granted CNJ's request to toll the deadline for filing an OFA until 10 days after Conrail provided CNJ with the information required under 49 CFR 1152.27(a). In a letter dated January 22, 2009, Conrail purported to specifically address CNJ's request for a minimum purchase price to acquire the line.

On February 6, 2009, Conrail reported to the Board that it had provided CNJ with the "last remaining piece of information required under the [Board's] rules." Conrail also asserted that the deadline for submitting an OFA was February 5, 2009, and that date had passed without Conrail receiving an OFA. Conrail therefore requested that the Board issue a decision approving the notice of exemption, effective February 12, 2009. In response, by letter dated February 9, 2009, CNJ asserted that the January 22, 2009 letter from Conrail did not meet the criteria under 49 CFR 1152.27(a), and asked that the Board take no action until it could consider a forthcoming motion by CNJ to compel Conrail to provide the line's minimum purchase price. On February 12, 2009, Conrail filed a letter in opposition to the CNJ request, asserting that it had provided all the relevant information at its disposal.

On April 2, 2009, Conrail filed a motion to dismiss or reject CNJ's notice of intent to file an OFA. CNJ filed a reply on April 24, 2009.

#### PRELIMINARY MATTER

On April 22, 2009—the deadline for filing a reply to Conrail's April 2, 2009 motion—the Board received a letter from CNJ requesting a 48-hour extension of time for filing a reply in order to address comments from the Mayor of Jersey City submitted on April 21, 2009, in STB Docket No. AB-167 (Sub-No. 1189X). In a letter dated April 23, 2009, Conrail objected to any extension, alleging that CNJ was engaged in a strategy to prolong the OFA process and that CNJ had not filed either a motion to compel, as CNJ had indicated it would, or an OFA. Because a 48-hour extension is reasonable to allow CNJ to address the new comments and will not unduly delay this proceeding, CNJ's motion for leave to late file will be granted and its reply will be accepted and considered.

On May 7, 2009, Conrail filed a reply to a reply and a motion to accept that filing. Under Board rules at 49 CFR 1104.13(c), a reply to a reply is not permitted. Conrail's May 7, 2009 filing does not add any substance to the record. Therefore, Conrail's motion for acceptance of a reply to a reply will be denied.

## DISCUSSION

Conrail argues that the Board should grant its motion to dismiss or reject CNJ's notice of intent to file an OFA because (1) the deadline for filing an OFA has passed, (2) CNJ does not have the requisite financial responsibility to file an OFA, and (3) there is no realistic likelihood of rail traffic over the line. None of these arguments provides a basis for Board dismissal or rejection.

The deadline to file OFAs has not passed. In the Board's January 7, 2009 decision, the deadline for filing an OFA was tolled until 10 days *after* Conrail provided CNJ with the information required under 49 CFR 1152.27(a). Conrail has not yet provided the required information.

Conrail purported to provide the minimum purchase price for the line in its January 22, 2009 letter to CNJ. Yet the only figure provided by Conrail is, according to the carrier, "based upon an outdated real estate appraisal and a subsequent offer for the same property made by a third party approximately two years ago." Further, the letter states, "Conrail reserves the right to obtain a current appraisal based upon fair market value . . . ." Rather than providing the minimum purchase price, Conrail has provided what it states the minimum purchase price is *not*. Because Conrail has not provided the information required pursuant to 49 CFR 1152.27(a). The deadline for filing an OFA has not been triggered.

Moreover, Conrail is incorrect in arguing that CNJ's failure to file a motion to compel is grounds for terminating the OFA process. Under the Board's OFA rules, "[a]n applicant must provide promptly upon request to a party considering an offer of financial assistance to continue existing rail service, and concurrently to the Board," the minimum purchase price for the line. 49 CFR 1152.27(a)(1)(ii). Because CNJ made a proper request for the information, Conrail had the burden to provide that information in order to re-start the OFA time-period, regardless of whether or not CNJ filed a motion to compel.<sup>2</sup> Conrail has failed to satisfy that burden.

Conrail's remaining arguments are premature. Conrail argues that CNJ does not have the requisite financial responsibility to file an OFA and that there is no realistic likelihood of rail traffic over the line. Those arguments are not ripe for consideration unless and until CNJ files an OFA. Should it do so, CNJ would be required to demonstrate at that time its financial responsibility (see 49 CFR 1152.27(c)(1)(ii)(B)) and that its offer is designed for continued rail service. See January 7, 2009 decision at 2.

As directed below, Conrail must provide CNJ with a minimum purchase price for the line that satisfies the Board's requirements at 49 CFR 1522.27(a). Specifically, Conrail must provide an up-to-date, minimum purchase price for the segments of the line that CNJ has expressed interest in purchasing pursuant to an OFA, including those segments Conrail claims it no longer owns or are involved in a state court settlement. The issues of ownership and financial

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<sup>2</sup> Indeed, as earlier noted, the Board made clear in the first ordering paragraph of the January 7, 2009 decision that it was incumbent upon Conrail to act, not CNJ.

responsibility raised by Conrail will be addressed in a subsequent Board decision if CNJ files an OFA and if the Board determines that CNJ is financially responsible. Once Conrail provides CNJ with the minimum purchase price for the line and certifies to the Board that it has done so, the time period for filing an OFA will be reinstated and will expire 10 days thereafter.

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

It is ordered:

1. Conrail's motion to dismiss or reject CNJ's notice of intent to file an OFA is denied.
2. Conrail is directed to provide CNJ with a minimum purchase price for the line that meets the requirements of 49 CFR 1522.27(a) as discussed in this decision and to certify to the Board that it has done so.
3. The due date for CNJ to file an OFA shall be 10 days after Conrail provides CNJ with a minimum purchase price for the line that meets the requirements of 49 CFR 1522.27(a) as discussed in this decision and files the certification described in ordering paragraph 2 above.
4. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Anne K. Quinlan  
Acting Secretary