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SERVICE DATE – JULY 10, 2009

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-1036

THE CITY OF CHICAGO, ILLINOIS
– ADVERSE ABANDONMENT –
CHICAGO TERMINAL RAILROAD IN CHICAGO, IL

Decided: July 8, 2009

By petition filed on June 10, 2009, the City of Chicago, Illinois (the City) seeks waiver of certain Board regulations and exemption from certain statutory provisions in connection with its proposed filing of a third-party or “adverse” abandonment application. The City will soon file an application for adverse abandonment of two railroad lines in the City owned by the Chicago Terminal Railroad (CTR): (1) the Kingsbury Branch between its point of connection to the Goose Island Branch north of North Avenue and its terminus at the junction of Division and Halsted Streets (the Kingsbury segment); and (2) a portion of the Lakewood Avenue Line between the south right-of-way line of Clybourn Avenue and the terminus of that line at Diversey Parkway (the Lakewood Avenue segment).¹ As discussed below, the waiver requests and exemptions will be granted to the extent warranted.

BACKGROUND

According to the City, the Kingsbury and Lakewood Avenue segments either run parallel to, or are, “for much of their length,” located within the right-of-way of, two city streets – Kingsbury Street and Lakewood Avenue, respectively. The City maintains that adverse abandonment is required because: (1) the properties adjacent to those streets have become largely residential and retail in recent years; (2) there is no present or reasonably foreseeable future need for rail service on the segments;² (3) the City and the local alderman have received

¹ The City states that the Kingsbury and Lakewood Avenue segments are parts of 4.5 miles of rail line not identified by milepost numbers that CTR acquired from Soo Line Railroad Company, d.b.a. Canadian Pacific Railway in December 2006. See Chicago Terminal Railroad – Acquisition and Operation Exemption – Soo Line Railroad Company, d/b/a Canadian Pacific Railway, STB Finance Docket No. 34968 (STB served Dec. 22, 2006).

² Concerning the Lakewood Avenue segment, the City maintains that the only recent user of that segment – Peerless Candy – has gone out of business and that the facilities used by Peerless have been demolished.

(continued . . .)

complaints that the trackage in those streets has caused personal injury and property damage; and (4) the presence of the trackage increases the cost of reconstruction or realignment of those streets.

To facilitate the future filing of its application for adverse abandonment, the City requests the waivers and exemptions at issue here. According to the City, the Board and its predecessor, the Interstate Commerce Commission (ICC), have consistently found that much of the information required in an ordinary (voluntary) abandonment proceeding is largely inapplicable or irrelevant to an application for adverse abandonment. Arguing that this policy applies here, the City requests (1) waiver of various regulations (discussed in detail below) and (2) exemption from the statutory provisions of 49 U.S.C. 10904 concerning offers of financial assistance to avoid abandonment and 49 U.S.C. 10905 concerning offering rail properties approved for abandonment for sale for public purposes.

On June 30, 2009, CTR replied to the City's petition for waiver and exemptions. In its reply, CTR states that it will be opposing any future adverse abandonment application and argues that the merits of the application would be so lacking in light of precedent as to warrant our summarily rejecting the City's waiver petition. CTR concedes that there are presently no customers on either segment but responds that (1) it is actively seeking to develop traffic, (2) the neighborhood has future traffic potential, and (3) the traffic-increasing effects of "climate legislation" and higher fuel prices should be considered. CTR also responds that it is currently using the segments to store surplus cars and that it will need the segments in the future to hold future inbound loads prior to delivery. Concerning the specific waivers and exemptions requested by the City, CTR states that it opposes some of the City's requests and does not object to the others. CTR's specific objections are discussed below.

DISCUSSION AND CONCLUSIONS

We will deny CTR's request that we reject the City's petition for waiver. CTR's request is premature. Its request is based entirely on its allegation that the lines are actually required for rail transportation, an allegation that remains to be heard on the merits of an adverse abandonment application should one be filed. The precedents cited by CTR do not apply here as each of the cited proceedings concerned decisions on their merits, not waiver or exemption

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Concerning the Kingsbury segment, the City maintains that there has been no rail traffic over that segment for many years but that CTR may have recently attempted to head-off an anticipated involuntary abandonment application by a private developer by generating certain limited traffic over the line. According to the City, CTR might have made two such attempts by (1) convincing a wood company to ship a load of firewood over the segment and (2) approaching local community groups and the local alderman's office concerning a plan to run a holiday "Polar Express" passenger train over the segment.

requests.³ While CTR has submitted an affidavit in support of its allegation that the lines are required for rail transportation, the carrier has not shown that its position is so compelling that we should terminate this proceeding before the City has even had an opportunity to file its case-in-chief. Because applications for adverse abandonment are heavily fact-based, it would be inappropriate to deny the City an opportunity to seek exemption and waiver prior to filing its application and to make its case for why the lines are not required by the public convenience and necessity. The appropriate time to evaluate the City's case with respect to the precedent cited by CTR is after the City's case is filed, not in the context of the requested exemptions and waiver. Thus, we will proceed to consider the merits of the City's petition for waivers and exemptions.

Concerning the merits of the City's petition for waiver and exemptions, 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 or unneeded regulations and exempt parties from their underlying statutory provisions.⁴ We will do so here, to the extent indicated below.

Notice of Intent. The City states that it intends to file and publish a notice of the proposed adverse abandonment. Arguing that the wording of the notice of intent prescribed in 49 C.F.R. 1152.21 is inappropriate for adverse abandonment applications, the City requests a waiver of the prescribed form for the notice and proposes instead to use the form of notice set forth in Appendix 2 of its petition. CTR opposes the City's attempt to exclude references to offers of financial assistance under 49 U.S.C. 10904 and environmental and historic provisions but does not object to the remainder of the City's proposed notice.

We will grant the City's request for waiver, with exceptions. The notice of intent in the City's Appendix 2 generally complies with the requirements of 49 C.F.R. 1152.21, and similar relief was granted in Seminole Gulf and St. Joseph County, *supra*. However, because labor protection is mandatory notwithstanding the alleged absence of adversely affected employees,

³ See, e.g., New York City Econ. Dev. Corp.—Adverse Abandonment—New York Cross Harbor R.R. in Brooklyn, NY, STB Docket No. AB-596 (STB served May 12, 2003), *rev'd sub nom. N.Y. Cross Harbor R.R. v. STB*, 374 F.3d 1177 (D.C. Cir. 2004).

⁴ 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); CSX Transportation — Adverse Abandonment — in Shelby County, TN, STB Docket No. AB-1010 (STB served Oct. 10, 2007) (CSXT); Norfolk Southern Railway Company — Adverse Abandonment — St. Joseph County, IN, STB Docket No. AB-290 (Sub-No. 286) (STB served Oct. 26, 2006) (St. Joseph County); Seminole Gulf Railway, L.P. — Adverse Abandonment — in Lee County, FL, STB Docket No. AB-400 (Sub-No. 4) (STB served June 9, 2004) (Seminole Gulf), citing Napa Valley Wine Train, Inc. — Adverse Abandonment — in Napa Valley, CA, STB Docket No. AB-582 (STB served Mar. 30, 2001); and East St. Louis Jct. R.R. Co.—Adverse Abandonment-in St. Clair County, IL, STB Docket No. AB-838 (STB served June 30, 2003) (St. Clair County).

we will require that the notice contain the labor-related provisions in 49 CFR 1152.21. As explained below, we will not be waiving environmental and historic regulations, so we will require that the City also include the environmental and historic provisions as contained in 49 CFR 1152.21. As also explained below, we will not be waiving the trail use and rail banking provisions of 49 CFR 1152.29. Thus, we will require the City to include in its notice of intent the references to trail use as set forth in 49 CFR 1152.21. We will deny CTR's request to require the City to include references to offers of financial assistance, for, as explained below, we are exempting the City from application of these provisions.

Service and Posting. The City has requested us to waive 49 CFR 1152.20(a)(2)(i), which requires service of the notice upon all significant users of the lines, arguing that there are no users of the lines, significant or otherwise.⁵ CTR opposes this request, stating that the lines are necessary for it to serve four shippers on contiguous trackage.⁶ The City also has requested waiver of 49 CFR 1152.20(a)(3), which requires the notice to be posted at each station and terminal along the lines, arguing that there are no stations or terminals along the affected rail lines. CTR does not oppose this request.

Because both of these notice requirements are statutory under 49 U.S.C. 10903(a)(3)(D) and 10903(a)(3)(B), respectively, we would also have to grant exemptions from those statutory provisions to provide the relief the City is seeking. Although the City has not explicitly sought exemptions from those statutory provisions, which are very similar to our corresponding regulations, we may infer that the City also intended to seek the necessary exemptions. See CSXT, at 3.

We will grant exemptions from 49 U.S.C. 10903(a)(3)(D) and 10903(a)(3)(B), except to the extent necessary to require the City to mail a copy of its notice to the four shippers on the contiguous lines that, according to CTR, need the lines for service to them (Big Bay Lumber, Sipi Metals, General Iron, and Finkl Steel). With this exception, regulation under these provisions here is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101. Rather, exemptions 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 adverse abandonment under sections 10903(a)(3)(D) and (a)(3)(B) is not necessary to protect shippers from abuse of market power because the potentially impacted rail shippers must be sent required notice. We will also grant these waiver requests to the same extent for the reasons given by the City.

We will grant the City's request for waiver of 49 CFR 1152.20(a)(2)(xii), which requires service of the notice upon the headquarters of all duly certified labor organizations that represent employees on the affected rail lines. CTR does not oppose this request. According to CTR

⁵ Petitioner does propose to serve the notice on CTR.

⁶ According to CTR, the four customers are Big Bay Lumber, Sipi Metals, General Iron, and Finkl Steel.

(Reply, at 11), its employees are not represented by a duly certified labor organization. Thus, there is no reason to require service on labor organizations in a future adverse abandonment proceeding.

System Diagram Map. The City seeks to waive various regulations pertaining to the System Diagram Map (SDM), in particular: (1) the requirements of 49 CFR 1152.10 to 1152.14, and 49 CFR 1152.24(e)(1) (requiring a carrier to maintain, file and publish a SDM and requiring a line to appear on the SDM for at least 60 days before an abandonment application can be filed for the specific line); and (2) the requirements of 49 CFR 1152.22(a)(5) (requiring reference to inclusion of the line to be abandoned on the SDM, the date when the line was first listed on the SDM, and a copy of the line description which accompanies the carrier's SDM). CTR opposes waiver, arguing (Reply, at 12) that, by expediting the Board's handling of this controversial request, such a waiver would deprive the parties of additional time needed to resolve this matter outside of litigation.

We are not persuaded by CTR's objections to the waiver of SDM requirements. There is more than ample precedent for waiver in the decisions cited herein. Moreover, the Board has an obligation to expedite its handling of proceedings [see 49 U.S.C. 10101(2) and (15)]. CTR does not allege that the parties have been negotiating over the status of the track or that both would like an opportunity to do so. Without any indication that negotiations are taking place or are mutually desired, it would be inappropriate for us to delay this proceeding to allow for them; moreover, even if the parties did mutually desire additional time to negotiate a private resolution to this matter, imposing a costly, unnecessary SDM mapping requirement on the City would not accomplish that goal.

In addition to waiving these SDM regulations, we must also exempt the City from the underlying statutory provision of 49 U.S.C. 10903(c) (2) to provide the relief the City is seeking. An exemption is warranted because 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. 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 adverse abandonment under section 10903(c)(2) is not necessary to protect shippers from the abuse of market power because the potentially impacted rail shippers will receive adequate notice. In addition to exempting the City from the need for complying with 49 U.S.C. 10903(c)(2), we will also waive the SDM regulations as requested because the City does not own the affected lines and cannot amend, file or publish the SDM.⁷

Physical Condition of Line. We will also waive the requirements of 49 CFR 1152.22(b)-(d), which require a description of the present physical condition of the line, estimated deferred

⁷ Waiver of this provision is customary in adverse proceedings because a third party generally does not have access to the system diagram map, as is the case here. See St. Joseph County at 4-5.

maintenance and rehabilitation costs, a description of service performed on the line during the prior year, and computation of the revenues and avoidable costs attributable to the line. CTR does not object to waiver of these requirements. Many of them are not necessary because rail service currently is not being provided over the lines. Moreover, as a third-party applicant, the City states that it is unable to provide any further description of service performed on the lines, revenue and cost data associated with the lines, or the lines' physical condition, and this information generally is not available to a third-party abandonment applicant.

Federal Register Notice. The City further requests that, in view of the waiver requests contained herein, the form of the draft Federal Register notice required by 49 CFR 1152.22(i) be waived. The City proposes instead to use the form of the draft Federal Register notice set forth in Appendix 3 of its petition.

We will grant this request, with certain exceptions, because the Appendix 3 draft Federal Register notice is in substantial compliance with 49 CFR 1152.22(i). The exceptions are the same as those discussed above for the notice of intent and include the labor-related provisions, the environmental and historic provisions, and the trail use and rail banking provisions. The City must include that information in its draft Federal Register notice.

Notice of Consummation. The City has requested a waiver of the abandonment consummation notice requirement in 49 CFR 1152.24(f) and the 1-year authorization limit in 49 CFR 1152.29(e)(2). According to the City, these provisions were not intended for noncarrier parties that, like the City, cannot dismantle the track without first complying with local law to obtain control over the property.

Because the Board needs to know if and when a rail line is removed from its jurisdiction, we will deny the City's request for waiver from the regulation at 49 CFR 1152.24(f) requiring that an applicant file a consummation notice. We will, however, grant the City's request for waiver of the 1-year time limit on abandonment authority specified at 49 CFR 1152.29(e)(2) because the City will not have control over the timing of consummation until it obtains control of the property from the railroad, which potentially involves invocation of other legal process, such as a proceeding under state law. See CSXT at 6-7.

Environmental and Historic Regulations. As requested by CTR, we will deny the City's request to waive the Board's regulations requiring environmental and historic reports. As noted by the Board in St. Joseph County, the Board generally conducts a full environmental and historic review in adverse abandonment cases, and environmental and historic reports give the agency the information necessary to conduct that review. The City has not provided adequate justification for why the reporting requirements should be waived.

Offers of Financial Assistance. We will grant the City's requests for exemption from 49 U.S.C. 10904, which governs offers of financial assistance, and for waiver of the implementing regulations at 49 CFR 1152.27. Concerning the exemption criteria, we find, first, that application of 49 U.S.C. 10904 to the proposed abandonment is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101. If the adverse abandonment were to be granted, the Board would be withdrawing its regulatory authority over the segments by finding

that the public convenience and necessity no longer require or permit their operation as part of the interstate rail network. In this situation, it would be fundamentally inconsistent to negate this finding by providing for further Board regulation under section 10904. See CSXT at 5-6; St. Joseph County at 6; St. Clair County at 4. No policy of 49 U.S.C. 10101 requires the agency to engage in such regulatory inconsistency. Moreover, an exemption from section 10904 would promote the rail transportation policy by expediting regulatory decisions [section 10101(2)] and by reducing a regulatory barrier to an exit from rail service that the agency might find to be consistent with the public convenience and necessity [section 10101(7)]. Secondly, shippers do not need an opportunity to invoke section 10904 here to protect themselves from the abuse of railroad market power because, if the application were to be granted, the Board would be finding that rail service is not needed over these rail segments. For the same reasons supporting granting the exemption, we will also waive the application of 49 CFR 1152.27.

We are not persuaded by CTR's objections to an exemption from the statutory OFA provisions. CTR argues that regulation under these provisions is required because the segments are actually needed for rail transportation and, therefore, an exemption would be contrary to provisions in the rail transportation policy of 49 U.S.C. 10101 favoring the preservation and promotion of continued rail service. This argument, however, is premature. CTR may raise this argument when the agency is considering whether the lines are actually needed for rail service – when the adverse abandonment is being heard on its merits – and such an objection would be fully and fairly considered at that time. But, as explained above, should we find that a grant of adverse abandonment were warranted, it would be fundamentally inconsistent to provide for a process that could result in keeping the rail lines part of the interstate rail network and beyond the reach of state and local authorities.

Sale for Public Use. We will likewise grant the City's requests for an exemption from the provisions of 49 U.S.C. 10905,⁸ which provide for the offering of rail properties approved for abandonment for sale for public purposes, and for waiver of the implementing regulations at 49 CFR 1152.28. CTR does not object to these requests. Should we decide to withdraw our primary jurisdiction over the lines, we would not then allow our jurisdiction to be invoked to impose a public use condition. See CSXT at 6; St. Joseph County at 6; St. Clair County at 4. Specifically, with regard to the exemption criteria, we find, first, that application of 49 U.S.C. 10905 is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101. The City has a prime role in determining the extent, if any, to which the lines can be put to public use. Application of section 10905 to the proposed abandonment would simply delay the public purposes to be sought by the City in filing its application (prevention of injury, easier road reconstruction). By avoiding such needless delay, an exemption would reduce unnecessary Federal regulatory control over the lines [section 10101(2)] and provide for the expeditious handling of this proceeding [section 10101(15)]. Other aspects of the rail transportation policy will not be adversely affected. Secondly, regulation of the proposed third-party application under section 10905 is not necessary to protect shippers from the abuse of market power because, if the application were to be granted, the Board would be finding that rail service over

⁸ This will also relieve the City from compliance with 49 CFR 1152.22(e)(4), which requires submission of public-purpose information in the application.

these segments is not required by shippers. For the same reasons that we are approving the exemption, we will waive the provisions of 49 CFR 1152.28.

Trails Act Conditions. We will not rule on the City's request for waiver of the trail use provisions of 49 CFR 1152.29 at this time. There is no need to take such action now. These provisions would be applicable only if and when the Board grants the City's adverse abandonment application. Therefore, this issue can be addressed, if need be, in a later decision. See Denver & Rio Grande Railway Historical Foundation – Adverse Abandonment – in Mineral County, CO, STB Docket No. AB-1014 at 5 (STB served Oct. 18, 2007); CSXT at 6.

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 exemptions and waivers is granted to the extent described above. The City 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