

SERVICE DATE – OCTOBER 5, 2006

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34909

CSX TRANSPORTATION, INC., NORFOLK SOUTHERN RAILWAY COMPANY,
AND CONSOLIDATED RAIL CORPORATION—JOINT USE AND OPERATION
EXEMPTION

Decided: October 4, 2006

On August 8, 2006, CSX Transportation, Inc. (CSXT), Norfolk Southern Railway Company (NSR), and Consolidated Rail Corporation (Conrail)¹ jointly filed a petition for exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 11323-25 for petitioners to provide for the joint use and joint rail freight operations over 7.69 miles of abandoned rail line of the former Staten Island Railway Corporation (SIRR) in New York and New Jersey lying generally between the Conrail Chemical Coast Line and points on Staten Island, NY.² The line consists of two segments as follows: (a) the North Shore Line between the end of track at milepost 4.6 at Union Avenue east of Arlington Yard, Richmond County, NY, and milepost 7.4, via the Chemical Coast Connector, at the proposed point of switch at the connection between the Chemical Coast Connector and Conrail's Chemical Coast Line in Union County, NJ, a distance of 2.8 miles; and (b) the Travis Branch between milepost 0.00 Arlington Yard Station and milepost 4.41 in Richmond County, a distance of 4.41 miles. Included with the North Shore Line segment are all tracks in Arlington Yard together with lead tracks on both the east and west ends of the yard, the so-called Wye Connector, that provides a direct connection to the Travis Branch from the North Shore Line and a track designated as the

¹ Conrail is jointly controlled by CSX Corporation (CSX) and Norfolk Southern Corporation (NSC). CSX controls CSXT and NSC controls NSR. CSXT and NSR are Class I railroads and Conrail is a Class III railroad.

² See Staten Island Railway Corporation—Abandonment Exemption—in Richmond County, NY, Docket No. AB-263 (Sub-No. 2X) (ICC served July 3, 1990), and Staten Island Railway Corporation—Abandonment, Docket No. AB-263 (Sub-No. 3) (ICC served Dec. 5, 1991). The lines were subsequently acquired by the New York City Economic Development Corporation (NYCEDC) and the Port Authority of New York and New Jersey (Port Authority).

Travis Lead that provides a connection to and from the Travis Branch to the east end of Arlington Yard.³

Petitioners requested expedited consideration of the petition. Notice of the petition's filing and a request for comments was served and published in the Federal Register on August 25, 2006 (71 FR 50500-01). Comments in support were filed by Mayor Michael R. Bloomberg of the City of New York, NYCEDC, and the Port Authority. No comments were filed in opposition.

We will grant the exemption, subject to labor protective conditions, and provide for the exemption to become effective on October 8, 2006.

BACKGROUND

The provision of freight rail service in this proceeding is a component of the Staten Island Railroad Revitalization Project, a joint effort between the Port Authority and NYCEDC to reinstitute rail service over the SIRR after a 15 year hiatus. By this petition, petitioners seek: (1) an exemption permitting them to implement the operations described in the related modified certificate in a manner described in petitioners' operating agreement with NYCEDC; (2) a prior determination that the Board authority granted pursuant to this petition will automatically expire upon termination of the modified certificate; and (3) a determination that the grant of authority under 49 U.S.C. 11323 will not give Conrail any ratemaking, interchange, or other common carrier authority that it currently lacks.

According to petitioners, the joint use agreement will govern their joint use of the line and the coordination of their operations, and will set forth their rights and obligations thereunder. The agreement provides that the line will be operated, maintained, and dispatched by Conrail, and that it will be used by or for the equal, full, and exclusive benefit of CSXT and NSR. CSXT and NSR will have the option of providing service directly or through Conrail and will compete with each other to serve shippers on the line. Initial operations will be for a 10-year term, which is renewable for an additional 10 years.

Petitioners indicate that there are three primary traffic flows anticipated over the line: (1) intermodal traffic moving in blocks assembled by the Howland Hook Marine Terminal/Port Ivory carrier moving to and from Arlington Yard (Howland Hook Traffic); (2) containerized municipal solid waste trains assembled by the Fresh Kills facility carrier to and from the Fresh Kills facility (Fresh Kills Traffic); and (3) mixed merchandise

³ Petitioners concurrently filed a Notice of Modified Certificate of Public Convenience and Necessity to operate the subject line in STB Finance Docket No. 34908, CSX Transportation, Inc., Norfolk Southern Railway Company, and Consolidated Rail Corporation—Modified Rail Certificate. That request was granted by decision served and published in the Federal Register on August 25, 2006 (71 FR 50499-50500).

(including aggregates and paper products) moving to and from two potential customers located on the Travis Branch (Travis Branch Traffic) that may, in the future, construct rail connections from their facilities to the Travis Branch in order to receive direct rail service.

According to petitioners, as currently planned Conrail will move the Howland Hook Traffic and the Travis Branch Traffic between Staten Island and the North Jersey Shared Asset Area⁴ for line haul movement via NSR and CSXT. Conrail will switch the Travis Branch Traffic directly from the relevant customer's facilities, if and when it develops, between Staten Island and the North Jersey Shared Asset Area for line haul movement via NSR and CSXT. NSR and/or CSXT at a future time will likely provide service to the Fresh Kills Traffic and the Howland Hook Traffic directly, as that traffic is expected to move in unit train volumes.

Mayor Bloomberg supports the reactivation of the SIRR and stresses that this project is of great importance to the City. The project, he believes, will reduce Staten Island truck traffic, allow the New York Container Terminal to grow and provide much needed employment at the port, offer low-cost rail transportation for businesses on the Travis Branch, and enable the Fresh Kills Transfer Facility to fulfill its function.

NYCEDC also supports petitioners' request for approval of the exemption and for expedited consideration. Commenter states that approval of the petition will be the last stage of the reactivation project in order for rail service to resume and it believes that all work on the right-of-way will soon be completed.

The Port Authority states that restoring freight service to Staten Island is vitally important to it and the region it serves. According to commenter, intermodal service is a fundamental component of port operations and, for over a decade, it has pursued an aggressive program to increase shipments of marine containers by rail. Commenter adds that a key element of the Port Authority's rail program is to provide dedicated on-dock/near-dock intermodal terminals for each of its major marine container facilities. It states that one of its most important challenges is to reactivate rail service to the Howland Hook Marine Terminal, which is the premier container facility in New York State, the only marine container terminal in New York City, and the largest private employer on Staten Island, with potential direct rail access to the national network. The Port Authority also believes that reactivation of the SIRR is critical to reducing area highway congestion.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 11323(a)(6), prior Board approval is required for the joint use and operation proposed here. Under 49 U.S.C. 10502(a), however, we must exempt a transaction or service from regulation when we find that: (1) regulation is not necessary

⁴ This area was established in CSX Corp. et al.—Control—Conrail Inc. et al., 3 S.T.B. 196, 228 (1998).

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 needed to protect shippers from the abuse of market power.

Detailed scrutiny of the proposed transaction under 49 U.S.C. 11323-25 is not necessary to carry out the RTP. By minimizing the administrative expense of considering the proposed transaction, an exemption will expedite regulatory decisions, allow competition and the demand for services to establish reasonable rates for transportation, and reduce barriers to entry and exit [49 U.S.C. 10101(1), (2), and (7)]. In addition, the transaction will help promote a safe and efficient rail transportation system, ensure the development and continuation of a sound rail transportation system, foster sound economic conditions, and permit the operation of transportation facilities and equipment without detriment to the public health and safety [49 U.S.C. 10101(3), (4), (5), and (8)]. Other aspects of the RTP will not be adversely affected.

Regulation of the transaction is not necessary to protect shippers from the abuse of market power. CSXT and NSR, the two Class I railroads, will compete to provide service to the shippers on the line. NSR and CSXT will each individually have the option of directly serving shippers or having that service performed by Conrail, whichever is more efficient. Shippers will have the option of receiving full service from either CSXT or NSR and the ability of NSR and CSXT individually to serve each shipper will prevent an abuse of market power. Given our market power finding, we need not also determine whether the proposed transaction is limited in scope.

Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a carrier of its statutory obligation to protect the interests of employees. Here, petitioners request that the Board impose the employee protective conditions in Norfolk and Western Ry. Co.—Trackage Rights—BN, 354 I.C.C. 605 (1978), as modified in Mendocino Coast Ry., Inc.—Lease and Operate, 360 I.C.C. 653 (1980). In support, petitioners state that no railroad employees will provide operations over the line before operations commence under the Modified Rail Certificate authorized in STB Finance Docket No. 34908; that there will not be an integration of forces maintaining, dispatching or operating the line; that employees working on the line will be subject to management only by their existing employers; and that there are no railroad employees of NYCEDC and the Port Authority, the line's owners, to be protected. Accordingly, as a condition to granting the exemption, the Board will impose the above-noted employee protective conditions.

This proceeding is exempt from environmental reporting requirements under 49 CFR 1105.6(c) and from historic reporting requirements under 49 CFR 1105.8. The Board's Section of Environmental Analysis (SEA) contacted the attorney for petitioner Conrail who verified that proposed operations over the line would be one train per day for the reasonably foreseeable future. Thus, because this transaction would not exceed the thresholds established in 49 CFR 1105.7(e)(4) or (5), or result in physical alterations to rail property, SEA has concluded that no environmental or historic reporting is required.

Finally, in requesting expedited consideration, petitioners state they have been advised by NYCEDC that the line should be ready for rail service to commence on or about October 1, 2006. Petitioners request expedited action in order to meet the desires of NYCEDC and the Port Authority, and for the operations to begin in an efficient and smooth manner. Under the circumstances cited by petitioners, the request for expedited action is reasonable. Accordingly, this decision is being issued on an expedited basis and the exemption will be made effective on October 8, 2006, rather than the normal 30 days after service of the decision.

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

It is ordered:

1. Under 49 U.S.C. 10502, we exempt the above-described transaction from the prior approval requirements of 49 U.S.C. 11323-25, subject to the employee protective conditions in Norfolk and Western Ry. Co.—Trackage Rights—BN, 354 I.C.C. 605 (1978), as modified in Mendocino Coast Ry., Inc.—Lease and Operate, 360 I.C.C. 653 (1980).

2. Notice will be published in the Federal Register on October 11, 2006.

3. This exemption will be effective on October 8, 2006. Petitions to reopen must be filed by October 25, 2006.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, Commissioner Buttrey.

Vernon A. Williams
Secretary