

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 32 (Sub-No. 100)

BOSTON AND MAINE CORPORATION AND SPRINGFIELD TERMINAL
RAILWAY COMPANY—ADVERSE DISCONTINUANCE—NEW
ENGLAND SOUTHERN RAILROAD CO., INC.

Decided: April 29, 2010

On June 19, 2009, Boston and Maine Corporation (B&M) and Springfield Terminal Railway Company (ST) (collectively, Pan Am),¹ filed an application under 49 U.S.C. § 10903 asking the Board to find that the public convenience and necessity (PC&N) require or permit the third-party, or “adverse,” discontinuance of operating authority² of New England Southern Railroad Co., Inc. (NES), over approximately 27 miles of a B&M rail line (the Line) in central New Hampshire.³ Comments were filed by NES and the State of New Hampshire Department of Transportation (NHDOT) on August 28, 2009, and Pan Am filed a reply on September 14, 2009. For the reasons set forth below, we will grant Pan Am’s application.

BACKGROUND

The Line extends over Pan Am’s New Hampshire Main Line between milepost 56.00 at Manchester and milepost 80.68 at Penacook, N.H., and includes a 0.49-mile segment of the former line of Claremont and Concord Railroad, extending from the switch with the New Hampshire Main Line at valuation station 1839+42.15 to valuation station 41+98, and a track for interchange in B&M’s yard at Manchester.⁴ At milepost 73.72 in Concord, N.H., the Line

¹ B&M and ST are subsidiaries of Pan Am Railways, the former Guilford Rail System.

² An adverse discontinuance application seeks a Board finding that the PC&N requires or permits the discontinuance of service by a carrier over a line of railroad, when that application is filed by someone other than that carrier. Such filings are also known as third party applications and are termed adverse because they are often, though not always, opposed by the carrier holding the authority to operate.

³ Notice was served and published at 74 Fed. Reg. 34,625 (July 16, 2009.)

⁴ Pan Am had also included in its August 8, 2007 petition for exemptions and waivers a 1.17-mile line segment extending from the switch with the New Hampshire Main Line at milepost B-73.72 to milepost C-1.17 (valuation station 56+75) in Concord. At NHDOT’s request, the Board directed Pan Am to clarify its ownership and control of that line segment. On May 22, 2009, Pan Am responded that B&M had sold the line segment to NHDOT in 1998.

connects with the White Mountain Line, which extends north approximately 73 miles to Lincoln, N.H., and is not otherwise connected to the interstate rail system. The White Mountain Line is owned by the NHDOT and, pursuant to a freight operating agreement, has been operated by NES since 1982 under a modified rail certificate. Plymouth & Lincoln Railroad (P&LR), which is located in Lincoln, operates over a portion of the White Mountain Line under a tourist excursion operating agreement and also runs a business restoring and repairing railroad equipment for customers throughout the region.

NES has been operating the Line under a 10-year lease (Lease) that the parties entered into on January 14, 1985. Either party was given the right to terminate the Lease once the initial 10-year term expired by serving 90 days' written notice on the other party. On April 27, 2007, Pan Am sent NES written notice of termination, effective on or about August 1, 2007, stating that it would operate the Line under its own operating plan.⁵

In its application, Pan Am claims that it terminated the Lease because its relationship with NES had deteriorated significantly as a result of numerous disputes "relating to the payment of invoices and the condition of the Subject Line." See Application at 3-4. According to Pan Am, NES refused to cease operations and surrender its operating authority voluntarily and commenced court actions to recover revenues allegedly due it. Pan Am claims that it met with NES on several occasions in an effort to resolve their differences, but that NES refused to seek discontinuance. To pursue the legal remedies necessary to terminate the Lease and evict NES, Pan Am indicates that an adverse discontinuance is needed to remove NES's interest in the Line from Board jurisdiction.

Pan Am states it will integrate the Line into its existing system and its closely controlled regional rail operations. The elimination of the interchange with NES at Manchester, according to Pan Am, will lead to more efficient service and reduced transit times for the Line's shippers. Pan Am claims that it is committed to working with NES to achieve a smooth transition of operations once the Lease is terminated, and that it is intent on providing service on a consistent basis that will meet and exceed the service needs and demands of this growing region of New Hampshire. To this end, Pan Am states that: (1) it will operate one crew on a 5-day-a-week basis; (2) the crew will be headquartered in Concord, where approximately 1,700 cars were interchanged with NES in 2006; (3) it will serve customers between Concord and Manchester as well as remaining customers in Manchester; (4) the crew's workday will be coordinated around customer needs; and (5) it will coordinate inbound and outbound traffic with main line trains to provide seamless movement of traffic from connections to customers.

⁵ In a decision served on February 12, 2008, the Board granted Pan Am exemptions from the notice posting requirements of 49 U.S.C. § 10903(a)(3)(B) and the offer of financial assistance (OFA) requirements of 49 U.S.C. § 10904; waivers from the information requirements of 49 C.F.R. § 1152.22(c), (d), and (e), the environmental documentation and historic reporting requirements of 49 C.F.R. §§ 1105.6(c)(2)(ii) and 1105.8(b)(1), the notice posting requirements of 49 C.F.R. § 1152.20(a)(3), and the OFA requirements of 49 C.F.R. § 1152.27; and a partial waiver from the notice posting requirements of 49 C.F.R. § 1152.20(a)(2).

DISCUSSION AND CONCLUSIONS

A. Legal Standard

The statutory standard governing a discontinuance of service is whether the present or future PC&N require or permit the proposed action. See 49 U.S.C. § 10903(d). It is well-established that the Board may consider an adverse application to discontinue service, so long as the applicant establishes that it has a proper interest in the proceeding.⁶ In implementing this statutory standard in an adverse proceeding, we consider the relative burdens that continuation of service on the one hand, and cessation of service on the other hand, would have on the involved carrier, the owner-lessor of the line, and the public. In an adverse discontinuance, the burden of proof is on the applicant. See, e.g., Cheatham.

We have exclusive and plenary jurisdiction over rail line discontinuances.⁷ In an adverse discontinuance case, if we conclude that the PC&N does not require or permit a carrier's continued operation over the line, our decision removes the shield of our jurisdiction, enabling the applicant to pursue other legal remedies, if necessary, to force the carrier off the line.⁸ A grant of adverse discontinuance authority does not, by itself, dispossess the incumbent carrier. It may continue to operate until there is an adverse state court judgment against it or until it voluntarily ceases to operate.⁹

B. PC&N Analysis

NES recognizes Pan Am's right to terminate the Lease and, as such, states that it does not oppose the adverse discontinuance. However, it attributes the parties' deteriorated relationship to PanAm.

NES also expresses concern that rail service may not be adequate once ST begins operating the Line. Contending that ST's service to and from the current NES-ST interchange at Manchester recently has declined from 5 to 2-days-a-week or less, NES claims that rail service is required at least three times a week to ensure that shippers on the Line and the White Mountain

⁶ See, e.g., Fore River R.R. Corp.—Discontin. Exemp.—Norfolk County, Mass., 8 I.C.C.2d 307 (1992) (Fore River); Cheatham County Rail Auth. “Application and Petition” for Adverse Discontin., Docket No. AB 379X (ICC served Nov. 4, 1992) (Cheatham); Jacksonville Port Auth.—Adverse Discontin.—in Duval County, Fla., Docket No. AB 469 (STB served July 17, 1996); Tacoma Eastern Ry. Co.—Adverse Discontin. of Opers. Applic.—Line of the City of Tacoma in Pierce, Thurston and Lewis Counties, Wash., Docket No. AB 548 (STB served Oct. 16, 1998).

⁷ See Modern Handcraft, Inc.—Aban., 363 I.C.C. 969, 972 (1981) (Modern Handcraft).

⁸ See Chelsea Prop. Owners—Aban.—Consol. R. Corp., 8 I.C.C.2d 773, 709 (1992), aff'd sub nom. Consol. Rail Corp. v. ICC, 29 F.3d 706 (D.C. Cir. 1994), 29 F.3d at 709; Modern Handcraft, 363 I.C.C. at 972.

⁹ See Modern Handcraft, 363 I.C.C. at 972.

Line will continue to use rail service, and to enable ST and NES to attract new traffic to their lines. NES emphasizes that it, as well as shippers located on the White Mountain Line and the State of New Hampshire, “have a strong vested interest in the adequacy of ST's services going forward.” See NES Comment at 9.

NES also expresses concern as to whether Pan Am will agree to an appropriate new interchange near the connection of the Line and the White Mountain Line. NES states that the interchange issue should be settled before there is a change in operators and that adequate facilities, suitable for a future NES-ST interchange, exist in B&M's Concord Yard. NES notes that discussions on an interchange have yet to take place and asks the Board to watch over the execution of Pan Am's plan to remove NES and install ST in NES's place, and to be mindful of Pan Am's service level representations.

NHDOT states that regular, dependable freight service to Concord is of great importance to the future viability of the state-owned line and the two businesses that currently rely on it: P&LR, which depends on the White Mountain Line for a rail connection; and 3M Company, a small volume shipper that requires rail service for its manufacturing process. In this regard, NHDOT claims that the revenues NES has realized from operating the Line have allowed it to operate and maintain the White Mountain Line. To assure the White Mountain Line's continued viability and dependable service to NES and to current and future shippers, NHDOT requests that the Board condition a grant of discontinuance authority on requiring Pan Am to provide regular interchange at B&M's Concord Yard, where there is a passing siding. NHDOT contends that this is the most feasible location for interchange and requests that the Board require the operating railroads to facilitate interchange on the existing lease track.

We find that the PC&N supports the proposed grant of discontinuance authority and will grant Pan Am's application. Pan Am has terminated the Lease with NES, asserting that their relationship has deteriorated significantly in the last few years. NES has not challenged Pan Am's right to terminate the Lease or its proper exercise of that right, notwithstanding that NES strongly disagrees with Pan Am's stated justifications for doing so.

The proposed adverse discontinuance is unopposed. Granting the proposed discontinuance should not result in a serious adverse impact on shippers and the community. Pan Am plans to integrate the Line into its existing system and states that it is: 1) committed to working with NES to achieve a smooth transition and to establish conditions that support present and reasonably foreseeable traffic levels; (2) intent on meeting and exceeding the service needs and demands of this region of New Hampshire; and (3) committed to an operating plan that, if adequately supported, will improve on the Line's current level of service.

Pan Am has a statutory obligation to provide adequate service and states that it is intent on providing service on a consistent basis that will meet and exceed the service needs and demands of the affected area. We will hold Pan Am to its assurances. In the event it fails to live up to its statutory obligation to provide adequate service, we will promptly consider requests for appropriate corrective action. See 49 U.S.C. §§ 10907, 11102, and 11123.

Pan Am also opposes a condition obligating it to interchange White Mountain Line traffic with NES at the Concord Yard. It contends that the concerns expressed by NES and NHDOT are unfounded given that approximately two cars per month were interchanged in 2008. Pan Am notes that it has not operated over the Line in over 20 years and argues that it would be unreasonable to allow NHDOT to select an interchange before Pan Am has had the opportunity to assess the condition of the Line and the passing siding. Pan Am argues that it should be permitted to negotiate with NES in good faith over an appropriate interchange and insists that it will work with NES to establish conditions that support present and reasonably foreseeable traffic levels.

Given that Pan Am has not operated over the Line in over 20 years and its statutory obligation to provide reasonable facilities for the interchange of traffic, see 49 U.S.C. § 10742, we will give Pan Am the opportunity to negotiate with NES over an appropriate interchange. Accordingly, we will deny NHDOT's request for a condition requiring Pan Am to establish an interchange at the Concord Yard. If there is difficulty in reaching an interchange agreement, the parties are encouraged to promptly bring the matter to the Board for resolution.

C. Other Issues

As noted, this adverse discontinuance was previously exempted from the OFA provisions of 49 U.S.C. § 10904 pursuant to a request by Pan Am. The exemption request was unopposed, and the Board found no need for the OFA provisions, because Pan Am would continue to provide rail service if it were to prevail on its adverse discontinuance application. Accordingly, OFAs will not be entertained. Similarly, because the Line will continue to be used for rail service, interim trail use/rail banking requests pursuant to section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d), and public use requests pursuant to 49 U.S.C. § 10905 are not appropriate and will not be entertained.

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

We find:

1. The present and future PC&N requires or permits the discontinuance of operations by NES over the above-described line of railroad, subject to the employee protective conditions set forth in Oregon Short Line R. Co.—Aban.—Goshen, 360 I.C.C. 91 (1979).
2. Discontinuance of operations by NES will not result in a serious, 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. Pan Am's adverse discontinuance application is granted.
2. NHDOT's request for a condition requiring Pan Am to provide interchange at B&M's Concord Yard is denied.
3. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.