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SERVICE DATE – OCTOBER 10, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-1010

CSX TRANSPORTATION, INC.—ADVERSE ABANDONMENT—IN SHELBY COUNTY,  
TN

Decided: October 9, 2007

This decision grants in part and denies in part exemption and waiver requests related to a third-party or “adverse” abandonment application petitioner intends to file.

In a petition filed on April 26, 2007, Memphis Community Connector (MCC or petitioner) seeks exemptions from several statutory provisions and waivers of certain Board regulations in connection with its intended filing of a third-party application for the adverse abandonment of an approximately 13.34-mile line of railroad (Line) in Shelby County, TN. Petitioner included a draft notice of intent and a draft Federal Register notice with its petition. In a letter filed on May 25, 2007, the Shelby County Government of Shelby County, TN (Shelby County), filed a notice of its intent to join this proceeding as a co-petitioner with MCC.

On June 26, 2007, CSX Transportation, Inc. (CSXT), the owner of the Line, filed a reply.<sup>1</sup> CSXT opposes nearly all of petitioner’s exemption and waiver requests.

BACKGROUND

The Line runs through a growing part of Memphis. According to petitioner, there are no stations on the Line, and no employees would be affected by abandonment of the Line because it has been out of service since March 1, 2001, when CSXT embargoed the Line to avoid unsafe operations over two bridges. See Bolen-Brunson-Bell Lumber Company, Inc. v. CSX Transportation, Inc., STB Finance Docket No. 34236 (STB served May 15, 2003). Shortly after the embargo, CSXT sought authority to abandon the Line, but its petition for exemption was denied by the Board based on the opposition of four shippers on the Line and CSXT’s failure to provide adequate supporting documentation. See CSX Transportation, Inc.—Abandonment

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<sup>1</sup> In a decision served on June 21, 2007, the Board extended the filing date for replies until June 26, 2007, to eliminate any confusion that may have been caused by petitioner’s error in naming CSX Corporation (CSXC), CSXT’s parent company, in the caption of its petition, rather than CSXT. On May 16, 2007, CSXC had filed a reply to the petition, which, by pleading filed on June 26, 2007, CSXT adopted as its own reply.

Exemption—(Between Memphis and Cordova) in Shelby County, TN, STB Docket No. AB-55 (Sub-No. 590X) (STB served Dec. 12, 2001) (Abandonment Denial).

In 2002, CSXT sought and obtained discontinuance authority for the entire Line in two separate proceedings. See CSX Transportation, Inc.—Discontinuance Exemption—(Between East of Memphis and Cordova) in Shelby County, TN, STB Docket No. AB-55 (Sub-No. 615X) (STB served July 17, 2002); CSX Transportation, Inc.—Discontinuance—at Memphis, in Shelby County, TN, STB Docket No. AB-55 (Sub-No. 618) (STB served Oct. 28, 2002). Petitioner claims that, since the embargo and discontinuance of service over the Line, CSXT has not maintained the Line and that the Line's condition has degraded to the point that rehabilitation to return it to service would be extensive and costly and would require the replacement of at least one bridge. Petitioner states that its intended use for the Line is to provide pedestrian and bicycle trails to the citizens of the growing Memphis suburbs, which Shelby County supports.

#### DISCUSSION AND CONCLUSIONS

The Board's regulations require that abandonment applications conform to the requirements of 49 CFR 1152, Subpart C. When appropriate, however, such as the filing of a third-party or adverse abandonment application, the Board may waive inapplicable and unneeded provisions. See Napa Valley Wine Train, Inc.—Adverse Abandonment—in Napa Valley, CA, STB Docket No. AB-582 (STB served Mar. 30, 2001), and cases cited therein. Petitioner seeks exemptions and waivers with respect to its notice of intent, adverse abandonment application and consummation in the event abandonment authority is granted. The specific exemption and waiver requests are discussed below.

CSXT argues that there are two main differences between this case and those cited by petitioner in support of its exemption and waiver requests. First, CSXT argues that 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), cited by petitioner, is distinguishable because the railroad in that case did not oppose the proposed third-party abandonment as CSXT does here. However, in that case, the railroad and another entity that proposed to acquire the line still opposed some of the applicants' exemption and waiver requests, which is what is at issue in this decision.

Second, CSXT argues that, unlike the applicants in St. Joseph, MCC is an unknown entity. However, Shelby County has joined MCC as co-petitioner for the express purpose of addressing CSXT's concern over MCC's status, and supports MCC's intention of providing pedestrian and bicycle trails to the citizens of Memphis suburbs.<sup>2</sup> With Shelby County joining MCC, the status of the petitioner is not an issue that may support distinguishing petitioner's exemption and waiver requests from those in St. Joseph or other cases.

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<sup>2</sup> On June 14, 2007, Mr. Thad Howard filed a letter opposing the proposed abandonment, expressing his concerns over MCC's intentions for the Line.

Notice of Intent.

Petitioner requests waiver of 49 CFR 1152.20(a)(2)(i), which requires service of the notice of intent on significant users of the line. Petitioner states that there are no known current users of the Line, but that it will notify the last four shippers on the Line. CSXT contends that this notice requirement is statutory, under 49 U.S.C. 10903(a)(3)(D), and that, because petitioner has not sought an exemption from this statutory provision, the request should be denied.

Although petitioner did not explicitly seek an exemption from section 10903(a)(3)(D), as the statutory provision is virtually identical to the regulation at 49 CFR 1152.20(a)(2)(i), it may be implied that an exemption request also was intended. In this case, it would serve little purpose to have petitioner re-file simply to add that it also is seeking an exemption for equivalent statutory language or to deny an otherwise reasonable request. Therefore, the waiver request will be granted, as well as the corresponding exemption, as their application to this transaction is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101. Moreover, an exemption will promote that policy by eliminating unnecessary procedures and by expediting regulatory decisions. Petitioner, as proposed, should serve notice upon the four shippers identified in the earlier abandonment proceeding.

Petitioner requests waiver of 49 CFR 1152.20(a)(3), which requires posting of a copy of the notice of intent at each agency station and terminal on the line to be abandoned. Petitioner states that there are no agency stations or terminals on the Line. CSXT, however, alleges that there is an inactive station on the Line and that it requires notice, and again argues that petitioner has failed to request an exemption for the corresponding statutory provision, at 49 U.S.C. 10903(a)(3)(B). As discussed above, the exemption request may be implied. Moreover, as there have been no shippers or employees on the Line for some time, requiring notice at the admittedly “inactive” station is unnecessary. Therefore, the waiver request will be granted, as will a corresponding exemption, for the same reasons discussed above.

Petitioner requests a waiver of 49 CFR 1152.20(a)(2)(xii), which requires service of the notice of intent on the headquarters of all duly certified labor organizations that represent employees on the affected line. Petitioner claims that there are no known railroad employees who would be affected by the proposed abandonment because there has been no rail service for over 6 years. CSXT argues that petitioner should have to provide notice anyway because it is not burdensome and the conditions that may be imposed by abandonment might create some rights in the employees. However, CSXT does not identify any such employees. Thus, the waiver request will be granted because there are no known railroad employees and compliance with the requirement is unnecessary.

Petitioner also seeks a waiver of the requirements of 49 CFR 1152.21, which prescribes the form of the notice of intent. Petitioner argues that it contains wording inappropriate for adverse abandonment proceedings. Petitioner proposes to use a modified form of notice that appears as Attachment A to its petition. CSXT objects to the request, arguing that the notice of intent is what alerts the public to the opportunity for public use, offers of financial assistance

(OFA) and trail use. CSXT further objects that the proposed form of notice fails to notify the public of an “inactive” station on the line or to protect employees that may be affected by the abandonment. CSXT’s objections follow its opposition of petitioner’s exemption and waiver requests.

The Board has approved form changes in other cases. See East St. Louis Junction Railroad Company—Adverse Abandonment—in St. Clair County, IL, STB Docket No. AB-838 et al., slip op. at 6-7 (STB served June 30, 2003) (St. Clair); St. Joseph at 3. Here, petitioner’s proposed notice of intent is acceptable, except, as discussed below, petitioner’s request for waiver of the Board’s trail use regulations will be denied, and, therefore, petitioner must retain all trail use language used in the form of notice under 49 CFR 1152.21.

CSXT further objects to petitioner’s language in the proposed notice as improperly referring to its adverse abandonment application as “an application to compel the abandonment.” CSXT argues that petitioner diverges from the form of notice approved in St. Joseph. It points out that the form of notice approved in St. Joseph referred to the adverse abandonment application as “an application seeking the adverse abandonment.” Petitioner’s language in its proposed form of notice does not appear to be technically accurate, as the Board does not compel a railroad to abandon its line, but rather approves abandonment, which then, with the shield of the Board’s authority removed as a result of that approval, may be used to compel the railroad to transfer the line under state eminent domain laws or other laws for that purpose. Thus, petitioner is directed to modify its form of notice of intent to use language similar to that used by petitioners in St. Joseph, in describing the proposed adverse abandonment application in this proceeding.

Petitioner requests waiver of the requirements of 49 CFR 1152.22(i), which prescribes the wording for the draft Federal Register notices that applicants must submit to the Board. Petitioner states that the wording is inappropriate for adverse abandonment applications. Instead, petitioner proposes to use the alternative language in its Attachment B, which is similar in content to petitioner’s proposed notice of intent. The Federal Register notice in petitioner’s Attachment B is in substantial compliance with the requirements of 49 CFR 1152.22(i), except that it also must reflect the modifications to petitioner’s proposed notice of intent required above. For the same reasons that apply to the form of the notice of intent, the waiver request pertaining to 49 CFR 1152.22(i) will be granted, subject to petitioner also making the above conforming modifications to its proposed Federal Register notice.

#### Contents of Application.

Petitioner requests waivers of 49 CFR 1152.10-14 and 49 CFR 1152.24(e)(1), which relate, among other things, to filing, amending, and providing notice to the public of prospective abandonments through a carrier’s system diagram map (SDM), and which establish a 2-month waiting period between amendments of the SDM and the filing of a corresponding abandonment application. CSXT again argues that the requirements concerning the SDM are also statutory under 49 U.S.C. 10903(c)(2), and that, because petitioner has not sought an exemption from

these requirements, the Board should reject the waiver requests. As discussed above, the requirements under the statute and regulation are the same, and, for the reasons stated above, the Board will treat the petition as one including a request for exemption from section 10903(c)(2). The information necessary to produce the SDM generally is not available to adverse abandonment applicants. Moreover, 49 CFR 1152.10-14 are directed to rail carriers. MCC is not a rail carrier. For these reasons, these waiver and exemption requests will be granted.

Petitioner requests waivers of 49 CFR 1152.22(a)(4) and (5), which require submission of a detailed map of the subject line and reference to the carrier's SDM. Although petitioner contends that it cannot obtain this information, it states that it intends to submit a map of the Line with its application containing as much of the information required by 49 CFR 1152.22(a)(4) as it can obtain. CSXT opposes the request for waiver from 49 CFR 1152.22(a)(4), contending that it is not onerous to submit a detailed map and that such maps may be obtained from map services. It also points out that a map of the Line was filed in Abandonment Denial. In the past, this requirement often has been waived in adverse abandonment proceedings because the applicant, unlike the railroad, may not have access to such a map. See St. Joseph at 4; St. Clair at 5. Here, however, petitioner has access to a map. Therefore, its waiver request regarding the requirements of 49 CFR 1152.22(a)(4) will be denied, except that petitioner may exclude information that is solely in the control of CSXT or may be unduly burdensome to obtain. The request to waive 49 CFR 1152.22(a)(5), which requires a party to identify when a line was first placed on the rail carrier's SDM, will be granted.

Petitioner also seeks waivers of 49 CFR 1152.22(b)-(d), which require that abandonment applications include information regarding the current physical condition of the line, the service performed on it, and the revenue and cost data attributable to it. Petitioner asserts that it lacks the necessary information. But CSXT argues that, if petitioner is going to use the condition of the Line to support its abandonment application, then it should have to submit evidence of the physical condition of the property, as required under section 1152.22(b). Because petitioner intends to use the condition of the Line to support its application, the request to waive section 1152.22(b) will be denied. The waiver request as to sections 1152.22(c) and (d) will be granted, however, because that information generally is not available to a third-party abandonment applicant.

#### Public Use, Trail Use, and Offers of Financial Assistance Conditions.

Petitioner seeks waivers of 49 CFR 1152.27-29, the Board's procedures for OFAs, public use, and interim trail use, and it seeks exemptions from the OFA requirements of 49 U.S.C. 10904 and the public use procedures of 49 U.S.C. 10905. Petitioner contends that these provisions serve no useful purpose here because it intends to acquire the right-of-way for interim trail use, pursuant to 16 U.S.C. 1247(d) and 49 CFR 1152.29. It further contends that these procedures are not necessary to carry out the rail transportation policy of 49 U.S.C. 10101.

CSXT opposes the OFA exemption and waiver requests as premature. However, the purpose of the third-party abandonment proceeding is to withdraw the Board's primary

jurisdiction so as to permit state, local or other federal law to apply where there is no overriding federal interest in interstate commerce. See Kansas City Pub. Ser. Frgt. Operations—Exempt—Aban., 7 I.C.C.2d 216, 225 (1990); Modern Handcraft, Inc.—Abandonment, 363 I.C.C. 969, 972 (1981). Absent an exemption, section 10904 could provide a vehicle for someone to invoke agency processes that the Board has determined are not necessary or appropriate. If the Board ultimately finds that the public convenience and necessity require or permit withdrawal of its regulatory authority in this adverse abandonment proceeding, it would be fundamentally inconsistent to provide for further Board regulation under section 10904, and thereby negate the Board's decision. See St. Joseph at 6; St. Clair at 4.

Moreover, a grant of an exemption from section 10904 does not affect the merits of an application. Under the circumstances presented here, a grant of an adverse abandonment or discontinuance would be frustrated if section 10904 could be invoked in an effort to continue active rail service. If the application fails, the exemption would be mooted. Accordingly, the request for exemption from 49 U.S.C. 10904 and waiver of the related regulations at 49 CFR 1152.27 will be granted.

Likewise, the exemption from the public use provisions of 49 U.S.C. 10905 and waiver of the implementing regulations at 49 CFR 1152.28 also will be granted. Again, should the Board decide to withdraw its primary jurisdiction over the Line, it should not then allow its jurisdiction to be invoked to impose a public use condition.

Petitioner also asks the Board to waive the trail use provisions of 49 CFR 1152.29. CSXT questions whether this request makes sense given that petitioner is seeking to use the Line for trail use. CSXT also argues that the Board's exemption authority does not convey jurisdiction to the Board to exempt a proceeding from the interim trail use statute. However, the trail use waiver request need not be resolved at this point. As the Board has done in past decisions, see St. Joseph at 6-7, and because the Board can address the issue, if need be, in a later decision, and because petitioner states that it is interested in acquiring the right-of-way for interim trail use, the request for a waiver of the regulations at 49 CFR 1152.29 will be denied.

#### Notice of Consummation.

Finally, petitioner requests waiver of the regulations at 49 CFR 1152.24(f) and 49 CFR 1152.29(e)(2) pertaining to notice of consummation. Petitioner contends that waiver of these regulations is warranted because, if the application is granted, it cannot consummate abandonment of the Line until it obtains control of the property in state court, the timing of which can vary. CSXT opposes the requests, arguing that such notice is made and extended easily.

Because the Board needs to know if and when a rail line is removed from its jurisdiction, waiver from the regulation at 49 CFR 1152.24(f) requiring that applicant file a consummation notice will be denied. If abandonment approval is obtained, the applicant must notify the Board when the transaction is consummated. However, petitioner's request for waiver of the 1-year

time limit on abandonment authority specified at 49 CFR 1152.29(e)(2) will be granted given that the petitioner 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.

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 in part and denied in part, as described above.

2. This decision is effective on its service date.

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey. Vice Chairman Buttrey did not participate.

Vernon A. Williams  
Secretary