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SERVICE DATE – DECEMBER 15, 2006

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 647

CLASS EXEMPTION FOR EXPEDITED ABANDONMENT PROCEDURE
FOR CLASS II AND CLASS III RAILROADS

Decided: December 12, 2006

On May 15, 2003, sixty-five shortline and regional carriers (Petitioners)¹ filed in essence a petition for rulemaking and institution of a proceeding under 49 U.S.C. 10502 to exempt a class of small carriers from the prior approval requirements for abandonments under 49 U.S.C.

¹ The sixty-five carriers are: Allegheny & Eastern Railroad, Inc.; Bradford Industrial Rail, Inc.; Buffalo & Pittsburgh Railroad, Inc.; Carolina Coastal Railway, Inc.; Commonwealth Railway, Inc.; Chicago SouthShore & South Bend Railroad; Chattahoochee & Gulf Railroad Co., Inc.; Connecuh Valley Railroad Co., Inc.; Corpus Christi Terminal Railroad, Inc.; The Dansville & Mount Morris Railroad Company; Eastern Idaho Railroad, Inc.; Genesee & Wyoming Railroad Company; Golden Isles Terminal Railroad, Inc.; H&S Railroad Co., Inc.; Illinois Indiana Development Company, LLC; Illinois & Midland Railroad Company, Inc.; Kansas & Oklahoma Railroad, Inc.; Knoxville & Holston River Railroad Co., Inc.; Lancaster and Chester Railway Company; Laurinburg & Southern Railroad Co., Inc.; Louisiana & Delta Railroad, Inc.; Louisville & Indiana Railroad Company; Minnesota Prairie Line, Inc.; Montana Rail Link, Inc.; New York & Atlantic Railway Company; Pacific Harbor Line, Inc.; Palouse River & Coulee City Railroad, Inc.; Pennsylvania Southwestern Railroad, Inc.; Piedmont & Atlantic Railroad Inc.; Pittsburg & Shawmut Railroad, Inc.; Portland & Western Railroad, Inc.; Rochester & Southern Railroad, Inc.; Rocky Mount & Western Railroad Co., Inc.; St. Lawrence & Atlantic Railroad Company; Salt Lake City Southern Railroad Company; Savannah Port Terminal Railroad, Inc.; South Buffalo Railway Company; South Kansas & Oklahoma Railroad Company; Stillwater Central Railroad; Talleyrand Terminal Railroad, Inc.; Three Notch Railroad Co., Inc.; Timber Rock Railroad, Inc.; Twin Cities & Western Railroad Company; Utah Railway Company; Willamette & Pacific Railroad, Inc.; Wiregrass Central Railroad Company, Inc.; York Railway Company; AN Railway, LLC; Atlantic and Western Railway, Limited Partnership; Bay Line Railroad, LLC; Central Midland Railway; Copper Basin Railway, Inc.; East Tennessee Railway, L.P.; Galveston Railroad, L.P.; Georgia Central Railway, L.P.; The Indiana Rail Road Company; KWT Railway, Inc.; Little Rock & Western Railway, L.P.; M & B Railroad, L.L.C.; Tomahawk Railway, Limited Partnership; Valdosta Railway, L.P.; Western Kentucky Railway, LLC; Wheeling & Lake Erie Railway Company; Wilmington Terminal Railroad, L.P.; and Yolo Shortline Railroad Company.

10903. Petitioners included a detailed proposal, including revised rules for 49 CFR 1152.50 (exempt abandonments) and 1152.27 (offers of financial assistance).

The Board issued a decision on August 13, 2003, to institute a proceeding to consider the issues raised in Petitioners' filing and held a public hearing to discuss the proposal on August 31, 2004. By an Advance Notice of Proposed Rulemaking (ANPR) served and published on January 19, 2006 (71 FR 3030), the Board invited comments on Petitioners' proposal and any alternative suggestions commenters might have. The ANPR stated that, after reviewing the comments, the Board would decide whether to issue a Notice of Proposed Rulemaking (NPR) in this proceeding.

A number of comments were received. After carefully considering the comments, we do not believe that any changes to the Board's current abandonment procedures are warranted at this time. Accordingly, we will not issue an NPR, and this proceeding will be discontinued.

BACKGROUND

1. The Abandonment Process

The Board has exclusive and plenary jurisdiction over the abandonment of rail lines. Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 319-21 (1981) (Kalo Brick); Phillips Co. v. Denver & Rio Grande Western R. Co., 97 F.3d 1375, 1376-78 (10th Cir. 1996), cert. denied, 521 U.S. 1104 (1997). Under 49 U.S.C. 10903, the Board may authorize abandonment if it finds that the present or future public convenience and necessity (PC&N) require or permit the abandonment. In making this public interest determination, the Board weighs the burden on shippers and communities from the loss of rail service against the burden on the carrier and interstate commerce from continued operation of the line at issue. Colorado v. United States, 271 U.S. 153 (1926). The Board considers all relevant factors, including profits or losses incurred from operating the line, costs avoidable by abandonment (such as maintenance and rehabilitation costs) and the opportunity costs incurred by forgoing more profitable use of the carrier's assets elsewhere. Kalo Brick, 450 U.S. 311, 321 (1981). See also 49 CFR part 1152. The statute directs the Board also to consider whether the abandonment will have a serious, adverse impact on rural and community development. 49 U.S.C. 10903(d).

Over the years, Congress has taken steps to minimize needless burdens and delay in the regulatory process. See Railroad Ventures, Inc. v. STB, 299 F.3d 523, 529 n.1, 530-31 (6th Cir. 2002). Since 1980, Congress has encouraged the agency to streamline the regulatory process where appropriate. Under 49 U.S.C. 10502, the Board must exempt a transaction, person, or service, in whole or in part, from otherwise applicable statutory provisions whenever the Board finds that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

The Board has used this exemption power to simplify and expedite abandonment cases where it believes that closer regulatory scrutiny is unnecessary, and most requests for abandonment authority are now handled through the exemption process. A carrier seeking

abandonment authority may petition the Board for an exemption for a particular line on a case-by-case basis. See 49 CFR 1152.60. Or, if no local traffic has moved over the line in at least 2 years, any overhead traffic can be rerouted, and no formal complaint filed by a user regarding cessation of service over the line is pending or has been decided against the railroad during the 2-year period, a carrier may utilize a class exemption for “out-of-service lines.” See 49 CFR 1152.50(b); Exemption of Out of Service Rail Lines, 2 I.C.C.2d 146, 157-58 (1986), aff’d sub nom. Illinois Commerce Comm’n v. ICC, 848 F.2d 1246 (D.C. Cir. 1988) (Out-of-Service Exemption).

2. The Petition

In their petition, Petitioners claimed that the existing abandonment procedures do not work well for small carriers. Petitioners stated that the data needed to support a full application under 49 U.S.C. 10903, i.e., base and forecast year statistics, come from the Board’s Uniform System of Accounts, which only Class I carriers are required to use and report to the Board. Petitioners asserted that small carriers typically lack the necessary data. They can try to compile the necessary information or ask the Board for a waiver, but neither option, Petitioners said, is attractive to small carriers. Petitioners maintained that the first option is too expensive. The second also involves expense, coupled with delay and uncertainty as to whether the waiver will be granted.

Petitioners also claimed that filing a petition for exemption for an individual line under 49 U.S.C. 10502(a) poses challenges for small carriers because the process is allegedly too uncertain. Petitioners cited a Board decision that states that petitions for exemption are appropriate only where there is no opposition or operation of the line is clearly unprofitable. Central Railroad Company of Indiana – Abandonment Exemption – In Dearborn, Decatur, Franklin, Ripley, and Shelby Counties, IN, STB Docket No. AB-459 (Sub-No. 2X) (STB served May 4, 1998). Petitioners argued that this standard has discouraged use of the petition for exemption process in all but the most routine cases. They also pointed out that a carrier must make its entire presentation in its initial filing, with no right to respond to comments and protests.

Petitioners claimed that these deficiencies have forced carriers to forgo seeking abandonment authority until a line is eligible for the Out-of-Service Exemption. Petitioners asserted that the result is that when a prudent small carrier makes the subjective business decision that a particular line is no longer viable, it will increase rates on the line and divert resources away from the line to other more productive parts of its system. This, in turn, forces any remaining traffic to find more economical alternatives. When the line becomes eligible, the carrier then invokes the class exemption for out-of-service lines. Petitioners argued that this so called “death spiral” wastes resources and deters potential offers of financial assistance (OFAs) to continue rail service under 49 U.S.C. 10904, because shippers will already have found alternative transportation and the physical assets will have deteriorated for at least 2 years.

To alleviate these perceived shortcomings in the Board’s current procedures, petitioners proposed a new class exemption under which Class II and Class III carriers would be eligible to abandon their lines by invoking a notice procedure. Under Petitioners’ proposal, the carrier

would publish relevant commercial and engineering information about the line in local newspapers and national railroad industry publications, in addition to filing with the Board a notice to be published in the Federal Register. Such a notice would contain: 3 years of aggregate carload and revenue data; a statement of physical condition of the line; an estimate of the rehabilitation, if any, that would be needed to bring the line up to Federal Railroad Administration class 1 standards; the net liquidation value (NLV) of the line; and information concerning connecting carriers, interchange locations, and any operating rights of third parties over the line. Other data would be made available upon request to an OFA offeror.

Under Petitioners' proposal, carriers that availed themselves of this class exemption procedure would waive any claim for the value of the line in excess of NLV. Also, if an OFA sale were consummated and the subject line connected only to the abandoning carrier, the abandoning carrier would be required to provide the purchaser with either haulage or trackage rights (at the abandoning carrier's choice), at commercially reasonable rates, to move any traffic to and from any connecting carrier with which traffic has moved during the 24 preceding months. The proposal would create a longer OFA filing period of 90 days and would, at the abandoning carrier's option, delay the need to file the historic and environmental reports required under the Board's environmental rules at 49 CFR 1105.7 and 1105.8 until after the OFA process. Under the proposal, carriers that elected to defer such reports would obtain only discontinuance authority and would not be able to remove track structure until such reports were completed.

3. The ANPR

In the ANPR, the Board raised initial concerns about some aspects of Petitioners' class exemption, as proposed. Specifically, the Board pointed out that Petitioners' proposed class exemption would require a finding that the traditional PC&N balancing analysis Congress required in section 10903 is unnecessary for some classes of carriers based only on their annual revenue and that Petitioners' proposal did not appear to contain sufficient data to support such a finding. Second, the Board noted that Congress had considered eliminating the PC&N test for all carrier abandonments during consideration of the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), but ultimately did not do so. See H.R. Rep. No. 104-422, at 180-81(1995) (Conf. Rep.), as reprinted in 1995 U.S.C.C.A.N. 865-66. The Board requested comments on how the Board could justify essentially doing what Congress rejected in ICCTA. Third, the Board expressed concern that the proposal might not allow the Board to satisfy its responsibilities under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4331-4335. Finally, the Board noted the concerns of organized labor that the proposed rules could be used by Class I carriers to avoid labor protection by spinning lines off to shell companies that could utilize the notice procedures. The Board requested public comment on whether to propose a holding period to alleviate the potential for abuse, and if so, what the holding period should be and how it would work.

The Board also requested public comments on other possible ways to improve the abandonment process and address the kinds of concerns Petitioners had raised. The Board noted that the Out-of-Service Exemption appears to have worked well and asked commenters to address whether a 1-year out-of-service exemption would alleviate some of the frustrations with the current process evidently experienced by the smaller carriers. The Board also noted that,

prior to ICCTA, 49 U.S.C. 10904(b) directed the agency to grant an abandonment application if no protest had been received within 30 days of filing. The Board asked if a similar, “no-protest” abandonment process for a petition for exemption would improve upon the current process for small carriers.

4. The Comments on the ANPR

We received written comments from: Petitioners; Association of American Railroads (AAR); a group of 12 Class III rail carriers;² a group of six Class II and Class III rail carriers and owners;³ RailAmerica, Inc.; American Congress on Surveying and Mapping; American Short Line and Regional Railroad Association (ASLRRA); BNSF Railway Company; The National Industrial Transportation League (NITL); National Grain and Feed Association (NGFA); the Rail Labor Division of the Transportation Trades Department, AFL-CIO, and its affiliated organizations;⁴ John D. Fitzgerald, for United Transportation Union – General Committee of Adjustment (UTU/GO-386); Rail Conference, International Brotherhood of Teamsters;⁵ West Virginia Department of Transportation, State Rail Authority (WVDOT); Washington State Department of Transportation (WADOT) and Washington Utilities and Transportation Commission; and the State of Oregon, Department of Transportation (Oregon DOT).

Generally, rail carriers favor publishing an NPR to give further consideration to the proposal or the alternative reforms suggested in the ANPR.⁶ Organized labor⁷ and state

² The 12 carriers are: Albany & Eastern Railroad Company; Dakota Northern Railroad, Inc.; Denver Rock Island Railroad Company; Heart of Georgia Railroad, Inc.; Iowa Traction Railroad Company; Minnesota Northern Railroad, Inc.; Mississippi Tennessee Railroad, LLC; Progressive Rail Incorporated; Rio Valley Switching Company; Southern Switching Company; St. Croix Valley Railroad Company; Winamac Southern Railroad Company.

³ The six carriers are: Delta Southern Railroad Inc.; Housatonic Railroad Company, Inc.; New York Cross Harbor Railroad Term. Corp.; Permian Basin Railways; San Pedro Rail Operating Co.; Wisconsin & Southern Railroad Co.

⁴ The affiliated organizations currently are: American Train Dispatchers Association; Brotherhood of Railroad Signalmen; International Association of Machinists and Aerospace Workers; International Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; Sheet Metal Workers International Association; Transportation Communications International Union; Transport Workers Union of America; United Transportation Union.

⁵ The Rail Conference now consists of the Brotherhood of Locomotive Engineers and Trainmen and the Brotherhood of Maintenance of Way Employees.

⁶ See, e.g., Comments of AAR at 3; 6-8.

⁷ See, e.g., Comments of Rail Conference, International Brotherhood of Teamsters at 2-7.

governments oppose any changes to the abandonment process.⁸ The trade associations representing shipper interests are split, with NITL in favor of the proposal and NGFA against.

DISCUSSION AND CONCLUSIONS

After carefully considering the petition and the record before us, we find that Petitioners have failed to show that publication of an NPR is warranted to consider specific changes to the abandonment process. Therefore, we will discontinue this proceeding.

In their petition, testimony at the public hearing, and written comments, Petitioners allege that a “death spiral” of marginal lines has resulted because railroads let unprofitable lines deteriorate for at least 2 years so as to be able to file for abandonment authority under the Out-of-Service Exemption notice procedure. But neither Petitioners nor any of the proposal’s other supporters have presented a single documented instance where this alleged death spiral scenario has actually taken place. Indeed, the only specific example that Petitioners supply to support their claim despite more than 25 years of experience under the present system is a verified statement of Arthur E. McKechnie, III, the executive Vice President and Assistant Secretary of Palouse River and Coulee City Railroad (PCC).⁹ Mr. McKechnie, however, recounts the successful negotiations between PCC and WADOT to keep two branch lines in service that PCC would have otherwise abandoned. Although a third branch line may ultimately be abandoned according to Mr. McKechnie, this evidence does not establish the need to change the abandonment process for small carriers. Rather, the example involving PCC and WADOT demonstrates how the Board’s existing abandonment process allows railroads to work with other entities to facilitate continued rail service on lines that might otherwise be abandoned where it makes sense to do so. We will not proceed with an NPR based merely upon a hypothetical scenario.

Moreover, Petitioners have not established that the current abandonment process is unduly burdensome for small carriers. The Board’s FY 2002-2004 Annual Report states that, in the 3-year period reviewed, 257 abandonments were approved and just 6 denied. While two-thirds of those cases were processed under the Out-of-Service Exemption, petitions for individual exemptions were approved 97.4% of the time.¹⁰ Further, the Board denied or rejected only 4 of the 32 abandonment cases filed by Class II and Class III carriers in 2005.¹¹ Thus, as

⁸ See, e.g., Comments of WADOT; Comments of Oregon DOT, Comments of WVDOT.

⁹ Petitioners also include verified statements from Christopher J. Burger, a retired president and chief executive officer of Central Properties, Inc., a shortline railroad holding company. Mr. Burger recounts his experience with the Chicago & North Western Railroad and generally opines on “the lengthy and laborious abandonment process.” See Petitioners’ Comments, Appendix B at 2. But he does not provide specific evidence of the reaction of small carriers to the existing administrative process.

¹⁰ See Petitioners’ Reply at 10.

¹¹ See Petitioners’ Comments at 5-6.

Petitioners themselves concede, abandonment authority has been forthcoming “in virtually every single case.”¹²

In attempting to justify the need for new abandonment rules for small carriers, Petitioners point to the few cases in which petitions for exemption to abandon lines, where there were significant protests, have been denied. But even protested abandonments are generally granted.¹³ Most denials of petitions for exemption are based on technical deficiencies in the information provided by the railroad.¹⁴ However, the filing requirements in abandonment exemption cases are not onerous. We do not require that a petitioner in an abandonment exemption proceeding provide evidence in any prescribed way. We evaluate the record before us, and if the petitioner has presented enough evidence to meet its burden, we will grant an exemption from the regulatory requirements of section 10903 under 49 U.S.C. 10502. Even if a petitioner initially fails to provide sufficient evidence to meet the statutory requirements for an exemption, we often will deny the petition without prejudice to refile a new petition for exemption, or to filing a formal application with the evidence that is needed to support its request.¹⁵ If the carrier provides the additional information, we will then grant the abandonment authority.¹⁶ Whether or not a carrier provides cost evidence for the Board to use in evaluating the petition is solely within the railroad’s control. And waivers to cover situations where small railroads may not have certain types of cost data are routinely granted. We fail to see how these procedures are so unfair, burdensome, or harmful to the public interest that issuance of an NPR to propose changes to the existing process is warranted.

Petitioners’ original filing took the position that their proposal would result in more sales to continue rail service under the OFA provisions, as rail assets would not deteriorate for 2 years while a carrier was waiting for the Out-of-Service Exemption procedures to become available. But even Petitioners now admit that few, if any, additional OFA sales would take place under their proposed rules.¹⁷ And there is already a class exemption process for Class III carriers to

¹² See Petitioners’ Reply at 11.

¹³ See, e.g., Central Kansas Railway, L.L.C.—Abandonment Exemption—in Sedgwick County, KS, STB Docket No. AB-406 (Sub-No. 14X)(STB served April 10, 2001); Dakota Rail, Inc.—Abandonment Exemption—in McLeod, Carver, and Hennepin Counties, MN, STB Docket No. AB-472 (Sub-No. 1X) (STB served Nov. 30, 2001).

¹⁴ See Petitioners’ Reply at 10.

¹⁵ See, e.g., Wyoming and Colorado Railroad Company, Inc.—Abandonment Exemption—in Carbon County, WY, STB Docket No. AB-307 (Sub-No. 5X) (STB served Nov. 10, 2004).

¹⁶ See, e.g., Wyoming and Colorado Railroad Company, Inc.—Abandonment Exemption—in Carbon County, WY, STB Docket No. AB-307 (Sub-No. 6X) (STB served May 31, 2006).

¹⁷ See Petitioners’ Reply at 3-5.

expeditiously sell their lines.¹⁸ Thus, this is not a sufficient reason to develop an NPR based on Petitioners' proposal.

Several of the comments on the ANPR addressed whether to propose a shorter 1-year out-of-service exemption or to implement a "no protest" abandonment process under which a petition for exemption would be granted if no protests were received within 30 days. A number of commenters, including WADOT and rail labor, strongly opposed these changes. And those that favored them did not argue that the changes would significantly improve the existing process. In these circumstances, we will not issue an NPR proposing specific rules that would implement these changes at this time.

Furthermore, neither Petitioners nor the other commenters have adequately addressed our initial concerns related to ensuring that the requirements of NEPA could be met, and Congress' decision in ICCTA to retain the traditional PC&N test, which requires the Board to balance the competing interests of shippers and communities that depend on rail service on the one hand and the burden on the carrier and the effects of the proposed abandonment on interstate commerce on the other. 49 U.S.C. 10903.

In sum, the record here does not show that our current procedures are unduly burdensome or that we should issue an NPR proposing specific modifications to our abandonment procedures at this time.

Finally, we note that concerns about the need to streamline the Board's historic review process were raised in this case.¹⁹ However, as discussed below, the Board has worked, and will continue to work, to improve and facilitate the process required by section 106 of NHPA outside of the instant proceeding.

At the public hearing, AAR urged the Board to seek to expedite and improve the agency's current historic review process, which, it believes, can significantly delay railroad abandonments. AAR raised specific concerns with what it considers to be costly and pointless documentation of rail lines that are sometimes deemed historic despite the fact that they have been repaired or replaced as part of ongoing maintenance activities. However, AAR specifically agreed to work with the Board outside this proceeding to explore options to streamline the Board's historic reviews. AAR also indicated that representatives of the rail industry would be eager to meet with the historic preservation community, and the Board's Section of Environmental Analysis (SEA).

¹⁸ See 49 CFR 1150.31 and 49 CFR 1150.41.

¹⁹ The Board's approval of railroad abandonments constitutes an undertaking under section 106 of the National Historic Preservation Act, 16 U.S.C. 470 (NHPA), and thus is subject to such reviews. The section 106 regulations, "Protection of Historic Properties" (36 CFR Part 800), specify the steps required to comply with the historic review process. The Board's environmental rules at 49 CFR 1105.8 set out the agency's specific requirements for complying with section 106.

Following the hearing, SEA consulted with representatives from AAR and ASLRRRA to learn more about the carriers' concerns. SEA also provided extensive background information on the nature of the railroads' concerns to the Advisory Council on Historic Preservation (ACHP), which implements section 106, and apprised ACHP that the Board would like its assistance in developing appropriate streamlining options. In addition, SEA met with the Executive Director of the National Conference of State Historic Preservation Officers (NCSHPO), a professional association that includes the state government officials that work with government agencies to ensure compliance with NHPA. SEA also drafted guidance (available on the Board's website under the "Environmental" button) to assist railroads and state historic preservation officers in understanding the historic preservation process and the Board's limited ability to protect historic properties. The guidance also includes sample historic reports, a detailed glossary, and a list of frequently asked questions.

With the assistance of an ASLRRRA representative, SEA is currently finalizing a "White Paper," as requested by the NCSHPO, which describes the Board's section 106 responsibilities, and details concerns about the historic review process from both the railroad and historic preservation perspectives. The White Paper also suggests various measures that could be implemented to improve the Board's current historic preservation review process for railroad abandonments.

Copies of the White Paper will be distributed to the NCSHPO, ACHP, AAR, ASLRRRA, appropriate tribes, and the National Association of Tribal Historic Preservation Officers for their comments and review. Following its review of any comments received, SEA will convene a meeting with ASLRRRA, AAR, and the historic preservation community to discuss what steps should be taken next on the streamlining initiative.

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 rulemaking is denied and this proceeding is discontinued.
2. This decision is effective on the date of service.

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

Vernon A. Williams
Secretary