

SERVICE DATE - AUGUST 12, 1997

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-167 (Sub-No. 1178X)

CONSOLIDATED RAIL CORPORATION—ABANDONMENT
EXEMPTION—IN ERIE COUNTY, NY

Decided: August 7, 1997

By petition filed May 1, 1997, Consolidated Rail Corporation (Conrail or petitioner) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon approximately 0.59 miles of its Black Rock Industrial Track extending between milepost 396.97± and milepost 397.56± in the City of Buffalo, Erie County, NY.¹ Rail Services Update filed a letter in support of the abandonment and United Transportation Union seeks imposition of labor protective conditions. We will grant the exemption petition subject to standard employee protective conditions.

BACKGROUND

Protective Closures Co., Inc. (Protective Closures), the only shipper affected by the abandonment, is located at the end of the Black Rock Industrial Track. It received a total of 19 carloads during the full year period ending September 30, 1996. Conrail submits that Protective Closures requested that this line segment be abandoned so that it can acquire the property to expand its manufacturing facilities. Assertedly, Conrail will continue to provide direct rail service to the shipper because Protective Closures plans to use a portion of the abandoned rail line as a private side track to connect its expanded facility with the remaining portion of the Black Rock Industrial Track. Conrail submits that there is no apparent opportunity for developing additional freight business on the line, other than that which would result from the expansion of the shipper's plant. Attached to the petition are copies of correspondence from Protective Closures regarding the proposed plant expansion; and letters from Mayor Anthony M. Masiello of Buffalo, the Niagara Frontier Transportation Authority (NFTA), and United States Congressman Jack Quinn supporting the project. NFTA also states that it will not seek to exercise its preferential rights under state law to acquire the right-of-way after abandonment.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without prior Board approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find 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.

Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of an abandonment application, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. Because Conrail's traffic over the remainder of the line is projected to increase after the shipper's plant is expanded, an exemption will also foster sound economic conditions and encourage efficient management. [49 U.S.C. 10101(5), and (9)]. Other aspects of the rail transportation policy will not be affected adversely.

Regulation is not necessary to protect shippers from the abuse of market power. Indeed, the line's only shipper requested that this small segment be abandoned so that it can acquire the property to expand its plant facility. Moreover, the shipper's new facility will continue to receive rail service

¹ A notice instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b) was served and published in the *Federal Register* on May 21, 1997 (62 FR 27835).

via the remaining segment of Conrail's Black Rock Industrial Track. Nevertheless, to ensure that the shipper is informed of our action, we will require that Conrail serve a copy of this decision on Protective Closures within 5 days of this decision's service date and certify to us that it has done so. Given our market power finding, we need not 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 obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, we will impose the labor protective conditions in *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979).

Conrail has submitted an environmental report with its petition and has notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed action. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified its data, and analyzed the probable effect of the proposed action on the quality of the human environment. SEA served an environmental assessment (EA) on July 2, 1997, recommending that no environmental or historic conditions be imposed on the abandonment. No comments have been received in response to the EA. Based on SEA's recommendations, we conclude that the proposed abandonment, if implemented, will not significantly affect either the quality of the human environment or the conservation of energy resources. Although the right-of-way may be suitable for other public use under 49 U.S.C. 10905, no one has sought a public use condition, and none will be imposed.

By letter filed June 19, 1997, Conrail requests expedited action. According to Conrail, the shipper needs immediate access to the property to prepare the land and erect the building to the point where construction can continue inside the enclosed shell during the winter. If construction is delayed until mid-April 1998, the shipper assertedly will suffer a total additional cost of \$1,150,000 in lost revenues and increased building costs. No one has protested the abandonment and no requests for either a public use condition under 49 CFR 1152.28 or for trail use/rail banking under 49 CFR 1152.29 were filed in response to the May 21, 1997 *Federal Register* notice. Moreover, the exemption petition is supported by several public entities. Although we would not expect to receive an offer of financial assistance (OFA) under 49 U.S.C. 10904 to allow rail service to continue under the circumstances here, we have not received a request that we exempt Conrail from the OFA procedures and we will not do so. In order to expedite consideration of the petition, however, we will make the decision and the exemption effective in 15 days, rather than the customary 30.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903 the abandonment of the above-described line, subject to the employee protective conditions in *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979).

2. Petitioner must serve a copy of this decision on Protective Closures within 5 days after the decision is served, and certify to the Board that service has been effected.

3. An OFA under 49 CFR 1152.27(c)(1)² to allow rail service to continue must be received by the railroad and the Board by August 22, 1997, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by a \$900 filing fee. See 49 CFR 1002.2(f)(25).

4. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **“Office of Proceedings, AB-OFA.”**

1 ² See *Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C.*
2 *10903*, STB Ex Parte No. 537 (STB served Dec. 24, 1996, and June 27, 1997).

5. Provided no OFA has been received, this exemption will be effective on August 27, 1997. Petitions to stay must be filed by August 22, 1997, and petitions to reopen must be filed by September 8, 1997.

6. Pursuant to the provisions of 49 CFR 1152.29(e)(2), Conrail shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by Conrail's filing of a notice of consummation by August 12, 1998 and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed not later than 60 days after satisfaction, expiration or removal of the legal or regulatory barrier.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary