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SERVICE DATE – SEPTEMBER 18, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35140

STATE OF MAINE—ACQUISITION OF CERTAIN LINES IN MAINE

STB Docket No. AB-355 (Sub-No. 38X)¹

SPRINGFIELD TERMINAL RAILWAY COMPANY—DISCONTINUANCE OF SERVICE
EXEMPTION—CUMBERLAND AND OXFORD COUNTIES, ME

Decided: September 16, 2008

On May 9, 2008, the State of Maine, acting by and through its Department of Transportation (MDOT), and the Maine Central Railroad Company (MEC), Portland Terminal Company (PTC), and Springfield Terminal Railway Company (ST) (collectively, petitioners) filed a joint petition for declaratory order requesting, among other things, that we confirm that MDOT did not become a common carrier subject to our jurisdiction by purchasing a portion of line from MEC in 1996, and that MDOT will not become a common carrier by acquiring another portion of line from MEC and PTC in the future. For the reasons discussed below, we will grant in part and deny in part the joint petition and take other appropriate actions to resolve these matters.

BACKGROUND

This proceeding involves a rail line in the state of Maine known as the Mountain Division. It originally was part of the rail system operated by Guilford Rail System (Guilford), now Pan Am Railways,² and extended from Portland, ME, where it connects with what is currently Pan Am Railways' main line, northwesterly through Maine and into New Hampshire. In 1994, the portion of the Mountain Division between milepost 0.0 in Portland and milepost 7.3 at the Westbrook-Windham town line was owned by PTC, while the portion between milepost 7.3 and milepost 51.11 at the border of Maine and New Hampshire was owned by MEC (MEC portion). At that time, ST was also a lessee of the entire Mountain Division.

¹ These proceedings are not consolidated but are being handled in a single decision for administrative convenience.

² Pan Am Railways is comprised of MEC, PTC, ST, and the Boston and Maine Corporation, as was Guilford.

On September 28, 1994, MEC and PTC filed a notice of exemption (1994 notice) with the Interstate Commerce Commission (Commission), the Board's predecessor, pursuant to 49 CFR 1152 Subpart F—Exempt Abandonments and Discontinuances. MEC and PTC sought authority to abandon and discontinue service over an approximately 45.35-mile segment of the Mountain Division extending between milepost 5.76 and milepost 51.11 in Cumberland and Oxford Counties, ME.³ Though at the time the 1994 notice was filed ST was a lessee of that 45.35-mile segment of the Mountain Division, the 1994 notice was filed only on behalf of MEC and PTC.⁴ Petitioners state that the failure to include ST in the discontinuance was inadvertent.

Notice of the filing was served and published in the Federal Register on October 20, 1994 (59 FR 52990). The notice stated that the exemption would become effective on November 17, 1994, and that environmental, historic preservation, public use, or trail use/rail banking conditions would be imposed, where appropriate, in a later decision. After a stay of the effective date of the notice of exemption so that the Commission's Section of Environmental Analysis (SEA) could complete its environmental process, the Commission served a decision on December 15, 1994, in which it imposed a public use condition requested by Trainriders/Northeast (Trainriders) and a historic preservation condition recommended in SEA's Environmental Assessment (EA).

Subsequently, according to petitioners, neither MEC, PTC, nor ST operated trains over the segment of the Mountain Division between mileposts 5.76 and 51.11 and, as evidence of their intent to abandon and discontinue operations over that segment, MEC, PTC, and ST abolished stations and tariffs and removed rail and ties from certain portions of the line. Petitioners state that, in 1996, believing the line was fully abandoned, MDOT and MEC negotiated for the purchase and sale of the portion of the Mountain Division between milepost 11.16 and milepost 51.11 (Segment One). By deed dated December 30, 1996, MEC conveyed Segment One to MDOT (1996 purchase), and, believing the line segment had been fully abandoned and service discontinued, MDOT did not seek regulatory authority to acquire it. MDOT acquired Segment One for the sole purpose of preserving the right-of-way for future rail operations by others.

More recently, MDOT has been engaged in discussions with MEC and PTC to purchase a second portion of the Mountain Division between milepost 6.0 and milepost 11.16 (Segment Two). In anticipation of that transaction, on October 29, 2007, PTC and ST filed a notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments and Discontinuances of Service for PTC to abandon and ST to discontinue service over an approximately 1.3-mile

³ See Maine Central Railroad Company—Abandonment Exemption—Cumberland and Oxford Counties, ME, Docket No. AB-83 (Sub-No. 14X); Portland Terminal Company—Discontinuance of Service Exemption—Cumberland and Oxford Counties, ME, Docket No. AB-268 (Sub-No. 2X).

⁴ The 1994 notice did state, under the heading "Information Required by Section 1152.22(a)(1-5), (8), and (e)(5)," that "MEC and PT are part of a railroad system owned by a non-carrier, Guilford Transportation Industries, Inc. This system is comprised of MEC, PT[C], Springfield Terminal Railway Company, and Boston and Maine Corporation."

portion of the Mountain Division⁵ between milepost 6.0 and milepost 7.3 in Westbrook, Cumberland County, ME (2007 notice). Notice of the exemption was served and published in the Federal Register on November 16, 2007 (72 FR 64703-04).⁶ The exemption was scheduled to become effective on December 18, 2007. The abandonment exemption, which involved only PTC, was reopened for imposition of an environmental condition on December 14, 2007.⁷ On April 17, 2008, the Board received a notice of consummation under 49 CFR 1152.29(e)(2) that, on April 16, 2008, PTC and ST exercised the authority granted by the Board and fully abandoned and discontinued service on the Mountain Division from milepost 6.0 to milepost 7.3.

Petitioners note that it was during the negotiations for the purchase of Segment Two by MDOT that they realized that ST was a lessee of the Mountain Division in 1994. MDOT, being barred by state statute from incurring a common carrier obligation,⁸ became concerned about the effect of ST's failure to discontinue operations in 1994 on the 1996 purchase and MDOT's status thereafter. Petitioners, therefore, filed the present petition for declaratory order. Petitioners request that we issue a declaratory order to eliminate the uncertainty regarding the status of MDOT as a result of the 1996 purchase and what status MDOT will have if it follows through with the proposed purchase of Segment Two. Specifically, petitioners ask us to determine that: (1) after receiving abandonment authority in 1994, MEC and PTC fully abandoned the line between milepost 5.76 and milepost 51.11 prior to the 1996 purchase; (2) ST's de facto discontinuance of operations on the line between milepost 5.76 and milepost 51.11 is tantamount to a formal discontinuance, such that ST has no residual regulatory right or obligation to provide service on the line; (3) as a result of the 1996 purchase, MDOT did not become a rail carrier; and (4) MDOT will not become a rail carrier if it follows through with the proposed purchase of Segment Two.

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. 554(e) and 49 U.S.C. 721, we may issue a declaratory order to terminate a controversy or remove uncertainty. We have broad discretion in determining whether to issue a declaratory order.⁹ Because of the unique circumstances presented by this matter, we find that it is appropriate to issue a declaratory order clarifying the line's status and MDOT's status. In this decision, we will explain why MDOT will not become a rail carrier if it follows through with

⁵ In their notice of exemption, PTC and ST refer to the line as the "Mountain Branch."

⁶ See Portland Terminal Company—Abandonment Exemption—in Cumberland County, ME, STB Docket No. AB-268 (Sub-No. 16X) (STB served Nov. 16, 2007); Springfield Terminal Railway Company—Discontinuance of Service Exemption—in Cumberland County, ME, STB Docket No. AB-355 (Sub-No. 34X) (STB served Nov. 16, 2007).

⁷ See Portland Terminal Company—Abandonment Exemption—in Cumberland County, ME, STB Docket No. AB-268 (Sub-No. 16X) (STB served Dec. 14, 2007).

⁸ See ME. REV. STAT. ANN. tit. 23, §§ 7151(2) and 7155(2) (2008).

⁹ See Boston & Maine Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Delegation of Authority—Declaratory Order Proceedings, 5 I.C.C. 2d 675 (1989).

the purchase of Segment Two. To remedy ST's inadvertent failure to seek discontinuance authority in the 1994 notice and to remove any doubt that MDOT did not acquire a common carrier obligation when it purchased Segment One in 1996, we will, on our own motion, exempt ST from the requirement that it obtain discontinuance authority for the MEC portion of the line (between mileposts 7.3 and 51.11) retroactively to the December 17, 1994 effective date of the 1994 notice.¹⁰

Status of the Line

A railroad may not abandon (i.e., permanently close and discontinue service over) a rail line without our advance authorization. In general, this licensing requirement applies to all carrier lines, including both main lines and lightly used "branch" lines.¹¹ Under 49 U.S.C. 10903, we may affirmatively approve the abandonment of a line by determining that the present or future public convenience and necessity require or permit the proposed abandonment. Alternatively, we may authorize abandonment by granting an exemption (individually or by class of rail lines) under 49 U.S.C. 10502. Our authority over abandonments is exclusive and plenary.¹²

The abandonment authority we issue is permissive authority that the railroad may decide not to exercise. The agency retains jurisdiction over rail properties until abandonment has been exercised, or "consummated."¹³ Under the provisions of 49 CFR 1152.29(e)(2), which were adopted in 1997, an abandonment is not deemed to have been consummated unless the railroad files a notice of consummation with the agency within 1 year of the service date of the decision permitting abandonment. The notice of consummation signifies that the railroad has exercised the authority granted and intends that the property be removed from the interstate rail network and our jurisdiction. Here, the April 2008 notice properly consummated the abandonment of the 1.3-mile portion of Segment Two of the line between mileposts 6.0 and 7.3.

At the time, however, abandonment was not properly consummated as to the portion of the line between mileposts 7.3 and 51.11. A carrier may not consummate an abandonment until all authority to operate over the line has been discontinued.¹⁴ Although the intent of MEC, PTC,

¹⁰ The docket number for the discontinuance exemption will be STB Docket No. AB-355 (Sub-No. 38X).

¹¹ See Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 320-21 (1981) (Kalo Brick).

¹² See Kalo Brick, 450 U.S. at 320; The Phillips Company—Petition for Declaratory Order, Finance Docket No. 32518, slip op. at 4-5 (ICC served Apr. 18, 1995), aff'd sub nom. Phillips Co. v. Denver & Rio Grande Western R. Co., 97 F.3d 1375, 1376-78 (10th Cir. 1996).

¹³ See Hayfield Northern R. Co. v. Chicago & N.W. Transp. Co., 467 U.S. 622, 633-34 (1984) (Hayfield).

¹⁴ See Consolidated Rail Corporation—Abandonment Exemption—in Mercer County, NJ, STB Docket No. AB-167 (Sub-No. 1185X) et al. (STB served Jan. 26, 2007) (Mercer
(continued . . .)

and ST in 1994 was to obtain authority to abandon and discontinue all operations over the line,¹⁵ and although MDOT's intent in 1996 was to purchase a portion of a fully abandoned line, the petitioners' respective intents do not obviate the fact that, without ST having obtained discontinuance authority over the MEC portion of the line (between mileposts 7.3 and 51.11), that portion could not be abandoned.

This discrepancy has led to MDOT's concern regarding the uncertainty as to its common carrier status and the petitioners' general concern with regard to the line's status. To clarify the situation, petitioners request that we find that ST's de facto discontinuance of operations is tantamount to a permissible (i.e., authorized) discontinuance. Although, in appropriate circumstances such as this, we can take steps as warranted to remedy a party's previously unauthorized actions, making the finding that petitioners seek is not the appropriate way to do so. It is well established that a carrier cannot confer upon itself abandonment or discontinuance authority through its own unilateral cessation of service; rather, it must obtain such authority from the Board. See Honey Creek Railroad, Inc.—Petition for Declaratory Order, STB Finance Docket No. 34869, et al., slip op. at 6 (STB served June 4, 2008) (noting that “[i]t is well-settled that a line of railroad can be abandoned only pursuant to Board authority”); see also Kalo Brick, 450 U.S. at 320-21. Thus, we decline to find that ST's actions amounted to an authorized discontinuance. Rather, we conclude that the appropriate way to proceed here is to grant to ST an exemption from the need to obtain discontinuance authority for the MEC portion of the line, taking that action retroactively as of the effective date for the exemptions previously granted to MEC and PTC in the 1994 notice.¹⁶

(. . . continued)

County); BNSF Railway Company—Abandonment Exemption—in Oklahoma County, OK, STB Docket No. AB-6 (Sub-No. 430X) et al. (STB served Feb. 27, 2007) (Oklahoma County).

¹⁵ Prior to adoption of 49 CFR 1152.29(e)(2), if there were any disputes with regard to a railroad's consummation of its abandonment authority, the Board or the Commission would look to the railroad's actions and statements to determine whether it manifested a clear intent to abandon the line; such actions may include “cessation of operations, cancellation of tariffs, salvage of the track and track materials, and relinquishment of control over the right-of-way.” See Birt v. STB, 90 F.3d 580, 585 (D.C. Cir. 1996) (Birt) (citing Illinois Central Gulf Railroad Company—Abandonment—in DeWitt and Piatt Counties, IL, Docket No. AB-43 (Sub-No. 134), 1988 WL 235412 at *5 (ICC served Dec. 19, 1988)).

¹⁶ We only need to grant the discontinuance exemption for the MEC portion of the line, because ST has already obtained discontinuance authority in STB Docket No. AB-355 (Sub-No. 34X) for the portion of the PTC line that MDOT now wants to acquire. MDOT's 1996 acquisition involves the MEC portion of the line. And the current acquisition being considered by MDOT only involves the remainder of the MEC portion of the line, in addition to that portion of the PTC line recently exempted.

Although retroactive exemption requests are not favored, we find that granting such relief is appropriate under the unique circumstances presented here.¹⁷ MEC, PTC, and ST, all of whom were, and still are, part of the same corporate family, state it was their intent in 1994 to abandon and discontinue all operating authority over the line and, as such, the error of not including ST in the notice to obtain discontinuance of operations authority was inadvertent. The record from the 1994 notice and the present matter support this claim. In the 1994 notice, recognizing they were part of the same railway system as ST, then-called Guilford, MEC and PTC stated that they sought abandonment and discontinuance of operations over the line¹⁸ and that, once it was abandoned, they believed the State of Maine would likely exercise its right to purchase the line. In 1996, MDOT did purchase Segment One, which it believed to be part of a fully abandoned line of railroad. MDOT, which is barred by state statute from operating a railroad, was a bona fide purchaser of the line and had no reason to believe Segment One was anything more than an abandoned rail line. Upon realization of the error of not including ST in the discontinuance proceeding in 1994, the petitioners in good faith notified us of the error, and filed the present petition for declaratory order. We find that granting ST an exemption from the need for discontinuance authority retroactively over the MEC portion of the line will simply effectuate the original intent of each entity involved with the 1994 notice proceeding and the subsequent 1996 purchase.¹⁹

Under 49 U.S.C. 10903, a rail carrier may not discontinue operations without our prior 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 is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Here, detailed scrutiny under 49 U.S.C. 10903 of the discontinuance by ST of its operations over this unused line is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will also encourage efficient management by relieving ST of the responsibility of operating over an unused line [49 U.S.C. 10101(9)]. Other aspects of the rail transportation policy will not be affected adversely.

Regulation is also not necessary to protect shippers from the abuse of market power because the line does not serve any shippers. Given our finding regarding market power, we need not determine whether the discontinuance is limited in scope.

¹⁷ See Horsehead Corporation—Petition for Acquisition and Operation Exemption—Chestnut Ridge Railway Company, STB Finance Docket No. 34481 (STB served Mar. 12, 2004).

¹⁸ In the environmental and historical report that accompanied the 1994 notice, MEC and PTC claimed that no local or overhead traffic had moved over the line for almost 8 years.

¹⁹ We note that in 1994 no entity filed in opposition to the notice of exemption, and the only party to file comments in that proceeding was Trainriders, which recognized the possibility that the state of Maine would purchase the line upon abandonment.

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 its employees. Accordingly, as a condition to granting this exemption, we will impose the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

We do not need to review the environmental impacts associated with our action here. Discontinuances are exempt from the environmental reporting requirements of 49 CFR 1105.6(c) and from historic reporting requirements under 49 CFR 1105.8(b). Furthermore, the agency already has reviewed the environmental impacts in association with the 1994 notice of exemption to abandon the line. Therefore, we find that our action exempting the discontinuance of service by ST will not significantly affect either the quality of the human environment or the conservation of energy resources.

Having exempted the discontinuance by ST retroactively, we now turn to determining whether there was a consummated abandonment of the MEC portion of the line, which includes the line segment bought by MDOT in 1996 (between mileposts 11.16 and 51.11). As previously discussed, we look at the railroad's actions and statements to determine whether it manifested a clear intent to abandon the line. Petitioners state that, after abandonment authority was granted by the Commission in 1994, neither MEC, PTC, ST, or any other affiliate operated trains over the Mountain Division between mileposts 5.76 and 51.11, stations and tariffs were abolished, rail and ties were removed from certain portions of the line, and the line was allowed to deteriorate due to lack of maintenance and use. Because our retroactive discontinuance exemption for ST removes the impediment to the abandonment of the line that ST's lease otherwise would constitute, we find that, with regard to MEC's portion of the line extending from milepost 7.3 to milepost 51.11, MEC had consummated the abandonment by the time of MDOT's purchase in 1996.

With regard to the PTC-owned portion of the line that MDOT is seeking to acquire, in 1994 PTC was only granted discontinuance authority. In 2007, however, PTC and ST filed the 2007 notice and received authority to abandon the line and discontinue service on the line, respectively, from milepost 6.0 to milepost 7.3. PTC then filed its notice of consummation on April 17, 2008, which is the clear evidence required by regulation that PTC has abandoned and ST discontinued operations over the PTC-owned portion of Segment Two.²⁰

Common Carrier Status of MDOT

Having exempted the discontinuance by ST for the MEC portion of the line and having found that MEC and PTC consummated their respective abandonments, we now clarify MDOT's

²⁰ With regard to the short portion of PTC's line between milepost 5.76 and milepost 6.0, we note that, because PTC only received discontinuance authority in 1994 for its portion of the line, if PTC plans to sell that portion as an abandoned line in the future, PTC would still have to obtain authority to formally abandon the line from milepost 5.76 to milepost 6.0. We also note that ST must obtain discontinuance authority prior to any abandonment and sale by PTC of that portion of its line.

status with regard to these former rail lines. As a general rule, a person, including a state agency, that acquires an active rail line assumes a common carrier obligation to provide rail service on the line following the change in ownership. But, where a rail line is fully abandoned, the subsequent acquisition of the right of way is not subject to the Board's jurisdiction, and, if a rail line is authorized for abandonment but not yet fully abandoned, a state is exempt from the regulatory requirements concerning acquisition of the line when the state does not intend to operate the line or hold itself out to the public as the operator of the line.²¹

Here, MDOT has not incurred a common carrier obligation by purchasing Segment One (the segment between milepost 11.16 and milepost 51.11) in 1996. At the time of purchase, MDOT believed that the line authorized for abandonment had been fully abandoned, had no intent to become an operator of the line, and never held itself out as an operator of the line. Further, under state law, MDOT may acquire rail lines, but may not conduct rail operations on lines it acquires, so MDOT could never have intended to become a common carrier.²² Moreover, as noted above, because we are granting in this decision a retroactive exemption for the discontinuance of service by ST between milepost 7.3 and milepost 51.11 (which includes Segment One), we find that the abandonment of that portion of the line was consummated by the time MDOT purchased Segment One in 1996. Thus, MDOT did not incur a common carrier obligation by virtue of the 1996 purchase.

With regard to the proposed purchase of Segment Two, we again have found that the MEC portion of Segment Two – from milepost 7.3 to milepost 11.16 – was fully abandoned by 1996 when Segment One was sold to MDOT. With regard to the PTC portion of Segment Two – from milepost 6.0 to milepost 7.3 – that portion was the subject of the 2007 notice, and its abandonment was consummated on April 17, 2008. MDOT would not incur any common carrier obligation by virtue of the proposed purchase of that portion of the line because Segment Two has been fully abandoned, is not within our jurisdiction, and MDOT does not intend to operate or hold itself out as the operator of the line. Therefore, we conclude that MDOT did not become a common carrier regarding the acquisition of Segment One in 1996, nor would it become a common carrier with regard to Segment Two were it to follow through with the proposed purchase.

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

²¹ See Common Carrier Status of States, State Agencies, 363 I.C.C. 132, 135-38 (1980), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982); 49 CFR 1150.21-24.

²² See ME. REV. STAT. ANN. tit. 23, §§ 7151(2) and 7155(2) (2008). Section 7151(2) states in relevant part that “it is the intent of the Legislature that the State may acquire the railroad line, but the State may not be an operator of the railroad.” Section 7155(2) states that “[i]n no event may the department or any other unit of State Government directly operate a railroad over a railroad line acquired under this chapter.”

It is ordered:

1. The joint petition for declaratory order will be granted in part and denied in part, as discussed above.

2. Under 49 U.S.C. 10502, in STB Docket No. AB-355 (Sub-No. 38X), we exempt from the prior approval requirements of 49 U.S.C. 10903 the discontinuance of service by ST of operations on the Mountain Division from milepost 7.3 to milepost 51.11, subject to the employee protective conditions in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979). This exemption is effective as of December 17, 1994.

3. Notice will be published in the Federal Register.

4. This decision is effective on its date of service.

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

Anne K. Quinlan
Acting Secretary