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SERVICE DATE – FEBRUARY 12, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB 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: February 11, 2008

By petition filed on August 8, 2007, Pan Am Railways¹ and its subsidiaries, Boston and Maine Corporation (B&M) and Springfield Terminal Railway Company (collectively, Pan Am or Petitioner), seek exemptions from several statutory provisions and waivers of certain Board regulations in connection with the filing of a third party or “adverse” discontinuance application. Replies in opposition were filed by New England Southern Railroad Co. Inc. (NES), the operator of the line that is the subject of this adverse discontinuance proceeding, and the State of New Hampshire Department of Transportation (NHDOT). Pan Am’s request for exemptions and waivers will be granted to the extent discussed below.

BACKGROUND

Pan Am states that it intends to ask the Board to find that the public convenience and necessity (PC&N) permit the adverse discontinuance of operations by NES over approximately 27 miles of rail line (the Line) in central New Hampshire. According to Pan Am, NES has been operating the Line under a lease that was entered into on January 14, 1985. The lease provides that either party may terminate on 90 days’ written notice to the other party once the initial 10-year term expires. Pan Am states that, on or about April 27, 2007, it gave NES written notice of termination, effective on or about August 1, 2007, and indicated that it would assume operating the Line under its own operating plan.

According to Pan Am, NES, in a letter dated July 21, 2007, responded that it would not file for discontinuance. Pan Am states that the adverse discontinuance is necessary to remove NES’s interest in the Line from Board jurisdiction and to pursue contract remedies under state law.

Pan Am states that NES’s operation of the Line affects: (1) a portion of its New Hampshire Main Line between Manchester and Penacook, NH; (2) a 1.17-mile line segment extending from the switch with the New Hampshire Main Line at Concord, NH, toward Lincoln, NH; (3) a 0.49-mile segment of the former line of Claremont and Concord Railroad extending

¹ Formerly Guilford Rail System.

from the switch with the New Hampshire Main Line at milepost B73.71; and (4) track proposed for interchange in Petitioner's Manchester yard. Pan Am plans to unite the Line with its existing system configuration and integrate the Line back into its closely controlled regional rail operations. This, Pan Am claims, will create a more efficient service for the Line's shippers.

Pan Am seek waiver of certain of the Board's notice requirements, contending that they are inapplicable or irrelevant to the issues in an adverse discontinuance. Additionally, Pan Am seeks a number of exemptions, pursuant to 49 U.S.C. 10502. Pan Am claims that the waiver and exemption requests are justified because service on the Line, which has eight shippers, will continue to be conducted by it—the previous operator and current owner. Noting that it has not operated the Line for over 20 years, Pan Am also claims that it does not possess much of the information that is the subject of the requested waivers.

DISCUSSION AND CONCLUSIONS

The Board's regulations require that abandonment and discontinuance applications conform to the requirements of 49 CFR 1152, Subpart C. In appropriate instances, however, such as the filing of a third-party or adverse abandonment or discontinuance application, the Board will waive inapplicable and unneeded provisions. See, e.g., Chelsea Property Owners—Abandonment—Portions of the Consolidated Rail Corporation's West 30th Street Track in New York, NY, Docket No. AB-167 (Sub-No. 1094) (ICC served July 19, 1989); City of Rochelle, Illinois—Adverse Discontinuance—Rochelle Railroad Company, STB Docket No. AB-549 (STB served June 5, 1998); and CSX Transportation—Adverse Abandonment—in Shelby County, TN, STB Docket No. AB-1010 (STB served Oct. 10, 2007).

Pan Am requests waiver from the requirements of 49 CFR 1152.10-14, which relate to the filing, amending, and providing notice to the public through a carrier's system diagram map (SDM) and establish a 2-month waiting period between amendments of the SDM and the filing of a corresponding discontinuance application. Pan Am also requests waiver from 49 CFR 1152.22(a)(5), which relates to the inclusion of an SDM, narrative, and line description in the application for discontinuance authority, and an exemption from the corresponding statutory SDM requirements of 49 U.S.C. 10903(c)(2). Pan Am contends that there is no need for an SDM in an application that is intended to permit a change in operators and not a complete discontinuance of service. It also asserts that SDM requirements are not relevant in an adverse discontinuance.

NHDOT responds that it, not Pan Am, owns and controls the 1.17-mile line segment between Pan Am's New Hampshire Main Line at Concord and Lincoln, having purchased the line segment from B&M in 1998. This line segment, according to NHDOT, is the White Mountain Branch, which is operated by NES under a freight operating agreement and a portion of which is operated by Plymouth & Lincoln Railroad (P&LR) under a tourist excursion operating agreement. NHDOT does not request that Pan Am comply with the SDM requirements, rather, NHDOT asks that Pan Am be required to submit a clarification of ownership and control for this line segment.

The SDM requirements are customarily waived in adverse discontinuance proceedings and clearly are not needed where, as here, the adverse discontinuance is intended to result only in a change of operators. We will grant Pan Am's waiver and exemption requests, except that we will require Pan Am to submit and serve on the parties to be served with notice, see infra, a clarification of ownership and control of the line segment between Concord and Lincoln.

Pan Am requests waivers from 49 CFR 1152.22(c), (d), and (e), which require that discontinuance applications include information regarding the service performed, the attributable revenue and cost data, and the community and rural impact. Pan Am contends that there is no point to requiring the submission of these data because there will only be a change of operators and not a complete discontinuance of service. Moreover, Pan Am notes that the revenue and cost data requirements are intended to apply only to carriers that seek to discontinue their own operations on the grounds that those operations are a burden on interstate commerce.

NHDOT objects to these waiver requests, contending that the proposed discontinuance of service will have a significant effect on continued freight operations over its White Mountain Branch and, therefore, these information requirements are directly relevant to our analysis of those effects. According to NHDOT, the revenues NES receives from operating Pan Am's New Hampshire Main Line has helped make it possible for NES to operate NHDOT's White Mountain Branch. NHDOT contends that, without these revenues, NES will not be able to continue to serve a small volume rail shipper, Innovative Paper Technologies, which is located on the White Mountain Branch, or maintain the White Mountain Branch, which serves as a rail connection for P&LR, and is used by PL&R for its business restoring and rebuilding rail cars.

NHDOT contends that information regarding the service performed, the revenue and cost data attributable to that service, and the community and rural impact is directly relevant to our analysis. The burden of proof is on Pan Am to demonstrate why the Board should withdraw its primary jurisdiction to permit Pan Am to seek the removal of NES from the Line under state law. And while NHDOT is entitled to submit any evidence or argument it deems useful in opposition to this adverse discontinuance request, including evidence relating to NES's operation of the Line, we do not see how it would benefit NHDOT or our analysis to require Pan Am's compliance with the information requirements of 49 CFR 1152.22(c), (d), and (e) when Pan Am has not operated the Line since 1985. Because Pan Am does not possess the information necessary to comply with these requirements, we will grant its request for waiver.

Pan Am also requests waivers from the environmental and historic reporting requirements of 49 CFR 1105 and any further exemptions or waivers that may be necessary to confirm the inapplicability of the environmental and historic reporting requirements to this proceeding. Pan Am contends that the proposed adverse discontinuance arises in the context of continued rail operations and will not result in significant changes that exceed the thresholds in 49 CFR 1105.7.

Because this proceeding is intended to result merely in a substitution of operators, it is excepted from environmental documentation under 49 CFR 1105.6(c)(2)(ii) and the Historic Report requirement under 49 CFR 1105.8(b)(1). We will therefore grant Pan Am's request for waiver of the Board's environmental and historic reporting requirements.

Pan Am requests partial waiver of the filing and notice requirements of 49 CFR 1152.20(a)(1) and (2), respectively, and the time-filing requirements of 49 CFR 1152.20(b)(1). Instead, Pan Am requests that it be permitted to serve the instant waiver petition only on the Line's shippers and connecting carriers.² Pan Am also asks that this waiver petition be permitted to serve as the notice of intent to discontinue service as required under 49 CFR 1152.20. Pan Am further requests that it be permitted to serve a copy of its adverse discontinuance application only on each of the aforementioned relevant parties and on NHDOT. Pan Am's request for waiver from 49 CFR 1152.20(a)(1) and (b)(1) is unopposed and will be granted.

NES opposes Pan Am's request for waiver to the extent it includes a waiver from 49 CFR 1152.20(a)(2)(ix), contending that it would not be unduly burdensome for Pan Am to give advance notice to the U.S. Railroad Retirement Board (RRB). NES argues that RRB should be given notice because the proposed adverse discontinuance is likely to result in reduced employment for NES. Further, NES notes that Pan Am has not requested waiver of 49 CFR 1152.24(b), which requires that an abandonment or discontinuance application be accompanied by an affidavit attesting to the applicant's compliance with the notice requirements of 49 CFR 1152.20(a)(2). As a consequence, NES argues that Pan Am should comply fully with the compliance affidavit requirement of section 1152.24(b).

We will grant in part Pan Am's request for partial waiver of the notice requirements of 49 CFR 1152.20(a)(2). Pan Am will be required to serve a copy of this decision on all of the Line's shippers and connecting carriers, the RRB, and the headquarters of all duly certified labor organizations that represent employees on the Line.³ This will serve as the notice of intent to these parties. Pan Am's request that it be permitted to serve a copy of its adverse discontinuance application only on the Line's shippers and connecting carriers and on NHDOT is unopposed and will be granted. See, e.g., City of Peoria and Village of Peoria Heights, IL—Adverse Discontinuance—Pioneer Industrial Railway Company, STB Docket No. AB-878 (STB served Sept. 10, 2004). The adverse discontinuance application must be accompanied by an affidavit of compliance under 49 CFR 1152.24(b) for those parties that we have required Pan Am to serve with notice under 49 CFR 1152.20(a)(2).

Pan Am requests waiver of the notice posting and newspaper publication requirements of 49 CFR 1152.20(a)(3) and (4), respectively, and an exemption from the notice posting requirement of 49 U.S.C. 10903(a)(3)(B). Pan Am contends that it cannot comply with the notice posting requirements because it is not in possession of the Line and because this is an adverse, not voluntary, discontinuance. Additionally, Pan Am argues that the notice posting requirements were designed for carriers proposing to discontinue service over their own lines. The request for waiver of 49 CFR 1152.20(a)(3) and the corresponding exemption from 49 U.S.C. 10903(a)(3)(B) is unopposed and will be granted.

² According to Pan Am's certificate of service, a copy of the waiver request was served on the Governor of New Hampshire, the New Hampshire Public Utility Commission, and the Bureau of Rail and Transit of New Hampshire.

³ See 49 CFR 1152.20(a)(2)(xii).

NES opposes Pan Am's request for waiver of the newspaper publication requirement of 49 CFR 1152.20(a)(4). NES notes that Pan Am offers no support for this waiver and contends that it would be incongruous to grant the requested waiver when Pan Am has not requested an exemption from the corresponding publication requirement of 49 U.S.C. 10903(a)(3)(C). Newspaper publication is not onerous and will ensure that all persons and entities with an interest in the Line are given notice and the opportunity to participate in any proceedings. We will deny this waiver request.

Finally, Pan Am seeks a waiver from the Board's procedures for offers of financial assistance (OFA), at 49 CFR 1152.27, and an exemption from the corresponding statutory OFA requirements of 49 U.S.C. 10904. Because it intends to continue operating the Line, Pan Am contends that these procedures will serve no useful purpose and are not necessary to carry out the rail transportation policy, 49 U.S.C. 10101.

The request for waiver of the OFA regulations at 49 CFR 1152.27 and for exemption from 49 U.S.C. 10904 will be granted. NES does not oppose the request. Moreover, in the event that Pan Am prevails in its adverse discontinuance application, the shippers on the line will continue to receive rail service from Pan Am, so an OFA is not warranted. See 49 U.S.C. 10904(d)(1).

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 waivers and exemptions is granted to the extent discussed above. Pan Am is directed to submit and serve on the parties to be served with notice, a clarification of ownership and control of the line segment between Concord and Lincoln.
2. This decision is effective on its service date.

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

Anne K. Quinlan
Acting Secretary