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SERVICE DATE - LATE RELEASE NOVEMBER 13, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-548

TACOMA EASTERN RAILWAY COMPANY—ADVERSE DISCONTINUANCE OF
OPERATIONS APPLICATION—A LINE OF CITY OF TACOMA, IN PIERCE, THURSTON
AND LEWIS COUNTIES, WA

Decided: November 13, 1998

On June 23, 1998, the City of Tacoma, WA (City), filed an application under 49 U.S.C. 10903 requesting that the Surface Transportation Board (Board) find that the public convenience and necessity require and permit the discontinuance of the operations by the Tacoma Eastern Railway Company (TE)¹ on 131.5 miles of City rail line in Pierce, Thurston, and Lewis Counties, WA (line).² The Board approved the application by decision served on October 16, 1998 (decision). The decision is scheduled to become effective on November 15, 1998.

On October 26, 1998, TE filed a petition to stay the effectiveness of the decision pending disposition of its petition to reopen, which it indicated it intended to file by November 5, 1998.³ City replied to the petition for stay on October 29, 1998.⁴

¹ TE was authorized to operate the line by lease in Tacoma Eastern Railway Co.--Lease and Operation Exemption--City of Tacoma, Washington, Finance Docket No. 32591 (ICC served Nov. 3, 1994).

² The line extends (1) from milepost 2192.0, at Tacoma, to milepost 17.7, at Chehalis, and (2) from milepost 2192.0, at Tacoma, to milepost 64.2, at Morton.

³ TE filed a petition to reopen the decision on the grounds of material error on November 5, 1998.

⁴ The pleading was incorrectly captioned as Finance Docket No. 33666, Belt Line Division of Tacoma Public Utilities—Operation Exemption—in Pierce, Thurston and Lewis Counties, WA.

The standards governing disposition of a petition for stay are: (1) whether petitioner is likely to prevail on the merits; (2) whether petitioner will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other interested parties; and (4) whether issuance of a stay is in the public interest. See, e.g., Hilton v. Braunskill, 481 U.S. 770 (1986); Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). The party seeking a stay carries the burden of persuasion on all of the elements required for such extraordinary relief. Canal Authority of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974).

TE has failed to demonstrate entitlement to a stay under the governing criteria, and, accordingly, its request will be denied.

Likelihood of prevailing on the merits. TE claims that the Board failed in its decision to rule on the argument that the Board lacks jurisdiction over the abandonment application because the operating agreement between TE and the City has not expired or been terminated.⁵ TE further maintains that the Board's decision is arbitrary and capricious because it failed to consider the argument advanced by TE based on Delaware & H. R. Corp. Trackage Agreement Modification, 290 I.C.C. 103, 110 (1953) (D&H).

While the Board did not explicitly address TE's argument that it lacks jurisdiction over the abandonment application, the Board's decision reflected the clear view that it had jurisdiction to entertain the matter. Furthermore, TE's reliance on D&H is misplaced.

⁵ The City notes that TE took a diametrically opposed position when it sought a stay in the exemption in City of Tacoma and Beltline Division of Tacoma Public Utilities—Change in Operator Exemption—Tacoma Eastern Railway Company, (STB Finance Docket No. 33566) (STB served Mar. 31, 1998), on the grounds that the City should not be permitted to proceed with judicial remedies to enforce its right to remove TE from the line until after it obtained a public convenience and necessity finding from the Board. The notice of exemption in STB Finance Docket No. 33566 was withdrawn by the City and dismissed by the Board on May 15, 1998.

That decision sought to prevent a carrier from escaping its obligations to another carrier under a trackage rights agreement. There, the Interstate Commerce Commission's (ICC) Division 4 said, ". . . we may not properly take jurisdiction of the application to abandon because it seeks to have us do indirectly what we may not do directly."⁶ The Board's action does not allow the City to avoid any obligations it has under its contract with TE. Only a court of competent jurisdiction can construe that contract and determine whether or not the contract has been breached, and whether or not any damages are due.

The Board's action here, following a long line of precedents, allows a court of competent jurisdiction, which alone can adjudicate the rights and obligations of TE and the City, to issue a ruling that can be given effect. Modern Handcraft, Inc.--Abandonment, 363 I.C.C. 969 (1981); Kansas City Pub. Ser. Frgt. Operations--Exempt.--Aban., 7 I.C.C.2d 216, 224-26 (1990) (Modern Handcraft); Fore River R.R. Corp.--Discon. Exempt.--Norfolk County, MA, 8 I.C.C.2d 307 (1992); Cheatham County Rail Authority "Application and Petition" for Adverse Discontinuance, Docket No. AB-379X (ICC served Nov. 4, 1992) (Cheatham County); and Chelsea Property Owners--Aban.--The Consol. R. Corp., 8 I.C.C.2d 773 (1992) (Chelsea), aff'd sub nom. Consolidated Rail Corp. v. ICC, 29 F.3d 706 (D.C. Cir. 1994). A court ruling affecting the parties' rights under the contract cannot be implemented by the City unless we find that the public convenience and necessity permits the service to be discontinued, because our primary jurisdiction would otherwise preclude the court's order from being given effect. Where no overriding Federal interest in interstate commerce exists, the agency will not permit its jurisdiction to be used to shield a railroad from the legitimate processes of state law; Modern Handcraft, Cheatham County, Chelsea. TE's position here would require the court to act when it would be unable to enforce its orders.

⁶ Moreover, D&H, by its terms, is limited to agreements entered before 1940. Whether Division 4 correctly applied the law affecting contracts entered into before 1940 is not an issue here. As the contract between TE and the City was entered into after that date, D&H is irrelevant here. See Chicago and North Western Transp. Co.--Abandonment, 354 I.C.C. 205 (1978) and Western Stock Show Assn.--Aban. Exemption--In Denver, CO, 1 S.T.B. 113 (June 12, 1996).

TE's argument contravenes longstanding agency and court precedent that establishes this agency's primary jurisdiction over abandonment or discontinuance of service over rail lines in interstate commerce and would make the exercise of the Board's authority subordinate to the actions of a state court. TE, therefore, is not likely to prevail on the merits of its argument.

Irreparable harm. TE argues that, in the absence of a stay, it will be irreparably harmed as it would be unduly prejudiced in a state court by virtue of the decision granting the application for adverse discontinuance. But, as noted in the Board's decision, a finding that the public convenience and necessity requires or permits the discontinuance of operations allows the parties to undertake other legal remedies to resolve the alleged contractual disputes between TE and the City. A grant of the stay has not been shown to be necessary to prevent any irreparable harm. A stay could, on the other hand, unnecessarily prolong the controversy between TE and the City. Thus, this element supports the denial of the stay request.

Harm to other parties. TE further argues that issuance of a stay will not substantially harm the City. TE states that, while the City would lose the benefit of the current Board decision granting adverse discontinuance, the City could still obtain a ruling on adverse discontinuance in the event that a court were to determine that the operating agreement has been terminated. We are not persuaded by this argument. As noted in the City's reply, any delay would continue to deprive the City of an opportunity to realize the potential of its multi-million dollar investment in the line. The record supports that a stay of the effective date of the Board's decision is likely to cause substantial continuing economic harm to the City.

Public interest. Finally, TE maintains that issuance of a stay will benefit the public as the Board will be honoring its past precedent and insisting upon orderly procedure to determine whether it has jurisdiction to entertain an application for adverse discontinuance. This argument is not convincing. Contrary to TE's suggestion, the Board has upheld its past precedent and maintained that it had jurisdiction in this instance by issuing its decision granting the adverse discontinuance application. Moreover, the public interest does not support the issuance of a stay. Enabling the City

to proceed with replacing TE's operations with that of the Belt Line Division of the City of Tacoma Department of Public Utilities (Belt Line) will provide shippers on the line with high quality service, which the City has represented that Belt Line can provide.

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

It is ordered:

1. The petition for stay is denied.
2. This decision is effective on its service date.

By the Board, Linda J. Morgan, Chairman.

Vernon A. Williams
Secretary