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SERVICE DATE - LATE RELEASE JUNE 16, 1999

SURFACE TRANSPORTATION BOARD

DECISION¹

STB Docket No. AB-559 (Sub-No. 1X)

GAULEY RIVER RAILROAD, LLC — ABANDONMENT
AND DISCONTINUANCE OF SERVICE — IN WEBSTER
AND NICHOLAS COUNTIES, WV

STB Docket No. AB-55 (Sub-No. 572X)

CSX TRANSPORTATION, INC. — DISCONTINUANCE
OF SERVICE — WEBSTER AND NICHOLAS COUNTIES, WV

Decided: June 16, 1999

By petitions filed jointly on February 26, 1999, the Gauley River Railroad Company (Gauley River) and CSX Transportation, Inc. (CSXT) seek exemptions under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903. Gauley River seeks authority to abandon and discontinue service over: (1) a 10-mile line of railroad extending between milepost BUE-119 near Cowen, WV, and milepost BUE-129 at Allingdale, WV (Line A); and (2) an 8.3-mile line of railroad extending between milepost BUE-12.4 at Muddlety Falls, WV, and milepost BUE-20.7 at Muddlety, WV (including the McMillon Creek Branch and Delmont Branch) (Line C). Both Gauley River and CSXT seek authority to discontinue service over a 12.4-mile line of railroad between milepost BUE-0.0 at Allingdale, WV, and milepost BUE-12.4 at Muddlety Falls, WV (Line B). The three lines (collectively, the Lines) total 30.7 miles in Webster and Nicholas Counties, WV.²

Comments were filed by Gauley Eagle Holdings, Inc. (GEH), Nicholas County Commission (NCC), Webster County Prosecuting Attorney's office (WC), and Region 4 Planning and Development Council (Region 4). 4-C Economic Development Authority (the 4-C Authority) filed a letter-comment supporting Region 4. The West Virginia State Rail Authority (WVSRA), Pardee & Curtin Resources Company (Pardee), Tioga Lumber Company (Tioga) and Pace Carbon Fuels, L.L.C. (Pace Carbon) (joint protestants) filed opposition and a request for investigation and hearing. Letter-comments in opposition were filed by United States Senator Robert C. Byrd, United States Representative Bob Wise, West Virginia Development Office, and Brotherhood of Locomotive

¹ A single decision is being issued in the two proceedings for administrative convenience only. Petitioners paid separate filing fees but submitted their respective petitions in a single document.

² Notice of the institution of exemption proceedings was published in the Federal Register at 64 FR 13469 on March 18, 1999.

Engineers Division 751. Requests for issuance of a notice of interim trail use (NITU) and a public use condition were filed by the Webster County Commission (WCC) and the West Virginia Department of WVSRA. The United Transportation Union (UTU) requested imposition of labor protective conditions. Gauley River and CSXT jointly replied to the various comments and protests.³

We will deny the petitions for exemption.

BACKGROUND

In mid-1998, Gauley River purchased Lines A and C and subleased Line B from CSXT.⁴ Gauley River states that Line B is owned by the Strouds Creek and Muddlety Railroad (SC&M), which had leased Line B to CSXT's predecessor by lease deed dated November 1, 1943.⁵

³ On June 4, 1999, joint protestants WVSRA, Pardee, Tioga, and Pace Carbon filed a reply to petitioners' reply to protests of May 7, 1999. The supplemental statement submitted by joint protestants does not contain any pertinent information that they could not have submitted in their prior pleading. Such a reply to a reply is not ordinarily permitted and will not be considered here in what has developed into an adversarial proceeding. On June 7, 1999, petitioner Gauley River filed a request to supplement its reply so that it may respond to the June 4 filing by joint protestants, and on June 11, 1999, Gauley River filed an estimated net liquidation value for the rail lines proposed to be abandoned. For the same reasons, we also will reject Gauley River's request to reply to the June 4 filing. Nor will we consider Gauley River's June 11 filing. We are unable to consider a stream of new filings within the time frame for deciding these cases. Under 49 U.S.C. 10904(c), an offer of financial assistance (OFA) is now due 120 days after the filing of the abandonment application and, even if not directly applicable to exemption petitions, we have interpreted the 120-day statutory time frame to apply to those proceedings as well and have extended that statutory time limit by rule to abandonment exemption proceedings. See 49 CFR 1152.27(b)(2). Accordingly, we have established a deadline of no more than 110 days to issue a decision on the merits to accommodate the letter and spirit of the statutory time limit in 49 U.S.C. 10904(c). See Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903, STB Ex Parte No. 537 (STB served March 15, 1996, Dec. 24, 1996, and June 27, 1997), aff'd, NARPO v. STB, 158 F.3d 135 (D.C. Cir. 1998); 49 CFR 1152.27(b)(2).

⁴ See Gauley River Railroad, LLC — Purchase and Operation Exemption — CSX Transportation, Inc., STB Finance Docket No. 33579 (STB served July 14, 1998).

⁵ The lease was renewed for an additional 15 years commencing April 1, 1989. See CSX Transportation, Inc. — Renewal of Lease Exemption — Strouds Creek and Muddlety Railroad

(continued...)

According to Gauley River, no traffic existed on the Lines at the time of purchase, and track conditions were so poor that traffic cannot now safely traverse them.⁶ Gauley River states, however, that it anticipated attracting sufficient new business to the Line to enable it to make track improvements and reinstitute service.

Gauley River states that, because the Lines have not been operated since 1994, they are in very poor condition and will require substantial track repairs. Gauley River says that it negotiated diligently with potential shippers to secure the business of certain coal producers with facilities located along the Lines. It appears to Gauley River, however, that those potential coal shippers have for some time relied exclusively on truck transportation to other CSXT-served loading facilities and are unwilling to enter into rail service contracts or make commitments to Gauley River. Without such contracts or commitments, Gauley River maintains that any further investment in the Lines would cause Gauley River to incur substantial avoidable losses.

Mr. Michael Ellis, manager of Gauley River, testifies that the Lines were acquired with the understanding that two coal producers — Pace Carbon and GEH — would be willing to make volume and term commitments to justify Gauley River's substantial investment in the Lines. Ellis states that Gauley River has been unable to come to terms with either company and that it appears unlikely that Gauley River will be able to secure the traffic needed to justify its continued investment in the Lines. Ellis says that interest on the debt to acquire the Lines has reached more than \$96,000, and that Gauley River has incurred other expenses geared to restoration of the Lines. These include \$287,000 for the acquisition of 4 locomotives; \$116,911 for rehabilitation of those locomotives; and \$14,258.75 for preliminary track maintenance. As noted, after Gauley River acquired the Lines, it assertedly placed an embargo on them due to unsafe track conditions.⁷ To rescind the embargo, Mr. Ellis estimates Gauley River would have to spend \$1 million to bring the Lines into conformity with FRA Class 1 safety standards.

⁵(...continued)

Company, Finance Docket No. 31373 (ICC served Dec. 21, 1988). The SC&M does not seek abandonment authority with respect to Line B. The map and other materials submitted by the petitioners do not clearly indicate that SC&M would continue to be connected to the national rail system following the abandonment sought here. Any future application or exemption request involving abandonment of Lines A and C should include sufficient information to permit us to make findings as to whether the SC&M would retain any connection to other rail lines, and, if not, whether the public convenience and necessity permits the abandonment of that segment.

⁶ Gauley River states that it has embargoed all service over the Lines due to unsafe track conditions.

⁷ Neither our records nor those of the Association of American Railroads reflect an embargo notice on file.

SHIPPER AND COMMUNITY INTERESTS

GEH, a land and natural resource management company, states that in 1995 it purchased 32,000 acres of surface and mineral coal reserves located adjacent to a portion of the Lines. Although GEH says that it is not currently shipping coal on the Lines, GEH estimates that between 500,000 and 750,000 tons of coal would be shipped annually in the near future should market conditions change.⁸ GEH further states that it sought reactivation by CSXT of the Lines in 1996 and 1997 and had entered into discussions on GEH's becoming a short line operator. GEH says that it contacted CSXT in March 1998 only to learn that CSXT had accepted an offer of another short line operator. On meeting with the new short line carrier (Gauley River), GEH says it was quoted rates three times the past CSXT rate of \$275 per domestic coal car and \$300 per export coal car, based on a 7,000-ton unit train.

GEH contravenes Gauley River's assertion that it diligently negotiated with potential shippers on the Lines. GEH contends that Gauley River failed to carry on good faith negotiations. At a meeting with Gauley River on April 1, 1998, GEH says that there were no negotiations but that GEH was informed of new freight rates and asked what amount of traffic it could generate. GEH disputes Gauley River's contention that the Lines are in very poor physical condition and would require substantial track repairs if operations were to be re-instituted. GEH states that it hired a qualified railroad contractor to evaluate Line B. GEH indicates that, after inspecting Line B, the contractor submitted a price quote in the range of \$100,000 to \$150,000 to upgrade that portion of the Lines. GEH responds to Gauley River's assertion that an exemption would permit the termination of service on a line with no traffic and minimal local impact. GEH insists that the Lines have no traffic only because a competitive freight rate has not been forthcoming and that the Lines are essential to the industrial development of approximately 1,500 acres.

Pace Carbon states that, in January 1998, it purchased property in Summersville in order to construct a facility to manufacture coal-based synthetic fuel. This location was chosen primarily for its close proximity to rail transportation. According to Pace Carbon, the facility has the capacity to produce approximately 600,000 tons of synthetic fuel per year. Pace Carbon asserts that, without the availability of rail service at its facility, full production of 600,000 tons annually would require approximately 25,000 truckloads per year or 69 truckloads each and every day. Pace Carbon notes that such an operation would be logistically difficult and economically infeasible. According to Pace Carbon, if Gauley River's short line is not available, the viability of Pace Carbon's facility will be in doubt. Due to current market conditions, however, Pace Carbon says that it is not yet in a position to enter into a long-term agreement with regard to shipments on the Gauley River line.

⁸ GEH says this property produced and transported approximately 1 million tons of coal each year from 1963 to 1991 to eastern utility consumers.

Mr. George D. Curtin, Senior Vice President of both Pardee and Tioga⁹ (the Companies), states that the Companies acquired 28,000 acres of coal and timber properties during the past 3 years. According to Mr. Curtin, the Companies own approximately 20 million tons of clean, recoverable coal that is becoming more in demand due to Phase II compliance with the Clean Air Act Amendments of 1990. Mr. Curtin says that the Companies are trucking some coal to rail or river loading facilities but that large scale, cost-effective mining of these reserves is dependent on rail transportation. Mr. Curtin states that the Companies have several mining prospects. One of these is their principal lessee, who plans to commence deep mine operations shortly that will produce 80,000 tons in 1999 and 180,000 tons in 2000. He projects an additional 400,000 to 500,000 tons per year from surface mine and associated operations.

Joint protestants (WVSRA, Pardee, Tioga, and Pace Carbon) assert that maintaining the status quo will not burden CSXT or Gauley River. Witness David L. Giordano for Pace Carbon states that, in January 1999, Pace Carbon agreed in good faith to make monthly payments to Gauley River in the amount of \$12,000, with the intent to reimburse Gauley River for interest and other miscellaneous expenses that Gauley River represents it incurs during each month in which the Lines remain in place. Pace Carbon says that it initiated these payments in order to preserve the ongoing negotiations between itself and Gauley River until such time as traffic commences and with the understanding that Gauley River would not change the status quo so long as such payments were made.

Joint protestants argue that the record does not provide sufficient information to evaluate the economic impact on Gauley River of disallowing the abandonment. The joint protestants state that the Lines have a monthly income of \$12,000 and an interest expense associated with the purchase of the Lines of \$68,829. But, they argue, the rate of return for the Lines cannot be determined because Gauley River does not disclose the purchase price. Joint protestants also question how the approximately \$400,000 expense for the purchase of locomotives and their rehabilitation can be charged as an expense against the Lines and how incurring that expense justifies abandonment of the Lines. The joint protestants also challenge Gauley River's statement that the projected 4,000 cars annually will not permit Gauley River to enjoy any appreciable rate of return. Without evidence of what Gauley River's actual investment is, joint protestants cannot determine the actual rate of return for the property. Joint protestants assert that there is no evidence that Gauley River is losing money.

WVSRA, as the agency responsible for the public interest of the citizens of the State of West Virginia, opposes removal of the Lines because, in its view, removal would have a serious adverse impact on rural and community development in the area. WVSRA asserts that the substantial

⁹ Tioga also owns the SC&M, which owns Line B, which is leased to CSXT and subleased to Gauley River.

financial investments that have been made in the area will be rendered worthless, which would adversely impact the community and deprive the area of future growth.

Region 4, supported by the 4-C Authority, is the agency responsible for planning and development in Webster and Nicholas Counties. Region 4 asserts that abandonment of rail service will have serious adverse impact on the local economy. Region 4 states that the Lines were a significant factor in the location of Pace Carbon and GEH in Nicholas County.

WC and NCC oppose the proposed abandonment and discontinuance and support the comments and protests by area businesses and mining firms and local economic and development offices.

Senator Byrd submits that the loss of rail service will negatively impact the economies of Webster and Nicholas Counties, which rely heavily on the coal mining and timber industries. He is concerned that the loss of rail service will not only cause the loss of existing businesses, but will also deter new businesses from locating in the area.

Representative Wise submits that the availability of rail service is vital for the local companies with plans to increase their production capacity and for locating new companies in the area.

In reply, Gauley River acknowledges that it accepted three contributions totaling \$36,000 from Pace Carbon which was applied to the interest on its acquisition debt. In his reply verified statement, Mr. Ellis says that the \$12,000 payments came about when Gauley River wanted to salvage side tracks for cash and Pace Carbon urged Gauley River to desist in exchange for the \$12,000 monthly payments. Gauley River argues that the \$12,000 monthly payments are not contractual and consequently can be stopped at any time.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned or service discontinued 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 or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

The exemption process is designed to minimize regulatory burdens. An exemption is appropriate when we have sufficient information to reach an informed decision. Typically, the types of abandonment and discontinuance transactions that are exempted are those where the shippers do not contest the abandonment or if they do contest it, revenue from their traffic is clearly marginal compared to the cost of operating the lines. See Boston and Maine Corporation — Abandonment

Exemption — In Hartford and New Haven Counties, CT, STB Docket No AB-32 (Sub-No. 75X) et al. (STB served Dec. 31, 1996), slip op. at 5 (Boston and Maine); Tulare Valley Railroad Company — Abandonment and Discontinuance Exemption — In Tulare and Kern Counties, CA, STB Docket No. 397 (Sub-No. 5X) (STB served Feb. 21, 1997), slip op. at 5-6; San Joaquin Valley Railroad Company — Abandonment Exemption — In Kings and Fresno Counties, CA, STB Docket No. AB-398 (Sub-No. 4X) (STB served May 23, 1997), slip op. at 5, aff'd (STB served Mar. 5, 1999). Where there is an inadequate record on which to grant an abandonment petition for exemption, the petition will be denied outright. See Boston and Maine, slip op. at 6.

As in any abandonment case, whether authority is sought by application or petition, the railroad must demonstrate that the lines in question are a burden on interstate commerce. Typically, in an attempt to make that showing, the carrier submits evidence to show that the costs incurred by the railroad for the line exceed the revenues attributable to it. Despite the fact that shippers and local interests have mounted substantial opposition here, petitioner has submitted very little evidence on which we can make such a determination.

Numerous shippers and local communities have expressed an interest in the line, but no traffic has moved since 1994, and no shipper has made a firm commitment to tender any traffic to Gauley River in the future. Nevertheless, the Lines still generate revenue. The record demonstrates that Gauley River receives a monthly payment from a shipper of \$12,000 for retaining the Line. Although the carrier does not have a contractual right to the money, it receives it every month and the carrier uses the funds. That being the case, we find that these revenues are attributable to the Lines. And, this payment appears to offset the expense that it incurs in leasing one segment from CSXT.

While abandonment decisions are not based solely on mathematical computations and considerations, the petitioners here bear the burden of showing that the current situation imposes a burden on them that outweighs the harm that would befall shippers and other members of the public and the adverse impact on rural and community development if the Lines were abandoned. A reasonable starting point would be for petitioners to demonstrate that they incur costs of more than \$12,000 per month arising out of the ownership of the Lines. They have failed to do so.

Gauley River has itemized a considerable expense for locomotives. The railroad has not supported its statement of the cost of the four locomotives, but obviously the cost must be significant. The railroad, however, must also establish that the cost is attributable to the line sought to be abandoned. The issue is one of first impression: whether the cost of locomotives purchased to operate on a line but never used because of a lack of traffic may be attributed to the line.

We believe that in order to attribute the cost of those locomotives to the Lines we would have to have evidence that the petition did not include. Railroads have an obligation to operate their properties economically and efficiently. Gauley River could put these locomotives out on lease;

there is a ready market, especially among short line carriers, for locomotives. The locomotives have never carried any traffic on the Gauley River. Given these circumstances, we cannot simply attribute the costs of the locomotives to the Line. We would need additional information showing that these units of capital are in fact sufficiently tied to the Lines to make their costs properly attributable to them.

Gauley River asserts that rehabilitating the Lines will cost a great deal, as much as \$1 million, but this number is unsupported. One protestant, GEH, submitted testimony that it obtained a price quote of between \$100,000 and \$150,000 for rehabilitating the portion of the line necessary to provide service to it. The railroad asserts that it has incurred \$14,258.75 for track maintenance. We agree that it is reasonable to attribute some maintenance expense to a line even though it is not in service. We also recognize that some rehabilitation and maintenance expenses would be incurred before the Lines could handle any traffic, although the amount of these expenses is unclear.

Petitioner asserts that as of April 30, 1999, it has incurred a total of \$96,152.87 in interest expenses for its purchase of the Lines. Gauley River does not give monthly costs, however, so we cannot tell whether the cost of the debt exceeds the \$12,000 monthly payment that the railroad receives. Given that 10 months elapsed between Gauley River's purchase of the Lines from CSXT and the date of Gauley River's reply statement, it seems reasonable that the monthly interest expense is less than \$12,000. In any event, we are unable to determine whether the costs incurred by petitioners exceed the revenue from the Lines, even if reasonable maintenance and rehabilitation expenses were added.

Upon review of the record before us, we conclude that Gauley River has failed to establish that continued regulation of the proposed abandonment and discontinuance of service by Gauley River and the discontinuance of service by CSXT are not necessary to carry out the rail transportation policy and either that it is not necessary to protect shippers from the abuse of market power or that the transaction is limited in scope. See Boston and Maine, slip op. at 5. As in Boston and Maine, we believe that the shippers' concerns warrant a more thorough review and, therefore, conclude that the petitions for exemptions should be denied. Id.

Denial of these petitions is without prejudice to Gauley River and CSXT refile appropriate abandonment and discontinuance applications or petitions for exemptions that cure the defects found in the current proposals. Any new filings must be under new docket sub-numbers accompanied by new filing fees.

Our denial of Gauley River's and CSXT's petitions for exemption moots the Joint Protestants' request for investigation and hearing, as well as labor protection and environmental issues, including the requests by WCC and WVSRA for issuance of a NITU and a public use condition.

It is ordered:

1. Joint protestants' reply of June 4, 1999, and Gauley River's reply thereto of June 7, 1999, are rejected.
2. Gauley River's and CSXT's petitions for exemption are denied.
3. This decision is effective on the date of service.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary