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SERVICE DATE – JANUARY 26, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-167 (Sub-No. 1185X)

CONSOLIDATED RAIL CORPORATION—ABANDONMENT EXEMPTION—
IN MERCER COUNTY, NJ

STB Docket No. AB-290 (Sub-No. 294X)

NORFOLK SOUTHERN RAILWAY COMPANY—DISCONTINUANCE
EXEMPTION—IN MERCER COUNTY, NJ

STB Docket No. AB-55 (Sub-No. 676X)

CSX TRANSPORTATION, INC.—DISCONTINUANCE EXEMPTION—IN MERCER
COUNTY, NJ

Decided: January 18, 2007

This decision grants a petition to reconsider a decision served in this proceeding on October 20, 2006. The instant decision also grants, on our own motion, Norfolk Southern Railway Company (NSR) and CSX Transportation, Inc. (CSXT) authority to discontinue service over the line that is the subject of this proceeding.

BACKGROUND

Consolidated Rail Corporation (Conrail) filed a notice of exemption in STB Docket No. AB-167 (Sub-No. 1185X) under 49 CFR 1152 Subpart F—Exempt Abandonments to abandon a portion of a line of railroad known as the Robbinsville Industrial Track, between milepost 32.20± and milepost 37.90± in the cities of Hamilton Township and Washington Township, Mercer County, NJ, a distance of approximately 5.7 miles. Notice of the exemption was served and published in the Federal Register on July 3, 2006 (71 FR 37976-77). The exemption was scheduled to become effective on August 2, 2006. However, on July 13, 2006, a formal expression of intent to file an offer of financial assistance (OFA) under 49 U.S.C. 10904 and 49 CFR 1152.27(c)(2) was filed by James Riffin to purchase the entire line. This filing automatically stayed the effective date of the exemption until August 12, 2006. Mr. Riffin simultaneously requested that Conrail provide him with the financial data and information prescribed in 49 CFR 1152.27(a). Under 49 CFR 1152.27(c)(2)(ii)(B), OFAs in this proceeding were due by

August 2, 2006 (30 days after publication of notice of the exemption in the Federal Register). However, as of that date, the Board had no record of receiving either an OFA or a request to toll the time period for filing an OFA from either Mr. Riffin or Conrail.

In a decision served on August 10, 2006, the Board imposed a 180-day public use condition, pursuant to a request filed by C&A Trail Conservancy, and environmental conditions. On August 18, 2006, Mr. Riffin filed a motion for reconsideration of that decision, and a copy of a timely petition, pursuant to 49 CFR 1152.27(c)(2)(ii)(C), requesting that the time period for filing an OFA be tolled until 90 days after Conrail provides Mr. Riffin with the information required under 49 CFR 1152.27(a).

In his motion, Mr. Riffin stated that, on August 9, 2006, Conrail had submitted some, but not all, of the information requested. On August 18, 2006, Mr. Riffin requested that Conrail provide him with additional information. Mr. Riffin further maintained that NSR and CSXT must obtain discontinuance authority from the Board before Conrail's abandonment can be authorized. In support of this contention, Mr. Riffin argued that the line that is the subject of this abandonment proceeding appears to be a part of Conrail's Retained Assets, within the North Jersey Shared Assets Area (NJSAA), as a result of the Board's decision in CSX Corp. et al. – Control – Conrail Inc. et al., 3 S.T.B. 196 (1998) (Conrail Acquisition), pursuant to which NSR and CSXT obtained Board authority to control Conrail and to operate over certain of Conrail's lines.

In a response filed on September 13, 2006, Conrail indicated that it took no position on whether the Board should reopen the August 10, 2006 decision, but urged that, if the proceeding is reopened, the Board limit the time period for Mr. Riffin to file his OFA to 10 days after Conrail notifies the Board that it has provided the additional information to Mr. Riffin. On September 19, 2006, Conrail notified the Board that it was providing the available, additional information to Mr. Riffin.

In its September 13, 2006 response, Conrail also asserted, in response to Mr. Riffin's position that CSXT and NSR need to obtain discontinuance authority before Conrail would be able to abandon this line, that it has not acted as an agent for CSXT and NSR in providing any common carrier service over this line, as there has not been a demand for service (or any new service provided) over the line since the 1999 "split date" when CSXT and NSR took over many of the Conrail operations pursuant to Conrail Acquisition. Thus, Conrail maintained that CSXT and NSR have not provided common carrier service over the line that would require them to seek discontinuance authority.

Because Mr. Riffin had presented evidence of his timely filing of a petition to toll the due date for filing an OFA and because Conrail did not object to reopening to permit Mr. Riffin to file an OFA, the Board's Director of the Office of Proceedings reopened the proceeding and tolled the OFA deadline in a decision served October 20, 2006. However, because the record indicated that Mr. Riffin had sufficient information to formulate an OFA, the Director made OFAs due on October 30, 2006. As a result, the effective date of the exemption was extended until November 9, 2006.

Also in the October 20 decision, the Director denied Mr. Riffin's request for a finding that NSR and CSXT require discontinuance authority. The Director reasoned that there was no indication that either of those carriers ever began service over the line or that Conrail had provided any service over the line either on their behalf or on its own behalf since the "split date" in 1999.

On October 30, 2006, Mr. Riffin filed a petition for reconsideration of the October 20 decision. Mr. Riffin also asked that the Board in essence extend the time for filing an OFA until 15 days after the Board rules on his petition for reconsideration. Conrail filed a reply in opposition to Mr. Riffin's filing on November 7, 2006.

In a decision served November 8, 2006, the Director extended the filing date for OFAs so that we could consider the matters presented by Mr. Riffin.

DISCUSSION AND CONCLUSIONS

In his petition for reconsideration, Mr. Riffin argues that it was error not to require CSXT and NSR to file for discontinuance authority over the line. He claims again that, because the line is in the NJCAA, NSR and CSXT each have active authority to operate over the line, citing language in Norfolk Southern Railway Company—Discontinuance Exemption—In Hudson County, NJ, et al., STB Docket No. AB-290 (Sub-No. 212X) et al. (STB served Jan. 28, 2002) (Hudson County). Mr. Riffin argues that it was improper for the agency to rule on the discontinuance authority issue based on whether CSXT and NSR had provided service over the line since 1999 or whether they had requested that Conrail provide any service on the line on their behalf. Rather, he claims that the issue is whether NSR and CSXT have operating rights for the line, and maintains that, if so, they must file for discontinuance authority before the agency can grant the exemption or approve an OFA. Mr. Riffin expresses concern that, should he acquire the line pursuant to the OFA process, CSXT or NSR could at some later date assert a right to operate over the line if they are not required to obtain discontinuance authority now as part of the Conrail abandonment proceeding.

Conrail opposes Mr. Riffin's request for reconsideration. The railroad claims that no regulatory purpose would be served by having CSXT and NSR file for discontinuance authority here. It explains that there are no shippers on the line and that no service has been provided on the line since 1999. Conrail further claims that we should not be guided by Hudson County, where, unlike here, Conrail had provided service on behalf of CSXT and NSR to active customers on the line. That case, according to the railroad, also is not apposite because it involved a through-route over which CSXT and NSR had provided overhead service, whereas the instant line is stub-ended and does not carry overhead traffic. Thus, Conrail states while it may have been appropriate in Hudson County for the carriers to file for discontinuance authority out of an abundance of caution to demonstrate that routing over the line would no longer be possible, in this case, Conrail's abandonment filing subsumes the rights of CSXT and NSR to operate over the subject land, and consummation of the abandonment would end any potential problems. Lastly, Conrail notes that the Robbinsville Industrial Track is in the South Jersey Shared

Assets Area, not in the NJSAA as claimed by Mr. Riffin.

We will grant Mr. Riffin's petition for reconsideration. The question of whether CSXT and NSR require discontinuance authority does not turn on whether the carriers have ever directly or indirectly exercised their rights to operate over the line. Rather, the carriers' possession of the rights, as opposed to their exercise, is the focus of our inquiry here. NSR and CSXT clearly have operating rights over the line in question; CSXT and NSR have operating rights over lines in the three shared assets areas pursuant to Conrail Acquisition, and the line in question is in one of those areas. When those carriers acquired operating rights over the lines of railroad within the shared assets areas (including the line in question here), they assumed a common carrier obligation over those lines. That common carrier obligation cannot be extinguished without Board authorization or exemption. Thus, to remove any uncertainty, CSXT and NSR would need discontinuance authority before Conrail could consummate its abandonment authority.

But, under the circumstances, requiring CSXT and NSR to separately file for discontinuance authority would be unnecessary. As discussed below, the current record is sufficient for us to save administrative resources and minimize the burden on those carriers by granting an exemption for discontinuance authority on our own motion. CSXT and NSR will not be harmed by our action. Presumably, they consent to discontinuance by having allowed an entity under their control, Conrail, to seek abandonment authority. There are no shippers on the line, and it is not used for overhead service. And our action will remove uncertainty so that the OFA process may proceed in a timely manner.

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 discontinuance by CSXT and NSR 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 CSXT and NSR of the responsibility of operating over an unused line. 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 because the line does not serve any shippers. Given our finding regarding market power, we need not determine whether the proposed discontinuance is limited in scope.

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).

Mr. Riffin requests that his OFA be made due 15 days after we rule on the matter of whether CSXT and NSR need discontinuance authority. However, he provides no justification why the 10 days previously provided to him in the October 20 decision is inadequate. Therefore, his OFA will be due February 5, 2007.

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 imposed the necessary environmental conditions in association with the notice of exemption to abandon the line. Therefore, this decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Mr. Riffin's petition for reconsideration is granted as discussed above.
2. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903 the discontinuance of service by CSXT and NSR of operations on the Robbinsville Industrial Track, subject to the employee protective conditions in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).
3. OFAs must be received by the railroad and the Board by February 5, 2007.
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."**
5. Provided no OFA has been received, the abandonment and discontinuance exemptions will be effective on February 15, 2007.

6. Notice of the exemptions being granted in STB Docket No. AB-290 (Sub-No. 294X) and STB Docket No. AB-55 (Sub-No. 676X) will be published in the Federal Register on January 26, 2007.

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

Vernon A. Williams
Secretary