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SERVICE DATE - SEPTEMBER 25, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-279 (Sub-No. 3)

CANADIAN NATIONAL RAILWAY COMPANY– ADVERSE DISCONTINUANCE – LINES
OF BANGOR AND AROOSTOOK RAILROAD COMPANY AND VAN BUREN BRIDGE
COMPANY IN AROOSTOOK COUNTY, ME

Decided: September 24, 2002

This petition of the Trustee of the Bangor and Aroostook Railroad Company, Debtor (BAR),¹ asks for exemptions from three statutory provisions and for waivers of several of our regulations. The exemptions and waivers would, if granted, facilitate BAR's filing of an application seeking a finding that the public convenience and necessity require or permit the discontinuance of trackage rights. Those rights are held by the Canadian National Railway Company (CN) over certain track owned by BAR and its wholly owned subsidiary, the Van Buren Bridge Company (VBBC).² The petition will be granted to the extent specified in this decision.

BACKGROUND

The plant of the Fraser Paper Company (Fraser) at Madawaska, ME, is currently served pursuant to a haulage agreement between BAR and CN. Under the haulage agreement, BAR crews and equipment move Fraser's traffic over BAR-owned or controlled track for the account of CN. CN deals directly with Fraser.

¹ On August 27, 2002, the Montreal, Maine & Atlantic Railway, LLC, filed a notice of exemption pursuant to 49 CFR 1150.31, *et seq.*, to acquire and to operate the rail lines and other rail assets of BAR. Notice of the exemption was served and published in the Federal Register on September 19, 2002.

² Although BAR's petition is filed only in STB Docket No. AB-279 (Sub-No. 3), the petitioner states that it intends to seek adverse discontinuance of not only the trackage rights held by CN but also a freight easement held by Waterloo Railway Company, a CN subsidiary. As discussed further below, we will grant relief only in this docket, the only proceeding properly before us at this time.

BAR moves the cars between Fraser's plant at Madawaska and an interchange junction with CN at St. Leonard, Canada. CN trains provide the line haul service beyond the interchange at St. Leonard. BAR owns the track involved in this movement between Madawaska (BAR milepost 0.0) and Van Buren, ME (BAR milepost 22.72). VBBC owns the track between Van Buren (VBBC milepost 0.0) and the interchange with CN at St. Leonard, Canada. BAR trains cross the St. Johns River over a VBBC railroad bridge at the Canadian border at VBBC milepost 0.31. The BAR-VBBC track between Madawaska and VBBC milepost 0.31 at the Canadian border (the Subject Line) is the subject of this petition.³

In addition to having the right to deal with Fraser via the haulage agreement, CN has the right to operate directly over the Subject Line pursuant to a trackage rights agreement with BAR (the Trackage Rights Agreement). CN invoked the trackage rights class exemption at 49 CFR 1180.2(d)(7) for that agreement in Canadian National Railway Company – Trackage Rights Exemption – Bangor and Aroostook Railroad Company, STB Finance Docket No. 34014 (STB served Mar. 21, 2001). In addition, CN's Class III railroad subsidiary, the Waterloo Railway Company (Waterloo), acquired from BAR and VBBC a freight operating easement (the Operating Agreement) over the Subject Line. That acquisition was the subject of another proceeding, Waterloo Railway Company – Acquisition Exemption – Bangor and Aroostook Railway Company and Van Buren Bridge Company, STB Finance Docket No. 34015 (STB served Mar. 21, 2002).

On August 15, 2001, an involuntary Chapter 11 bankruptcy proceeding was filed against BAR. The United States Bankruptcy Court for the District of Maine granted an order for relief on December 4, 2001. The Trustee was appointed on or about December 28, 2001. On March 18, 2002, the Trustee filed a motion with the Bankruptcy Court seeking to reject the Trackage Rights Agreement, the Operating Agreement, and another agreement,⁴ arguing that these agreements are burdensome to the estate and therefore can be rejected pursuant to federal bankruptcy law. On April 24, 2002, the Trustee filed a petition with the Board to reopen and to revoke the exemptions granted in STB Finance Docket Nos. 34014 and 34015.

By decision served on June 25, 2002, in STB Finance Docket Nos. 34014 and 34015, we denied BAR's request to revoke the exemptions in those proceedings. In that decision, we found that BAR had not shown that revocation of the exemptions met the statutory criteria of 49 U.S.C. 10502(d). We also explained that BAR could extinguish CN's statutory right to operate over the Subject Line only

³ The VBBC track between the border and St. Leonard is not subject to our jurisdiction because it is in Canada.

⁴ This other agreement was the "Junction Settlement Agreement," under which CN paid BAR's parent company \$5 million in exchange for BAR's agreement to the haulage agreement.

by filing an adverse or third-party discontinuance application under 49 U.S.C. 10903 and by demonstrating that the present and future public convenience and necessity require or permit the discontinuance of CN's trackage rights.

By petition filed on August 9, 2002, BAR announced its intention to file a third-party discontinuance application to extinguish CN's trackage rights over the Subject Line. As part of the process, BAR has requested waivers and exemptions designed to eliminate its need to file certain information that is required for a typical discontinuance application, i.e., one brought by the carrier providing the service proposed for discontinuance. BAR asserts that the information in question is irrelevant or inapplicable to an adverse discontinuance proceeding brought by a third party. BAR maintains that this type of waiver is routine, citing Board precedents.

On August 22, 2002, CN and Waterloo (collectively, CN) filed a reply to BAR's petition for waiver. CN states that it will be strenuously opposing BAR's forthcoming adverse discontinuance application. CN opposes waiver of some of the provisions proposed for waiver by BAR. In addition, CN argues that, because BAR stated in its petition that it intends to seek termination of Waterloo's easement approved in STB Finance Docket No. 34015, any request that the Board withdraw its primary jurisdiction over those rights must be the subject of a separate request for a third-party abandonment.

On August 26, 2002, BAR filed a reply to CN's reply filed on August 22, 2002, and a motion for leave to file this document. BAR's reply reiterates the arguments BAR advanced in its petition.⁵ We will grant the motion for leave to file the reply in this proceeding, because the motion is unopposed.

DISCUSSION AND CONCLUSIONS

As noted, BAR seeks an exemption from statutory provisions and waiver of certain regulations to facilitate the filing of its third-party discontinuance application. Each of BAR's proposed exemptions and waivers is discussed below.

Exemptions. Pursuant to 49 U.S.C. 10502, BAR seeks exemption from the requirements of section 10903(a)(3)(B) "to the extent deemed necessary for the forthcoming adverse discontinuance application." This provision requires that a rail carrier seeking to abandon or to discontinue service "post a copy of the notice in each terminal and station on each portion of a railroad line proposed to be abandoned or over which all transportation is to be discontinued." The provision is designed for carriers

⁵ The reply is captioned under the docket number of this proceeding and also under STB Docket No. AB-124 (Sub-No. 2). As discussed below, BAR must file for separate relief under that docket number.

that, unlike BAR, are proposing to voluntarily discontinue their own service over a line. Moreover, here CN has not instituted service pursuant to the trackage rights, so CN has no employees on the line to read the posted notices. BAR's employees would not be adversely affected by a grant of the subject discontinuance authority. The sought exemption will therefore be granted.

BAR also seeks exemption from section 10903(c)(2) "to the extent deemed necessary for the forthcoming adverse discontinuance application." This provision requires all rail carriers to maintain a system diagram map and to identify on that map rail lines planned for abandonment or discontinuance of service. Compliance with this requirement is not feasible for a third-party applicant. Thus, an exemption from this provision will be granted. See Salt Lake City Corporation – Adverse Abandonment – In Salt Lake City, UT, STB Docket No. AB-33 (Sub-No. 183) (STB served Oct. 5, 2001); New York City Economic Development Corporation – Adverse Abandonment – New York Cross Harbor Railroad, Inc., STB Docket No. AB-596 (STB served Dec. 3, 2001).

Finally, BAR seeks exemption from the financial assistance requirements of 49 U.S.C. 10904 and waiver of the related regulations at 49 CFR 1152.27. CN does not oppose either the sought exemption or the related waiver. In a third-party discontinuance proceeding, we withdraw our primary jurisdiction to permit the operation of state, local or, as here, other Federal law to take effect "where there is no overriding federal interest in interstate commerce." See 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. Absent an exemption from 49 U.S.C. 10904, that provision would provide a vehicle for someone to invoke jurisdiction that the agency had just disavowed. Such a result would render our decision a nullity. If we make a finding that the public convenience and necessity do not require the continuation of CN's trackage rights over BAR, it would be inconsistent to allow anyone to invoke section 10904 to preserve those rights. Therefore, we will grant BAR's petition to exempt this proceeding from section 10904.

Application of these three statutory provisions – 49 U.S.C. 10903(a)(3)(b), 49 U.S.C. 10903(c)(2), and 49 U.S.C. 10904 – to this transaction is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101. Rather, exemption will promote that policy by eliminating unnecessary procedures, and thus will expedite regulatory decisions [49 U.S.C. 10101(2)], foster sound economic conditions in transportation [49 U.S.C. 10101(5)], and encourage efficient management of railroads [49 U.S.C. 10101(9)]. Other aspects of the rail transportation policy will not be adversely affected.

Waivers. Like our predecessor agency, the Interstate Commerce Commission (ICC), we would ordinarily reject an abandonment or discontinuance application that does not substantially conform to the requirements of 49 CFR 1152 Subpart C. However, in appropriate instances,

particularly involving adverse applications, we will waive inapplicable and unneeded provisions.⁶ Citing past waiver cases, BAR requests waiver of the following specific provisions of 49 CFR 1152, Subpart C: 1152.20(a)(3) [posting requirements]; 1152.22(a)(5) and 1152.10 - 1152.14 [system diagram map]; 1152.22(a)(4) [detailed map]; 1152.22(b) [condition of properties]; 1152.22(c) [service provided]; 1152.22(d) [revenue and cost data]; and 1152.22(e) [rural and community impact].

CN does not object to waiver of the provisions dealing with the system diagram map, posting requirements, or offers of financial assistance. These provisions have been waived in previous decisions, and we will waive them here.

CN does object to waiver of the provisions dealing with the condition of the property, the service provided, revenue and cost data, and rural and community impact. We will not waive the requirement to submit information on the condition of the property. This information might bear upon the ability of BAR and CN to provide common carrier service to Fraser, an issue that is relevant under the public convenience and necessity standard of 40 U.S.C. 10903(d).

We also will not waive the requirement to submit information on the service provided under the trackage rights, to the extent that such information is in the possession of BAR. We cannot determine whether the present and future public convenience and necessity require or permit the discontinuance of CN's trackage rights without having knowledge of the service that is or could be provided under those rights.

We will waive the requirement to submit revenue and cost information. This requirement is intended to apply to carriers seeking to discontinue their own operations on the grounds that those

⁶ See, e.g., Chelsea Property Owners – Abandonment – Portion of the Consolidated Rail Corporation's West 30th Street Secondary Track in New York, NY, Docket No. AB-167 (Sub-No. 1094) (ICC served July 12, 1989); David H. Murdock d/b/a Murdock Investment Company – Abandonment – Consolidated Rail Corporation Line in Baltimore, MD, Docket No. AB-167 (Sub-No. 1102) (ICC served Aug. 6, 1992); Grand Trunk Western Railroad Incorporated – Adverse Discontinuance of Trackage Rights Application – A Line of Norfolk and Western Railway Company in Cincinnati, Hamilton County, OH, STB Docket No. AB-31 (Sub-No. 30) (STB served Feb. 12, 1998); City of New Rochelle, Illinois – Adverse Discontinuance – Rochelle Railroad Company, STB Docket No. AB-549 (STB served June 5, 1998); The Kansas City Southern Railway Company – Adverse Discontinuance Application – A Line of Arkansas & Missouri Railroad Company, STB Docket No. AB-103 (Sub-No. 14) (STB served Nov. 24, 1998); and CSX Corporation and CSX Transportation, Inc. – Adverse Abandonment Application – Canadian National Railway Company and Grand Trunk Railroad, Inc., STB Docket No. AB-31 (Sub-No. 38) (STB served Mar. 2, 2001, and Feb. 1, 2002).

operations are a burden on interstate commerce, i.e., because they cause the carrier to incur a loss. Here, CN is not seeking to discontinue its own trackage rights, and BAR certainly is not arguing that CN should be forced to discontinue these rights on the ground that their exercise will be unprofitable to CN.

We will not waive the requirement to submit information on rural and community impact. Under 49 U.S.C. 10903(d), we must consider the possibility of “serious adverse impact on rural and community development” in discontinuance proceedings, and this possibility can exist in adverse discontinuances as well as in standard discontinuances. At this point, we cannot be certain that issues involving rural and community development will not arise.

CN also objects to waiver of the detailed map requirement of 49 CFR 1152.22(a)(4), arguing that BAR should be able to prepare the required map because it owns the property over which service would be discontinued. This provision requires the submission not only of a map but also of information showing the line’s relation to other rail lines, highways, water routes, and population centers. This information may be relevant to whether there is a public need for CN’s trackage rights and to the effect of discontinuance on rural and community needs. Thus, we will not waive the detailed map requirement.

BAR’s request for “any further exemption or waiver” that may be necessary to ensure that it is not required to submit unnecessary environmental or historical information will be denied. BAR maintains that, because it would continue to provide rail service to Fraser even if we were to grant the adverse discontinuance of CN’s trackage rights, it is exempt from the environmental and historic reporting requirements of 49 CFR Part 1105, pursuant to 49 CFR 1105.6(c)(6) and 1105.8(b)(3). If BAR believes that its proposal is exempt from environmental or historic reporting requirements, it should make that case in its filing, rather than seeking an exemption at this stage.

Scope of Application. If BAR, as it suggests in its petition and as it indicates in its reply, also intends to seek termination of Waterloo’s easement approved in STB Finance Docket No. 34015, it must file a separate application to do so, following the procedures required for filing such an application (including seeking waivers and exemptions, if needed). BAR may then seek to have these proceedings consolidated for concurrent handling. The instant proceeding, however, embraces only the request for discontinuance of the CN trackage rights approved in Canadian National Railway Company – Trackage Rights Exemption – Bangor and Aroostook Railroad Company, STB Finance Docket No. 34014 (STB served Mar. 21, 2001).

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 waiver and exemption is granted to the extent specified herein.
2. This decision is effective on its date of service.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams
Secretary