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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-83 (Sub-No. 16X)

MAINE CENTRAL RAILROAD COMPANY--ABANDONMENT EXEMPTION--
IN ANDROSCOGGIN COUNTY, ME

Decided: September 14, 2000

Maine Central Railroad Company (MEC) filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments and Discontinuances to abandon an approximately 18.97-mile line of railroad, referred to as the Lewiston Industrial Track or Lewiston Line, between Engineering Station 0+00 (approximately milepost 0.00) and Engineering Station 1001+81.6 (approximately milepost 18.97), in Androscoggin County, ME. Notice of the exemption was served and published in the Federal Register on July 1, 1998 (63 FR 36033-34). The exemption was scheduled to become effective on July 31, 1998.

On July 6, 1998, the Board's Section of Environmental Analysis (SEA) served an environmental assessment (EA) in this proceeding. The EA noted that the Maine Historic Preservation Office requested additional information concerning potentially historic resources on the Lewiston Line and possible impacts to any historic structures during MEC's salvage operations. Because of the outstanding historic resources concerns, SEA recommended that a condition be imposed requiring MEC to retain its interest in and take no steps to alter the historic integrity of all sites and structures on the right-of-way until completion of the historic review process mandated by section 106 of the National Historic Preservation Act, 16 U.S.C. 470f. Accordingly, in a decision served July 29, 1998, the Board's Director of the Office of Proceedings (Director) imposed the recommended historic review condition.¹

On September 2, 1999, MEC filed a motion to withdraw its notice of exemption. In its motion, MEC stated that it seeks to withdraw its abandonment proposal because of the amount of time the proceeding has remained open, because of the significant work still required to complete the historic review process, and because of the recent work by the State of Maine to improve the portion of the Lewiston Line owned by the State.

¹ The Director also imposed a condition requiring MEC to consult with the National Geodetic Survey (NGS) and provide NGS with 90 days' notice prior to disturbing or destroying any geodetic markers.

MEC's withdrawal request is opposed by the State of Maine, acting by and through its Department of Transportation (MDOT),² and by Pejepscot Industrial Park, Inc. d/b/a Grimmel Industries (Grimmel),³ which is connected to the Lewiston Line by a rail spur and seeks to obtain rail service on that line.⁴ MDOT explained that in 1991, wishing to explore rail passenger and freight opportunities, it purchased the physical assets of the 9.4-mile eastern portion of the Lewiston Line between Brunswick and Lisbon Falls, ME. However, MEC retained a freight easement and the common carrier obligation to provide rail freight service.⁵ The easement agreement provided that, as long as the State had not commenced passenger operations on the line, MEC would be responsible for maintaining the line and providing rail freight service. The agreement further provided that MEC's easement would end when this agency removes the common carrier obligation for rail freight service on the line.⁶ Freight Easement Agreement, Section 2.3.

The Lewiston Line, including the portion owned by the State, has been out of service since 1987. According to MDOT, beginning in 1994, Grimmel has repeatedly asked MEC to provide rail service to its facility. MDOT and Grimmel assert that MEC has consistently refused

² On September 30, 1999, MEC filed a motion for leave to file a rebuttal to the reply of MDOT. MEC filed its rebuttal on October 4, 1999. On October 12, 1999, MDOT replied to MEC's rebuttal. MEC then filed a letter on October 25, 1999. MDOT replied on November 1, 1999. No one has objected to these additional filings, and in the interest of obtaining a complete record, the filings will be accepted.

³ Grimmel, which salvages, sells and ships scrap metal, has a shredding facility at Topsham, ME. Grimmel filed a petition for leave to intervene on September 30, 1999. The petition to intervene will be granted. The petition was not opposed, and Grimmel's intervention will not unduly broaden the issues here. See 49 CFR 1113.7.

⁴ The municipalities of Brunswick and Rockland, ME, in letters filed October 28 and November 1, 1999, respectively, support MDOT's position and oppose MEC's withdrawal request. The cities contend that allowing withdrawal of the abandonment request will preclude arrangements by MDOT to restore rail service to the Lewiston Line.

⁵ MEC's affiliate Springfield Terminal Railway Company (ST) was also a party to this agreement.

⁶ Our predecessor, the Interstate Commerce Commission (ICC), found that its approval was not needed for MDOT to purchase the underlying property and track material, because no common carrier rights or obligations were being transferred. See Maine, DOT--Acq. Exemption, ME. Central R. Co., 8 I.C.C.2d 835, 837 (1991) (State of Maine) ("MEC has both the intent and unconditional ability to continue to assume and exercise its common carrier rights and obligations.").

to provide Grimmel service at Topsham. They state that in 1997 MEC agreed to provide service only if Grimmel paid MEC \$250,000 for track repairs on the Lewiston Line, paid MEC's crew expenses to serve Topsham, and paid a \$600 per car rate for the rail movement from the Topsham facility to Portland, ME. Grimmel's general manager charges that MEC has no intention of providing rail service to the company. He contends that it is in the public interest to allow the State to replace MEC with a different carrier that would provide service.

MDOT indicates that, following negotiations between the State and MEC in 1998, MEC agreed to abandon the entire Lewiston Line. MDOT claims that the parties further agreed that, following abandonment, they would negotiate for MDOT's purchase of the remaining portion of the line, and MDOT would rehabilitate the line so that Grimmel could be served by another railroad.

MDOT maintains that it has entered into a number of similar operating arrangements with satisfactory results. MDOT notes that MEC acknowledged in its June 1998 notice of exemption that the line would be acquired by the State for the purpose of providing rail service and that therefore no salvage would be undertaken.⁷ MDOT asserts that, because of MEC's assurances, it did not object to the abandonment.

MDOT states that, after July 31, 1998, it began negotiations with MEC for the purchase of the segment it did not own. MDOT further states that, in good faith reliance on MEC's agreement to abandon the line, MDOT commenced a \$250,000 rehabilitation of the line to Grimmel's facility, including replacement of ties and repairs of bridges, grade crossings, and wash-outs. MDOT indicates that it has already spent \$150,000 on the Lewiston Line.

MDOT maintains that the Board has the discretion to deny a request to withdraw an abandonment filing if the carrier's conduct is inconsistent with the public interest. According to MDOT, allowing MEC to withdraw its abandonment proposal would preserve an unsatisfactory status quo by rewarding MEC's long-standing failure to fulfill its common carrier obligation. Therefore, MDOT asks us, by letter filed November 12, 1999, to remove the historic condition as it applies to the State-owned portion of the Lewiston Line so that abandonment authorization as to that portion of the line can be made final and it can then terminate MEC's freight easement on that portion of the line.⁸ In its October 12, 1999 letter, MDOT contends that it would run into

⁷ See notice at 3, which states that part of the Lewiston Line "is already owned by the State of Maine, subject to MEC's operating rights (which MEC seeks to discontinue). MEC believes that the State of Maine, or a third party acting in conjunction therewith, will acquire the remainder of the [l]ine and/or operating rights over same post-abandonment."

⁸ By letter filed November 1, 1999, the Maine Historic Preservation Office advised the
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federal preemption claims if it were to seek legal remedies against MEC without our having issued abandonment authority.

MDOT asserts that the motivation behind MEC's withdrawal of the abandonment is to prevent entry of a competing carrier, the St. Lawrence and Atlantic Railroad Company (SL&A), and the potential diversion of traffic from MEC. MDOT argues that MEC's attempted withdrawal of its abandonment proposal lessens transportation service and competitive options for shippers in the State and is contrary to the public interest.

MEC replies that, because abandonment of the Lewiston Line had not been consummated within 1 year from the July 1, 1998 service date of the notice of exemption authorizing abandonment, the authority to abandon automatically expired pursuant to the Board's rule at 49 CFR 1152.29(e)(2).⁹ Alternatively, MEC argues that, if its abandonment authority was stayed by the Board's imposition of the historic review condition, it has not satisfied the condition, and therefore it has the right to withdraw its still pending abandonment request.

MEC claims that "MDOT changed its fundamental strategy" concerning the Lewiston Line when MDOT informed MEC 7 months after the abandonment proposal was filed that the SL&A, a competitor of MEC in the area, would operate over the line. MEC argues that MDOT is biased against MEC and is attempting to isolate MEC for the benefit of other carriers in the state. MEC faults MDOT for making repairs without first communicating with the Maine Historic Preservation Office and without confirming that the abandonment proposal was still pending. MEC submits that, because the line has been out of service for over 10 years and requires substantial rehabilitation, it will commence service only upon a reasonable level of demand and the feasible expectation of a compensatory return from freight traffic. It argues that we should not force it to provide service for a single shipper at a significant loss or else forfeit its proprietary rights in the line for the benefit of a competing carrier.

⁸(...continued)

Board that MDOT has satisfactorily completed the historic review consultation process with respect to the portion of the Lewiston Line owned by MDOT and that MEC's proposed abandonment would not adversely affect historic properties on that portion of the line.

⁹ Section 1152.29(e)(2) states in relevant part: "If, after 1 year from the date of service of a decision permitting abandonment, consummation has not been effected by the railroad's filing of a notice of consummation, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. In that event, a new proceeding would have to be instituted if the railroad wants to abandon the line."

DISCUSSION AND CONCLUSIONS

MEC's authority to abandon the Lewiston Line has not automatically expired under 49 CFR 1152.29(e)(2), because the historic condition imposed by the Director in the decision served July 29, 1998, is a regulatory barrier to consummation. See Pittsburgh & Shawmut Railroad, Inc.--Abandonment Exemption--In Jefferson and Clarion Counties, PA, STB Docket No. AB-487 (Sub-No. 3X) (STB served Oct. 19, 1998).¹⁰ Thus the abandonment proposal remains pending with us.

When we authorize a carrier to abandon a line, that authority is permissive, not mandatory. The carrier can choose to exercise that authority or not. Because we do not compel a carrier to abandon a line, we normally grant a carrier's motion to withdraw its request for abandonment authority. Moreover, denying MEC's petition to withdraw the notice would not give MDOT and Grimmel the relief they seek--the ability to exercise rights that would assertedly be triggered upon abandonment of the line. That is because, until MEC exercises the abandonment authority it has received, the line is not abandoned and our primary jurisdiction over the line continues. Refusing to allow MEC to withdraw the notice would not force MEC to exercise the abandonment authority.¹¹

MDOT and Grimmel do have remedies available to pursue the relief they desire. MDOT or Grimmel may file a third-party application with the Board under 49 U.S.C. 10903, asking us to find that the public convenience and necessity no longer require the presence of MEC on the line.¹² If we were to make such a finding, we would withdraw our primary jurisdiction over the

¹⁰ Our rules provide, at section 1152.29(e)(2), that if a legal or regulatory barrier exists at the end of the 1-year period, the carrier has 60 days after removal of that barrier in which to exercise the abandonment authority and file a notice of consummation.

¹¹ Thus, MDOT's reliance on Conrail Abandonment of a Portion of the West 30th Street Secondary Track in New York, NY, Docket No. AB 167 (Sub-No. 493N) (ICC served Feb. 11, 1988), at 5-6, is misplaced. In that case, the ICC said that, where third parties have acquired rights or interests in the outcome of an abandonment request, the ICC (and now the STB) may deny a railroad's request to withdraw a filing if the agency finds it is in the public interest to do so. Here, MDOT's rights under its contract with MEC would vest only when MEC consummates a grant of abandonment authority. Because denying MEC's request to withdraw its notice of exemption would not and could not trigger consummation, we see no public interest in denying MEC's withdrawal request.

¹² It would not be appropriate for us to consider such a request in this proceeding. Rather, MDOT or Grimmel would need to file an application to initiate a new proceeding in
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line, thereby clearing the way for the operation of state law. Modern Handcraft, Inc.—Abandonment, 363 I.C.C. 969 (1981) (Modern Handcraft); Kansas City Pub. Ser. Frgt. Operation Exempt.—Aban., 7 I.C.C.2d 216, 224-26 (1990) (Kansas City); Chelsea Property Owners—Aban.—The Consol. R. Corp., 8 I.C.C.2d 773, 778 (1992), aff’d sub nom. Conrail v. ICC, 29 F.3d 706 (D.C. Cir. 1994). As the ICC explained in Modern Handcraft, 363 I.C.C. at 972, we will not allow our jurisdiction to be used to shield a carrier from the legitimate processes of state law while there is no overriding Federal interest to protect.¹³

Line owners dissatisfied with carriers operating over their lines have often filed third party applications for discontinuance, not to terminate service but rather to replace the existing operator with a new one. See City of Rochelle, Illinois—Adverse Discontinuance—Rochelle Railroad Company, STB Docket No. AB-549 (STB served May 27, 1999); Tacoma Eastern Railroad Company—Adverse Discontinuance of Operations Application—A Line of City of Tacoma in Pierce, Thurston, and Lewis Counties, WA, STB Docket No. 548 (STB served October 16, 1998), reconsideration denied, STB served Mar. 3, 1999; Cheatham County Rail Authority “Application and Petition” for Adverse Discontinuance, Docket No. AB-379X (ICC served Nov. 4, 1992) (Cheatham County); Fore River RR. Corp.—Discon. Exempt.—Norfolk County, MA, 8 I.C.C.2d 307 (1992) (Fore River). Moreover, this agency has withdrawn its primary jurisdiction in order to allow parties to assert rights arising out of a contract, Grand Trunk Western Railroad Incorporated—Adverse Discontinuance of Trackage Rights Application—A Line of Norfolk and Western Railroad Company in Cincinnati, Hamilton County, OH, STB Docket No. AB-31 (Sub No. 30) (STB served May 13, 1998), or out of the termination of contracts, Fore River and Cheatham County.

Alternatively, MDOT or Grimmel may file an application under 49 U.S.C. 10907, the “feeder line” provision of the statute. Under section 10907, we may require a railroad to sell its interest in a line if it is shown that the carrier operating the line refuses to provide adequate service over the line; the service is inadequate for the majority of shippers on the line; the sale will not significantly harm the railroad financially or operationally; and sale will result in

¹²(...continued)

which MDOT and/or Grimmel would have the burden of demonstrating that the public convenience and necessity do not require MEC’s presence on the Lewiston Line. MEC would then have the opportunity to show that the public’s interest in its continued presence on the line outweighs the public’s interest in MDOT’s ability to proceed with its proposed use of the line. An application proceeding is the appropriate vehicle for the submission of evidence and argument on such issues.

¹³ In Kansas City, the ICC, rejecting the line owners’ attempt to interpret Modern Handcraft narrowly, made clear, at 7 I.C.C.2d 216 at 226, note 18, that agency jurisdiction would not bar either a quiet title proceeding or a condemnation proceeding.

improved railroad transportation for shippers using the line. Upon such a showing, any financially responsible person—and all governmental authorities are deemed to be such persons—may acquire the line for its constitutional minimum value in order to provide rail service.¹⁴

In sum, petitioners have failed to show why MEC's motion to withdraw its abandonment request should not be permitted and we therefore will dismiss MEC's notice of exemption.¹⁵ The effect of dismissal is that MEC's common carrier obligation to provide rail service over the line will remain in place. However, the petitioners may seek to eject MEC from the line by filing either an application under section 10903 requesting that we withdraw our primary jurisdiction over the line so as to permit MDOT to invoke its asserted contract rights, or an application to acquire the line under the feeder line provision of section 10907. We also note that Grimmel has filed an action in a federal District Court to enforce MEC's common carrier obligation. See Pejepsco Industrial Park, Inc. d/b/a Grimmel Industries v. Maine Central Railroad Co., Springfield Terminal Railway Co., Guilford Transportation Industries, Inc., 215 F.3d 195 (1st Cir. 2000) (holding that the district court has jurisdiction to hear the failure-to-provide-service complaint but should refer the issue to this agency under the doctrine of primary jurisdiction).

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

¹⁴ The constitutional minimum value is the greater of the net liquidation value or the going concern value. Caddo Antoine And Little Missouri Railroad Company-Feeder Line Acquisition-Arkansas Midland Railroad Company Line Between Gurdon and Birds Mill, AR, Finance Docket No. 32479 (STB served Aug. 12, 1999).

¹⁵ Because we are allowing MEC to withdraw the notice of abandonment, MDOT's request for clarification of the abandonment authority--that it included discontinuance of service by ST--is moot.

It is ordered:

1. The motion by MEC to withdraw is granted. The notice of exemption, filed on June 11, 1998, is dismissed.
2. This decision is effective on the date of service.

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

Vernon A. Williams
Secretary