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SERVICE DATE - MAY 19, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-167 (Sub-No. 1161X)

CONSOLIDATED RAIL CORPORATION  
--ABANDONMENT EXEMPTION--  
IN VERMILION AND CHAMPAIGN COUNTIES, IL

Decided: May 16, 2000

We are denying the petition to reject and/or to revoke the notice of exemption in this proceeding.

BACKGROUND

On June 10, 1996, Consolidated Rail Corporation (Conrail)<sup>1</sup> filed a notice of exemption under 49 CFR 1152.50 to abandon approximately 24.50 miles of its line of railroad known as the Pekin Secondary Track from approximately milepost 4.0 to approximately milepost 28.50, in

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<sup>1</sup> By decision served on July 23, 1998, the Board approved, subject to certain conditions, the acquisition of control of Conrail, and the division of the assets thereof, by CSX Corporation and CSX Transportation, Inc. (referred to collectively as CSX) and Norfolk Southern Corporation and Norfolk Southern Railway Company (referred to collectively as NS). See CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company--Control and Operating Leases/Agreements--Conrail Inc. and Consolidated Rail Corporation, STB Finance Docket No. 33388, Decision No. 89 (STB served July 23, 1998). Acquisition of control of Conrail was effected by CSX and NS on August 22, 1998. The division of the assets of Conrail was effected by CSX and NS on June 1, 1999. See CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company--Control and Operating Leases/Agreements--Conrail Inc. and Consolidated Rail Corporation, STB Finance Docket No. 33388, Decision No. 127 (STB served May 20, 1999).

Vermilion and Champaign Counties, IL.<sup>2</sup> The notice was published in the Federal Register (61 FR 33795-96) on June 28, 1996.<sup>3</sup>

Joseph C. Szabo, on behalf of the United Transportation Union-Illinois Legislative Board (UTU-IL),<sup>4</sup> filed a petition to stay the exemption, on July 8, 1996, and a petition to reject or revoke the exemption, on July 18, 1996. Conrail replied to each petition. We will consider below the arguments raised by UTU-IL in both of its pleadings.

#### DISCUSSION AND CONCLUSIONS

Pursuant to 49 U.S.C. 10502, we have exempted “out-of-service” rail lines from the regular procedures for obtaining permission for abandonment of a rail line under 49 U.S.C. 10903. In their place we have adopted the abbreviated procedures set forth in 49 CFR 1152.50 for abandonment of a rail line where the carrier certifies that: (1) no local traffic has moved over the line for at least 2 years; (2) any overhead traffic can be rerouted over other lines; and (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on its behalf) regarding cessation of service over the line either is pending with the Board or any U.S. District Court or has been decided in favor of the complainant within the 2-year period.<sup>5</sup> If the carrier’s notice of exemption contains false or misleading information as to these factors, however, the

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<sup>2</sup> In a related proceeding, Norfolk and Western Railway Company (NW), a wholly owned subsidiary of Norfolk Southern Railway Company (NSR) that has subsequently been merged into NSR, sought an exemption to acquire the 49.8-mile portion of Conrail’s Pekin Secondary Track between milepost 28.5 at Urbana and milepost 78.3 at Bloomington, in Champaign, DeWitt and McLean Counties, IL. The acquisition exemption was granted in Norfolk and Western Railway Company--Acquisition and Exemption--Consolidated Rail Corporation, STB Finance Docket No. 32957 (STB served Aug. 15, 1996), 61 FR 42460 (Aug. 15, 1996). The exemption became effective on August 30, 1996.

<sup>3</sup> On July 8, 1996, Grand Prairie Co-op, Inc., filed a notice of intent to file an offer of financial assistance (OFA) under 49 CFR 1152.27(c)(2) to purchase a 5-mile portion of the line, which automatically stayed the effective date of the exemption until August 7, 1996. In a decision served on August 2, 1996, the effective date of the exemption was further postponed until August 22, 1996, to permit the filing of OFAs by August 12, 1996. No OFAs were filed and the exemption became effective on August 22, 1996. The actual abandonment of the line was contingent upon consummation of the acquisition transaction in STB Finance Docket No. 32957.

<sup>4</sup> The exemption was subject to our standard labor protective conditions for rail line abandonments set forth in Oregon Short Line R. Co. — Abandonment — Goshen, 360 I.C.C. 91 (1979).

<sup>5</sup> In addition to these certifications, the carrier must provide other information in the notice, including a proposed consummation date.

carrier's attempt to use the class exemption is void ab initio and the Board will reject the notice. 49 CFR 1152.50(d)(3). Moreover, under 49 U.S.C. 10502(d), we may revoke the exemption (in whole or as it applies to a particular line) if we find that regulation is necessary to carry out the rail transportation policy set forth in 49 U.S.C. 10101. The party seeking revocation has the burden of proof and petitions to revoke must be based on reasonable, specific concerns. CSX Transp., Inc.-Aban.-In Randolph County, WV, 9 I.C.C.2d 447, 449 (1992).

In its notice of exemption, Conrail made the required certifications, including a statement that any overhead traffic could be rerouted over other lines. Conrail explained that it used the subject line to provide overhead service to shippers at Urbana and points west of Urbana, but that after the sale of the Pekin Secondary Track in STB Finance Docket No. 32957,<sup>6</sup> all overhead traffic that previously moved over the line would be rerouted over NW's lines. Conrail proposed a consummation date of August 5, 1996 (the earliest possible date under the rules) or the date on which NW acquired and began operation on the line being acquired in STB Finance Docket No. 32957, whichever was later.

1. The Request for Rejection. Rejection is appropriate only if the exemption request contains false or misleading information. UTU-IL has submitted an affidavit that the line is used for interchange between Conrail and other rail carriers and argues that the line is not eligible for the class exemption because the overhead traffic involved would have to be rerouted over another carrier's lines, rather than lines of the abandoning carrier. UTU-IL also argues that Conrail's proposed consummation date was too vague. For these reasons, UTU-IL submits that the notice of exemption should be rejected.

a. Under 49 CFR 1152.50, a line is considered to be "out-of-service" when no traffic has originated or terminated on the line for at least 2 years. Exemption of Out of Service Rail Lines, 2 I.C.C.2d 146, 146 (1986) (Exemption), aff'd sub nom. Illinois Commerce Comm'n v. I.C.C., 848 F.2d 1246 (D.C. Cir. 1988), cert. denied, 488 U.S. 1004 (1989). UTU-IL has presented no evidence to rebut Conrail's testimony that no local traffic has originated or terminated on the line for over 2 years. The affidavit submitted in support of UTU-IL's petition demonstrates only that the line has been used for overhead traffic.

b. Contrary to UTU-IL's assertion, our regulations do not require that the rerouting of overhead traffic be limited to the abandoning carrier's lines. The phrase "other lines" does not appear in the regulations with any qualifying language limiting such lines to those of the abandoning carrier. UTU-IL relies on the following statement in Exemption, 2 I.C.C.2d at 150 (emphasis added):

"Indeed, neither the [Interstate Commerce] Commission nor any court (to our knowledge) has ever required a carrier to forego the abandonment of a line which generates no traffic

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<sup>6</sup> See supra note 2.

simply to protect the interests of shippers moving overhead traffic that can be rerouted over another of the carrier's lines."

This language is not a limitation on the class exemption. On the contrary, had UTU-IL quoted the remainder of the paragraph, rather than taking it out of context, it would have been clear that it is entirely within the carrier's managerial discretion how it will reroute overhead traffic.<sup>7</sup> UTU-IL has failed to show that the overhead traffic cannot be rerouted, and thus has not shown that the notice of exemption contained false or misleading information.

c. The proposed consummation date of the exemption was not too vague to serve as proper notice, as UTU-IL contends. Abandonment authorizations under the class exemption are permissive, and under the regulations in effect when Conrail filed its notice of exemption, the carrier could decide not only whether but also when to actually abandon the line,<sup>8</sup> so long as it did not abandon earlier than 50 days after the filing date of the notice (or 30 days after publication of the notice in the Federal Register). By providing a longer contingency period for consummation, the carrier merely gave greater advance notice to the public.<sup>9</sup>

d. Summary. Conrail's certification — that no local traffic had moved over the line for at least 2 years prior to the filing of the notice and that overhead traffic can be rerouted — qualified this abandonment for use of the class exemption, and the notice of exemption in this case did not contain false or misleading information. Therefore, there is no basis for rejecting the notice of exemption.

2. The Request for Revocation. Under 49 U.S.C. 10502(d), revocation of an exemption is appropriate only if regulation is necessary to carry out the rail transportation policy set forth in 49 U.S.C. 10101. UTU-IL urges us to revoke the exemption as it applies to this line because abandonment of this line allegedly would reduce competition for interchange traffic at the Peoria-Pekin gateway. Given the numerous carriers in the general area and the lack of shipper interest in

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<sup>7</sup> The remainder of the paragraph reads as follows (Exemption, 2 I.C.C.2d at 150):

"In fact, the rerouting of overhead traffic is a matter of managerial discretion that requires no regulatory authorization and can be accomplished even where abandonment authority is denied. Thus, the rerouting of overhead traffic is not an issue that would affect the outcome of an abandonment proceeding."

<sup>8</sup> We revised our abandonment regulations after this notice of exemption was published to provide that an abandonment authorization will expire if not exercised (and a notice of consummation filed with the Board) within 1 year. 49 CFR 1152.29(e)(2), 1152.50(e). That revision to our regulations does not apply retroactively to this case.

<sup>9</sup> UTU-IL alleges that the contingency creates uncertainty, which adversely affects employee morale and the shipping public. We do not agree that providing a longer notice period hurts shippers or employees.

retaining the line,<sup>10</sup> there is nothing in the record to support UTU-IL's contention that this abandonment would be anticompetitive. UTU-IL also argues that abandonment should not be permitted because traffic patterns may change in the future. But such unsupported speculation is not a sufficient basis for precluding this abandonment. In short, we conclude that UTU-IL has not shown that retention of this line, or further regulation for any other purpose, is necessary to carry out the rail transportation policy. Accordingly, the exemption will not be revoked.

3. The Request for Stay. Finally, we note that UTU-IL filed a request for a stay. We did not act on that request before the exemption became effective. However, because the stay petition did not address the standard criteria for consideration of a stay, see Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977),<sup>11</sup> the stay would not have been granted. Moreover, in view of our determination here that the requests for rejection and revocation are without merit, it is clear that a stay is unwarranted.

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 to reject and/or revoke the notice of exemption is denied.
2. The petition for stay is denied.
3. This decision is effective on its service date.

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

Vernon A. Williams  
Secretary

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<sup>10</sup> No shipper has objected to the abandonment of this line.

<sup>11</sup> Those criteria 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.