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SERVICE DATE - MARCH 3, 1999

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-548

TACOMA EASTERN RAILWAY COMPANY—ADVERSE DISCONTINUANCE OF  
OPERATIONS APPLICATION—A LINE OF CITY OF TACOMA, IN PIERCE, THURSTON  
AND LEWIS COUNTIES, WA

Decided: February 26, 1999

On June 23, 1998, the City of Tacoma, WA (City), filed an application under 49 U.S.C. 10903 requesting that the Surface Transportation Board (Board) find that the public convenience and necessity require and permit the discontinuance of the operations by the Tacoma Eastern Railway Company (TE)<sup>1</sup> on 131.5 miles of City rail line in Pierce, Thurston, and Lewis Counties, WA (line).<sup>2</sup> The Board approved the application by decision served on October 16, 1998 (decision).

On October 26, 1998, TE filed a petition to stay the effectiveness of the decision pending disposition of a petition to reopen. On November 5, 1998, TE petitioned the Board to reopen its October 16, 1998 decision on the grounds that the Board had committed material error.<sup>3</sup> By decision served November 13, 1998, Chairman Morgan declined to stay the effective date of the exemption. Thus, the Board's decision served on October 16, 1998, became effective on November 15, 1998.<sup>4</sup>

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<sup>1</sup> TE was authorized to operate the line by lease in Tacoma Eastern Railway Co.--Lease and Operation Exemption--City of Tacoma, Washington, Finance Docket No. 32591 (ICC served Nov. 3, 1994) (notice of exemption).

<sup>2</sup> The line extends (1) from milepost 2192.0, at Tacoma, to milepost 17.7, at Chehalis, and (2) from milepost 2192.0, at Tacoma, to milepost 64.2, at Morton.

<sup>3</sup> The City replied to TE's petition to reopen on November 17, 1998.

<sup>4</sup> The Belt Line Division of the City of Tacoma Department of Public Utilities (Belt Line) will replace TE as the operator of the line. See Belt Line Division of Tacoma Public Utilities—Operation Exemption—in Pierce, Thurston and Lewis Counties, WA, STB Finance Docket No. 33666 (STB served Nov. 6, 1998). The City states that the Belt Line is in the process of establishing service on the line.

On December 7, 1998, TE filed a “petition for leave to file tendered petition for clarification” accompanied by a petition for clarification. The Belt Line filed a reply on December 17, 1998. In its petition, TE asked the Board to clarify that the discontinuance authority is permissive, not mandatory. TE requested permission to late file its petition and requested clarification because it says the City has taken the position that the Board’s authority compels TE to discontinue operations. The City has taken the position that clarification is unnecessary and would be repetitive because the Board’s prior decision was clear. As we have previously granted the relief sought by the City, and we agree with the City that our prior decision was clear, we will deny the petition for clarification and, as discussed below, we also will deny TE’s petition to reopen.

#### ARGUMENTS

First, TE argues that the Board materially erred in failing to resolve its argument that the Board lacks jurisdiction over the adverse application for discontinuance because the operating agreement between TE and the City for the operation of the involved line has not expired or been lawfully terminated. Second, TE argues that the Board materially erred in failing to dismiss the application for lack of jurisdiction.<sup>5</sup>

In supplementing its jurisdictional argument advanced in its opposition and stay, TE maintains that, where the owner of a rail line files a third-party application for discontinuance of service by a carrier operating over the line pursuant to an agreement that was not approved by the Board (or its predecessor the Interstate Commerce Commission (ICC)), the Board does not have authority to grant the application unless the operating agreement has expired or been terminated. See Delaware & H. R. Corp. Trackage Agreement Modification, 290, I.C.C. 103, 110 (1953) (D&H). TE notes that in Fore River RR. Corp.--Discon. Exempt.--Norfolk County, MA, 8 I.C.C.2d 307 (1992), and in Western Stock Show Assn.--Aban. Exemption--In Denver, CO, 1 S.T.B. 113 (June 12, 1996) (Western Stock), the operating agreements had expired or had been lawfully terminated. In Cheatham County Rail Authority “Application and Petition” for Adverse Discontinuance, Docket No. AB-379X (ICC served Nov. 4, 1992) (Cheatham), TE notes that the rail owner obtained a judicial determination that the operating agreement had been terminated before filing the adverse application for discontinuance. TE acknowledges that in both Chicago and North Western Transp. Co.--Abandonment, 354 I.C.C. 205 (1978) (Chicago and North Western), and 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 May 13, 1998), the operating agreements were trackage rights agreements which had been approved by the ICC and which had not expired or been lawfully terminated. But TE seeks to distinguish these cases because they involved trackage rights and argues that this case is similar to D&H and dissimilar to the trackage rights cases.

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<sup>5</sup> TE indicates that it has adopted by reference the arguments in support of these allegations of material error contained in its petition to stay (stay) and its statement in opposition to the application filed on August 7, 1998 (opposition).

TE submits that it has demonstrated in the record that the operating agreement between TE and the City has not been terminated. TE argues that the agreement cannot be lawfully terminated unless and until disputes regarding whether TE has materially defaulted under the agreement have been mediated and resolved against TE in arbitration. TE alleges that there is a legitimate dispute as to whether there has been a lawful termination of the operating agreement. TE asserts that the City is required to obtain a judicial determination of whether the operating agreement has been lawfully terminated before filing an adverse application for discontinuance of service. According to TE, because the City failed to obtain a judicial determination, the Board does not have authority to grant the application.

The City replies that TE's argument that there is precedent for the proposition that the Board will not exercise its jurisdiction to grant involuntary discontinuance where an agreement under which the carrier is operating the line has not been terminated is incorrect. The City responds that TE's comparison of the D&H trackage rights agreement entered into before 1940 when the ICC had no jurisdiction over such agreements and the TE operating agreement approved by the ICC pursuant to the exemption procedures at former 49 U.S.C. 10505 is based on a fundamental misconception of the applicable law. Further, the City notes that an exemption conferred by the ICC pursuant to 49 U.S.C. 10505 (or by the Board pursuant to 49 U.S.C. 10502) does not deprive the ICC or the Board of jurisdiction. In addition, the City adds that the operating agreement has been terminated.

TE also argues that, even if the Board had jurisdiction over the application, it materially erred in finding that the public convenience and necessity permits discontinuance of service by TE under 49 U.S.C. 10903. TE states that the granting of an adverse application for discontinuance of service is the equivalent of revoking a carrier's interstate operating authority and should be undertaken only in the face of clear and convincing evidence that the carrier is not providing adequate service to the public. TE maintains that there is no such evidence in the record and that none is cited in the decision sought to be reopened.

TE continues to maintain that no shipper on the involved line has identified inadequate rail service on the part of TE.<sup>6</sup> TE contends that the views of Rainier presented in the reply verified statement of Peter Huffman (Huffman) are open to question and are not entitled to be considered by the Board. Also, TE states that, because Rainier provided no specific service or rate complaints, TE was unable to investigate the facts and provide rebuttal. TE also alleges that, because the MRSRR is an intrastate excursion train operator, is not a shipper in interstate commerce, and is not regulated by the Board or a state transportation regulatory agency, MRSRR's testimony in support of the application was not entitled to be considered by the Board.

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<sup>6</sup> The record before the Board identifies 4 current shippers on the line: (1) the Boeing Company; (2) James Hardie Building Products, Inc. (Hardie); (3) Rainier Veneer, Inc. (Rainier); and (4) GFN Utilization & Marketing Inc. (GFN). While not a shipper, the Mount Rainier Scenic Railroad (MRSRR) operates an excursion train over the line.

Finally, TE notes that the record does not support the Board's finding that three of the four shippers on the line support replacement of TE by the Belt Line. TE states that the correct finding would be that two of the four shippers support continued operation by TE,<sup>7</sup> one opposes such operation,<sup>8</sup> and the position of the fourth is not known.<sup>9</sup> TE argues that the alleged harm to the rail line owner from TE's operations cannot by itself support adverse discontinuance of those operations. TE repeats its contention from its opposition that the record establishes that any harm to the City from TE's operation is largely self-inflicted as a result of the City's withholding payments TE alleges are due to it.

The City reiterates that it entered into an operating agreement with TE with the expectation that TE, in close cooperation with the Economic Development Administration of the City, would develop freight and passenger service on the line. Traffic was to be developed both from industries and tourist activities already on the line and industries encouraged to locate on the line by the quality of TE's service. According to the City, such traffic has not materialized because of the abject failure of Edward M. Berntsen, President of TE (Berntsen), either to cooperate with the City or to provide quality rail service on the line.

The City responds that not a single shipper intervened in opposition to the application to displace TE and replace it with the Belt Line. The City submits that Berntsen's own verified statement was self serving and that the letters of support from Hardie and GFN appear to have been procured on the basis of a failure to disclose that, although TE's operations are being discontinued, rail service will continue to be available from the Belt Line. The City continues to allege that the financial condition of TE is such that it is not likely to survive.

#### DISCUSSION AND CONCLUSIONS

Under 49 CFR 1115.4 a petition to reopen must state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances. Initially, however, we will briefly address TE's petition for clarification.

With regard to the clarification petition, we find that TE's argument that the Board materially erred in failing to resolve its argument that the Board lacks jurisdiction over the adverse application for discontinuance lacks merit. Chairman Morgan rejected this argument in her decision November 13, 1998, and we adopt her decision here. The Board will not undertake to interpret or enforce operating agreements or contracts. The dispute over the alleged termination of the operating agreement is a question that, as the Board noted in its decision, can be resolved in other appropriate forums.

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<sup>7</sup> These shippers would be Hardie and GFN.

<sup>8</sup> This shipper would be Boeing.

<sup>9</sup> This shipper would be Rainier.

TE's reliance on D&H continues to be misplaced. That decision sought to prevent a carrier from escaping its obligations to another carrier under a trackage rights agreement. There, the Interstate Commerce Commission's (ICC) Division 4 said, ". . . we may not properly take jurisdiction of the application to abandon because it seeks to have us do indirectly what we may not do directly."<sup>10</sup> The Board's action here, following a long line of precedents and consistent with the relief sought by the City, allows a court of competent jurisdiction, which alone can adjudicate the rights and obligations of TE and the City, to take action in light of the Board's decision that the public convenience and necessity does not require continued operations by TE. 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 (1990) (Modern Handcraft); Fore River R.R. Corp.--Discon. Exempt.--Norfolk County, MA, 8 I.C.C.2d 307 (1992); Cheatham County; and Chelsea Property Owners--Aban.--The Consol. R. Corp., 8 I.C.C.2d 773 (1992) (Chelsea), aff'd sub nom. Consolidated Rail Corp. v. ICC, 29 F.3d 706 (D.C. Cir. 1994).

With regard to the petition to reopen, we find no merit to TE's argument that the Board materially erred in finding that the public convenience and necessity permits discontinuance of service by TE. TE has not presented any new evidence regarding the shippers that has not already been considered by the Board when issuing its decision. TE's contention that the views of Rainier, the second largest shipper on the line, as presented in Huffman's verified statement are not entitled to consideration is wrong. Parties filing reply verified statements will be considered to have admitted the truth of material allegations of fact contained in their opponent's statements unless those allegations are specifically challenged. 49 CFR 1112.6. Huffman's statement has been made under penalty of perjury and certified to be true and correct. Further, Rainier has not contested Huffman's statement.

Contrary to TE's allegation, MRSRR's testimony is entitled to consideration in determining whether the public convenience and necessity permits discontinuance of TE's interstate operations. TE is correct in stating that MRSRR is not a shipper on the line.<sup>11</sup> However, MRSRR, as a user, has an interest in the line because it uses a portion of the line for its operations and is subject to TE's control over that portion of the line.

The proper means by which interested persons may become parties to an abandonment or discontinuance proceeding is to file written comments or protests with the Board. Persons who may oppose the abandonment or discontinuance, but who do not wish to participate fully in the process

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<sup>10</sup> Moreover, D&H, by its terms, is limited to agreements entered before 1940. Whether Division 4 correctly applied the law affecting contracts entered into before 1940 is not an issue here. As the contract between TE and the City was entered into after that date, D&H is irrelevant here. See Chicago and North Western and Western Stock.

<sup>11</sup> The Board's decision at 8 inadvertently classified MRSRR as a shipper.

by appearing at any oral hearings or by submitting verified statements of witnesses containing detailed evidence, should file comments. Persons opposing the proposed abandonment or discontinuance that do wish to participate actively and fully in the process should file a protest. 49 CFR 1152.25(a)(1). TE filed the only opposition to the application. That opposition included one verified statement from Berntsen. Attached to Berntsen's verified statement were letters addressed to him from Hardie and GFN. The letters from Hardie and GFN were neither directed to the Board nor identified as verified statements, comments or protests in opposition to the application. Since Hardie's and GFN's letters to Berntsen are merely signatures stating that they support TE's continued operation of the line, they fail to carry the weight of the evidence in support of the application. We will clarify our decision to reflect that two (Boeing and Rainier) of the four shippers and the MRSRR support replacement of TE by the Belt Line. The third shipper (Hardie) would be open to another rail service company. The fourth shipper (GNF) would support TE's continued operation of the line.<sup>12</sup>

Moreover, we disagree with TE's assertion that, because the City is the rail line owner, the City's alleged harm cannot by itself support the adverse discontinuance of TE's operations. We note that the City's alleged harm was not the sole reason for approving the application as TE would suggest. As noted in the Board's decision, the burden of proof is on the City as the moving party. The City, a municipal government representing the interests of the community, acquired the line for the purpose of economic development of the community. While not a shipper, the City has a direct interest in the line. Based on the record before us, continuation of TE's operations on the line would have an adverse economic impact on the community. Thus, in considering the discontinuance, the Board weighed the impact of TE's continued operation of the rail line for shippers and the community and correctly found that the public convenience and necessity permitted the discontinuance of operations. Accordingly, there is no basis for reopening, and TE's petition to reopen will be denied.

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

It is ordered:

1. TE's petition to reopen is denied.
2. TE's petition for clarification is denied.

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<sup>12</sup> As noted in the decision at n.9, TE has transported only one shipment for GFN since September 1997 and 17 carloads for Hardie since its operations began in May 1998. It is interesting to note that Hardie became a shipper on the line after the City notified TE that it was terminating the operating agreement on 60-days' notice.

3. This decision is effective on the date served.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.  
Commissioner Burkes did not participate in the disposition of this proceeding.

Vernon A. Williams  
Secretary