

SERVICE DATE – JULY 9, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-999X

CALDWELL COUNTY RAILROAD COMPANY–DISCONTINUANCE OF SERVICE
EXEMPTION–IN CALDWELL COUNTY, NC

Decided: June 29, 2007

By petition filed on March 21, 2007, Caldwell County Railroad Company (CCRC) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to discontinue service over a 5.2-mile segment of its line of railroad. The rail segment over which CCRC proposes to discontinue service extends from milepost 107.5, near Lenoir, to the end of the line at milepost 112.7, near Valmead, in Caldwell County, NC. Pursuant to 49 U.S.C. 10502(b), the Board served and published a notice in the Federal Register on April 10, 2007 (72 FR 17986-87) (April 2007 notice), instituting an exemption proceeding. The exemption will be granted, subject to standard employee protective conditions.

BACKGROUND

The 5.2-mile rail segment proposed for discontinuance is the western part of a 22.1-mile rail line known as the HG Line extending from milepost HG-90.6, at Hickory, NC, to milepost 112.7, at Valmead. In 1994, CCRC, a Class III rail carrier, was authorized to lease the HG Line from Norfolk Southern Railway Company (NS) in Caldwell County Railroad Company–Lease, Operation, and Acquisition Exemption–Norfolk Southern Railway Company, Finance Docket No. 32584 (ICC served Oct. 19, 1994).¹ In 1995, the Caldwell County Economic Development Commission (CCEDC)² acquired the HG Line from NS. See Caldwell County Economic

¹ Concurrently, Donald J. and Carol N. McGrady were authorized to continue in control of CCRC upon CCRC's becoming a Class III rail carrier. See Donald J. and Carol N. McGrady–Continuance in Control Exemption–Caldwell County Railroad Company, Finance Docket No. 32585 (ICC served Oct. 19, 1994).

² CCEDC was established for the purpose of preserving local rail service which Class I rail carriers had abandoned or planned to abandon in the future. In connection with its acquisition of the HG Line, CCEDC was exempted from the requirements of 49 U.S.C. Subtitle IV. See Caldwell County Economic Development Commission–Exemption From 49 U.S.C. Subtitle IV, Finance Docket No. 32659 (ICC served Aug. 3, 1995) (August 1995 decision). As ordered in the August 1995 decision, the exemption was subject to the condition that CCEDC: (1) notify the Interstate Commerce Commission (ICC), the Board's predecessor, in advance of any proposed abandonment or discontinuance of service on the line; (2) submit any

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Development Commission–Acquisition Exemption–Norfolk Southern Railway Company, Finance Docket No. 32658 (ICC served Feb. 14, 1995). According to a verified statement from Mr. William Stone, Vice Chairman of CCEDC, filed with CCRC’s petition, CCRC operates over the line pursuant to a lease agreement between CCRC and CCEDC. Mr. Stone states that CCEDC originally had entered into a lease and operating agreement for the service with Southeast Shortlines, Inc., which in turn assigned its rights and responsibilities under the lease to CCRC, with CCEDC’s consent. The lease, which was for an initial term of 5 years, automatically renews unless CCRC provides advance notice to CCEDC that it does not want to renew. CCRC has operated over the line since 1994.

The only active shipper on the line, Sealed Air Corporation (Sealed Air), is located at Valmead at the end of the line segment at milepost 112.7. Sealed Air is an international publicly traded corporation that specializes in protective packaging and food packaging. CCRC submits that Sealed Air receives only two to three rail cars per week. According to CCRC, traffic volumes have been low, with only 132 rail cars in 2004, 140 rail cars in 2005, and 125 rail cars in 2006. CCRC states that there is no overhead traffic on this line segment.

CCRC states that the line segment is considered Federal Railroad Administration excepted track, and that it will be very costly to keep the line segment in service. CCRC notes that, according to a track inspection and evaluation report performed by Main Line Rail Management, Inc., dated December 30, 2005, several hundred thousand dollars of repairs are needed on the line segment, and repairs to some bridges also are needed. In addition, CCRC indicates that the line segment is subject to occasional flooding, which adds to maintenance costs.

CCRC submits that, in September 2006, a new industrial site, which is in excess of 200 acres, was established proximate to milepost 108 of the HG Line. CCRC asserts that the new development will benefit Caldwell County, which has been beset by high unemployment due to job losses in the furniture industry. However, CCRC states that the industry at the site does not require rail service and that it has requested CCRC to discontinue rail service through its campus due to security and vibration issues.

CCRC states that Sealed Air will not suffer any adverse effects as a result of the discontinuance of rail service. According to CCRC, Sealed Air has entered into an arrangement with Caldwell County and the City of Lenoir. Under the terms of the agreement, Sealed Air will receive assistance with plant modifications so Sealed Air’s traffic can be transported by truck

² (...continued)

environmental or historic data that may be required to permit the ICC to conduct an environmental review of the abandonment or discontinuance; and (3) comply with any conditions that might be found to be required prior to consummation of the abandonment or discontinuance.

between its plant in Valmead and a new rail offload facility that is being built at milepost 105 by CCEDC. CCRC states that the new offload facility, which is planned to be in place and functioning no later than the effective date for the discontinuance of service, is a 5-mile drive by truck and has access to U.S. Route 321A and North Carolina Route 18. CCRC indicates that at least two other businesses which currently have no rail service have indicated that they will use the offload facility, transferring their freight from longer highway routings to a combination of rail and shorter-route truck service.

CCEDC fully supports CCRC's petition for exemption to discontinue service, as it will help facilitate the location of a new industrial site along the rail line. CCRC states that CCEDC has no current plans to abandon the line segment proposed for discontinuance, and that CCEDC plans to maintain the line so rail service might resume over the line segment if future developments in the area so dictate. Moreover, should the line be abandoned at some future point, CCRC states that CCEDC will remain obligated to comply with the terms of the August 1995 decision and to comply with environmental requirements at that time to any abandonment proceeding.

PRELIMINARY MATTER

On May 14, 2007, Mr. Dick Keyes late filed a protest to CCRC's petition for exemption. On May 23, 2007, CCRC, pursuant to 49 CFR 1104.13(a), filed a motion to strike Mr. Keyes' late-filed protest, or alternatively, if the Board accepts the protest into the record, to deny it for lack of merit. CCRC argues that, in the Board's April 2007 notice, the Board set April 30, 2007, as the due date for replies and for service of any replies on counsel for CCRC. CCRC states that it received a copy of the protest on May 8, 2007. On June 26, 2007, Mr. Keyes filed an additional letter of protest regarding the proposed discontinuance of service. On June 29, 2007, CCRC filed a reply to that letter of protest.

Mr. Keyes states that he is a property owner along the rail segment proposed for discontinuance. He opposes the petition for exemption, claiming that: (1) he will be deprived of rail service; (2) the proposed discontinuance of service will decrease the value of his property; and (3) favorable treatment was given to Sealed Air. Mr. Keyes contends that the petition was filed without thorough planning and without regard to the monetary damage to all other property owners with rail frontage and those with existing rail sidings. He expresses his disagreement with the decisions that were made by CCRC, Caldwell County, and others relative to this matter and believes that CCRC should either build a connector track around the new industry that is locating near the HG Line or provide some economic benefit to the property owners along the rail line similar to that provided to Sealed Air. Mr. Keyes also alleges that the discontinuance is not for an indefinite period of time but that instead it has a term of 30 years.

In reply, CCRC states that, unlike Sealed Air, Mr. Keyes does not use the rail service, has not done so in the recent past, and has not indicated his intention to use such rail service in the future. Mr. Keyes complains that no accommodation was made for his benefit, as was done for

Sealed Air in providing an alternative rail offload facility. CCRC states that Mr. Keyes is not in need of any transloading facility; he identifies no freight to transport. However, CCRC asserts that, should Mr. Keyes or some subsequent property owner or other business in the area ever have a need to use the offload facility, they will be able to do so. According to CCRC, the facility will be a public facility open to any shipper in the area that may need rail and other transportation service. Furthermore, CCRC states that it sees no reason to build a connector track as proposed by Mr. Keyes. As to the discontinuance lasting 30 years, CCRC asserts that this is merely Mr. Keyes' supposition. According to CCRC, there is no agreement with the entity that is developing a facility in the area that requires a 30-year discontinuance and there is no certainty at this stage as to how long rail service might be discontinued. CCRC states that the proposed discontinuance will serve to maintain the rail right-of-way for potential future use in years to come, consistent with the national policy favoring preservation of rail lines for future use.

While the Board could have rejected the late-filed protest, CCRC, in its motion, has responded to the concerns expressed by Mr. Keyes. To ensure a complete record, the late-filed protest will be accepted into the record, as will CCRC's reply. Accordingly, the late-filed protest will be accepted, and CCRC's motion to strike will be denied.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail carrier may not discontinue operations without the Board's prior approval. Under 49 U.S.C. 10502, however, the Board must exempt a transaction or service from regulation when it is found 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 or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

The concerns expressed by Mr. Keyes do not provide grounds to deny CCRC's petition for exemption. Mr. Keyes is not an active shipper on the line, and thus, his claim that the proposed discontinuance will deprive him of rail service is without merit. Moreover, his concerns regarding the effect of the discontinuance on the value of his property appear to be valid but do not outweigh the value of CCRC's discontinuance for rail transportation policy. Furthermore, Mr. Keyes does not address whether regulation is needed to carry out the rail transportation policy or whether the proposed discontinuance is limited in scope. He only makes an unsupported assertion that the discontinuance is an abuse of market power by CCRC and CCEDC to eliminate rail service to a group of property owners for the benefit of one company. The Board and its predecessor have previously held that there can be no abuse of market power where current shippers do not object to the discontinuance of service. See Kansas & Oklahoma Railroad, Inc.—Discontinuance Exemption—in Lane, Ness and Rush Counties, KS, STB Docket No. AB-853 (Sub-No. 2X), slip op. at 2 (Oct. 15, 2004). Here, Sealed Air supports the discontinuance.

In this case, detailed scrutiny under 49 U.S.C. 10903 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 also will foster sound economic conditions and encourage efficient management by enabling a significant economic development project to proceed with no loss of transportation service to the one shipper on the line [49 U.S.C. 10101(4), (5), and (9)]. Other aspects of the rail transportation policy will not be adversely affected.

Regulation is not necessary to protect shippers from the abuse of market power. As noted, Sealed Air does not oppose the proposed discontinuance of service and will have other transportation options available to it by virtue of the construction of an offload facility at another point on the HG Line and the availability of truck service. Nevertheless, to ensure that Sealed Air is informed of our action, the Board will require CCRC to serve a copy of this decision on Sealed Air within 5 days of the service date of this decision, and to certify to us that it has done so. Given the finding regarding market power, it is not necessary to determine whether the proposed discontinuance is limited in scope.

Under 49 U.S.C. 10502(g), the Board may not use its 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, the employee protective conditions set forth in Oregon Short Line R. Co.–Abandonment–Goshen, 360 I.C.C. 91 (1979), will be imposed.

Because this is a discontinuance proceeding and not an abandonment, the Board need not consider offers of financial assistance (OFAs) to acquire the line for continued rail service (the OFA provisions for a subsidy to provide continued rail service do apply to discontinuances), trail use requests under 16 U.S.C. 1247(d), or requests to negotiate for public use of the line. This proceeding is also exempt from environmental reporting requirements under 49 CFR 1105.6(c) and from historic reporting requirements under 49 CFR 1105.8(b).³ 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. Keyes' late-filed protest is accepted into the record.
2. CCRC's motion to strike is denied.

³ CCRC states that the track will remain in place and thus there will be no salvage. CCRC indicates that it has consulted with the Board's Section of Environmental Analysis on this matter and was advised that no environmental report is required.

3. Under 49 U.S.C. 10502, the Board exempts from the prior approval requirements of 49 U.S.C. 10903 the discontinuance of service by CCRC of its operations over the above-described line segment, subject to the employee protective conditions set forth in Oregon Short Line R. Co.–Abandonment–Goshen, 360 I.C.C. 91 (1979).

4. CCRC is directed to serve a copy of this decision on Sealed Air within 5 days of the service date of this decision, and to certify to the Board that it has done so.

5. An OFA under 49 CFR 1152.27(b)(2) to subsidize continued rail service must be received by the railroad and the Board by July 19, 2007, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by a \$1,300 filing fee. See 49 CFR 1002.2(f)(25).

6. 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.”**

7. Petitions to stay must be filed by July 24, 2007. Petitions to reopen must be filed by August 3, 2007.

8. Provided no OFA to subsidize continued rail service has been received, this exemption will be effective on August 8, 2007.

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

Vernon A. Williams
Secretary