

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1110

LACKAWAXEN-HONESDALE SHIPPERS ASSOCIATION, STOURBRIDGE RAILROAD COMPANY, AND DELAWARE LACKAWAXEN AND STOURBRIDGE RAILROAD COMPANY—ADVERSE DISCONTINUANCE OF OPERATING AUTHORITY—IN WAYNE AND PIKE COUNTIES, PA.

Digest:¹ This decision permits the Lackawaxen-Honesdale Shippers Association, Stourbridge Railroad Company, and Delaware Lackawaxen and Stourbridge Railroad Company to bypass some of the procedures normally required in a typical discontinuance proceeding should they file an application for adverse discontinuance of service by the current operator of the line. The Board is waiving those procedures that would be unnecessary when an adverse discontinuance is intended to result only in a change of operators, such as revenue and cost data, but retaining other requirements that are necessary to allow the Board to act on the application.

Decided: January 22, 2014

By petition filed on September 23, 2013, the Lackawaxen-Honesdale Shippers Association (LHSA), Stourbridge Railroad Company (SRC), and Delaware Lackawaxen and Stourbridge Railroad Company (DL&S) (collectively, the Petitioners) seek waivers of certain Board regulations and exemptions from certain statutory provisions in connection with the filing of a third party or “adverse” discontinuance application. They intend to file to terminate operations by the current operator, Morristown and Erie Railway, Inc. d/b/a Stourbridge Railway (M&E) on a rail line in Pennsylvania.² The waiver exemption petition is unopposed. The Petitioners’ request for waivers and exemptions will be granted to the extent discussed below.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² In an October 15, 2013 letter, M&E asked the Board to provide a period for voluntary arbitration by the parties pursuant to 49 C.F.R. § 1108.1 *et seq.* The Petitioners rejected that proposal. Subsequently, in a November 6, 2013 letter, M&E proposed that the parties participate in Board-sponsored mediation, but the Petitioners did not respond.

BACKGROUND

The Petitioners state that they intend to ask the Board to find that the public convenience and necessity permit the adverse discontinuance of operations by M&E over approximately 24.80 miles of rail line (the Line) in Wayne and Pike Counties, Pa. According to the Petitioners, M&E has been operating the Line under an operating agreement with SRC, the Line's owner, that was entered into on December 8, 2008 (the Agreement). The Agreement provides that either party may terminate on 90 days' written notice to the other party once the initial 10-year term expires. According to the Petitioners, on or about November 9, 2011, M&E provided SRC with written notice of its demand to terminate the Agreement and negotiate a new agreement. Then, on or about December 13, 2011, counsel for M&E advised SRC that without a new agreement M&E would cease operations as soon as December 16, 2011. In response, on or about December 27, 2011, SRC advised M&E that it could not agree to a new contract, and M&E subsequently ceased railroad operations on the Line. Upon approval of the discontinuance application, the Petitioners state that SRC will proceed to state court to resolve its differences with M&E and that DL&S will file for Board authority to operate the Line in place of M&E. M&E's position is that there has been no traffic on the Line for more than two years, but if M&E were contacted by a shipper to provide freight service, it would do so.

DISCUSSION AND CONCLUSIONS

The Board's regulations require that abandonment and discontinuance applications conform to the requirements of 49 C.F.R. § 1152, subpart C. In appropriate instances, however, such as the filing of a third-party or adverse abandonment or discontinuance application, the Board will waive inapplicable and unneeded regulations and grant exemptions as appropriate from statutory provisions.³

System Diagram Map. The Petitioners request waiver of the requirements of 49 C.F.R. § 1152.10-14, which relate to filing and amending of, and providing notice to the public through, a carrier's system diagram map (SDM), and establish a 2-month waiting period between amendments of the SDM and the filing of a corresponding discontinuance application. The Petitioners also request waiver of 49 C.F.R. § 1152.22(a)(5), which requires reference to inclusion of the rail line subject to the discontinuance request on the carrier's SDM or narrative, the date on which the line was first listed there for abandonment or discontinuance, and a copy of the line description that accompanies the carrier's map. Petitioners further seek an exemption from the corresponding statutory SDM requirements of 49 U.S.C. § 10903(c)(2). In support, they contend that there is no need to comply with the SDM requirements in filing an application that is intended only to permit a change in operators and not a complete discontinuance of

³ See Paulsboro Refining—Adverse Aban.—in Gloucester Cnty., N.J., AB 1095 (Sub-No.1) (STB served July 26, 2012); Palmer Ranch Holdings—Adverse Aban.—Seminole Gulf Ry.—in Sarasota Cnty., FL, AB 400 (Sub-No. 5) (STB Served Sept. 21, 2011); and Cerro Gordo Cnty., Iowa—Adverse Discontinuance—Iowa Traction Railroad (Cerro Gordo), AB 1063 (STB served Mar. 16, 2011).

service. The Petitioners also assert that SDM requirements are not relevant in an adverse discontinuance.

The SDM requirements are customarily waived in adverse discontinuance proceedings where, as here, the adverse discontinuance is intended to result only in a change of operators. Accordingly, we will grant the Petitioner's waiver request related to the SDM filing requirements.

Line Attributes. The Petitioners request waivers of 49 C.F.R. § 1152.22(b), (c), (d), and (e), which require that discontinuance applications include information regarding the condition of properties, service performed, attributable revenue and cost data, and rural and community impact. The Petitioners contend that there is no point to requiring the submission of these data because there will only be a change of operators and not a complete discontinuance of service here. Moreover, the Petitioners note that the revenue and cost data requirements are intended to apply only to carriers that seek to discontinue their own operations on the grounds that those operations are a burden on interstate commerce. The Petitioners are correct that this information is unnecessary here and, accordingly, we will grant waivers of § 1152.22(b)-(e).

Environmental and Historic Impacts. The Petitioners request waivers of the environmental and historic reporting requirements at 49 C.F.R. §§ 1152.20(c) and 1105 and any further exemptions or waivers that may be necessary to confirm the inapplicability of the environmental and historic reporting requirements to this proceeding. They contend that the proposed adverse discontinuance arises in the context of restored rail operations and would not result in significant changes that exceed the thresholds in 49 C.F.R. § 1105.7.

Because this proceeding is intended to result merely in a substitution of operators and would not result in operations that would exceed the thresholds in 49 C.F.R. § 1105.7, it is excepted from environmental documentation under 49 C.F.R. § 1105.6(c)(2)(ii) and the Historic Report requirement under 49 C.F.R. 1105.8(b)(1). We will therefore grant the Petitioners' request for waiver of the Board's environmental and historic reporting requirements.

Filing, Notice, Posting and Newspaper Publication. The Petitioners request partial waiver of the filing and notice requirements of 49 C.F.R. § 1152.20(a)(1) and (2), and the time-filing requirements of 49 C.F.R. § 1152.20(b)(1). The Petitioners ask that this waiver petition be permitted to serve as the notice of intent to discontinue service as required under 49 C.F.R. § 1152.20 and that they be permitted to serve their waiver petition only on all connecting rail carriers and M&E.⁴ The Petitioners further request that they be permitted to serve a copy of their adverse discontinuance application only on each of the aforementioned parties, the Pennsylvania Department of Transportation (PDOT), and the Pennsylvania Public Utility Commission (PPUC). The Petitioners allege that there are no known railroad employees that would be adversely affected by the application.

⁴ According to the Petitioners' certificate of service, the waiver petition was also served on New York Susquehanna and Western Railway Corp. The petitioners also inadvertently proposed to serve themselves.

The Petitioners' request for waiver of the requirements of 49 C.F.R. § 1152.20(a)(1) and (b)(1) is unopposed and will be granted. We will grant in part the Petitioners' request for partial waiver of the notice requirements of 49 C.F.R. § 1152.20(a)(2). The Petitioners state that their petition for waiver will be served on all connecting carriers and M&E. We find this to be insufficient notice under 49 C.F.R. § 1152.20(a)(2), and therefore we will require the Petitioners to serve their petition for waiver not only on all connecting carriers and M&E, but also on PDOT and PPUC. With respect to labor, the Petitioners assert that there are no known railroad employees on the Line that would be adversely affected by the application, but they do not support that assertion. Accordingly, in an abundance of caution, the Petitioners will be required to serve a copy of their petition for waiver on the U.S. Railroad Retirement Board and the headquarters of all duly certified labor organizations that represent employees on the Line, if any.⁵ Additionally, the Petitioners request that they be permitted to serve a copy of their adverse discontinuance application on all connecting rail carriers, M&E, PDOT, and PPUC in order to satisfy the Board's notice requirements at 49 C.F.R. § 1152.24(c). We find this request is reasonable and therefore it will be granted. See, e.g., City of Peoria and Village of Peoria Heights, Ill.—Adverse Discontinuance—Pioneer Industrial Ry., AB 878 (STB served Sept. 10, 2004). Petitioners' adverse discontinuance application must be accompanied by an affidavit of compliance under 49 C.F.R. § 1152.24(b) for those parties that we have required the Petitioners to serve with notice under 49 C.F.R. § 1152.20(a)(2).

The Petitioners also request waiver of the notice, posting, and newspaper publication requirements of 49 C.F.R. § 1152.20(a)(3) and (4) and an exemption from the statutory notice posting requirement at 49 U.S.C. § 10903(a)(3)(B). The Petitioners contend that they cannot comply with the notice posting requirements because they are not legally in possession of the Line and because this is an adverse, not voluntary, discontinuance. Additionally, the Petitioners argue that the notice posting requirements were designed for carriers proposing to voluntarily discontinue service over their own lines. The request for waiver of 49 C.F.R. § 1152.20(a)(3) is unopposed and will be granted.

The Petitioners' request for a waiver of 49 C.F.R. § 1152.20(a)(4), which requires newspaper publication of a notice of intent to discontinue service at least once a week for three consecutive weeks, will be denied. As we noted in Cerro Gordo, AB 1063, slip op. at 5, newspaper publication is not onerous and ensures that all persons and entities with an interest in the line are given notice and the opportunity to participate in any proceedings. Here, requiring three weeks of newspaper publication will not unduly delay this proceeding and will better ensure that the public is aware of the upcoming application.

Offers of Financial Assistance. Finally, the Petitioners seek a waiver of the Board's procedures for offers of financial assistance (OFA) at 49 C.F.R. § 1152.27 and an exemption from the corresponding OFA requirements at 49 U.S.C. § 10904. Because they intend to operate the Line, the Petitioners contend that these procedures would serve no useful purpose and are not

⁵ See 49 C.F.R. § 1152.20(a)(2)(ix) and (xii).

necessary to carry out the rail transportation policy (RTP), 49 U.S.C. § 10101. The request for waiver of the OFA regulations at 49 C.F.R. § 1152.27 will be granted. M&E has not filed in opposition to the request. Moreover, in the event that the Petitioners prevail in their adverse discontinuance application, the shippers on the Line would continue to receive rail service from DL&S, obviating the need for the OFA process.⁶

Exemption Criteria. As indicated, the Petitioners also seek exemptions from the following statutory provisions corresponding to Board regulations previously discussed: 49 U.S.C. § 10903(c)(2) (SDMs); § 10903(a)(3)(B) (Posting); § 10904 (OFAs). We will grant these related exemptions because full compliance with the Interstate Commerce Act is not necessary here to carry out the RTP of 49 U.S.C. § 10101. Rather, these exemptions would provide the Petitioners with a reasonable opportunity to make their case that there is no overriding present or future public need for M&E's continued service on the Line. Exemptions would promote the RTP by eliminating unnecessary procedures, and thus would expedite regulatory decisions (§ 10101(2)), foster sound economic conditions in transportation (§ 10101(5)), and encourage honest and efficient management of railroads (§ 10101(9)). Other aspects of the RTP would not be adversely affected. Further, application of the statutory provisions from which we are granting exemptions is not necessary to protect shippers from an abuse of market power, because there currently are no active shippers on the Line and rail service over the Line would continue to be available from DL&S upon its obtaining Board authority.

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 waivers and exemptions is granted to the extent discussed above.
2. The decision is effective on the date of service.

By the Board, Chairman Elliott and Vice Chairman Begeman.

⁶ Although the Petitioners also requested a waiver of the filing fees for this petition and the forthcoming application, that request is moot. The Board's Chief, Section of Administration, the agency official delegated authority to rule on filing fee waiver requests under 49 C.F.R. § 1002.2(e), has already granted this request.