

SERVICE DATE – MARCH 30, 2005

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-156 (Sub-No. 25X)

DELAWARE AND HUDSON RAILWAY COMPANY, INC. — DISCONTINUANCE OF
TRackage RIGHTS EXEMPTION — IN SUSQUEHANNA COUNTY, PA AND
BROOME, TIOGA, CHEMUNG, STEUBEN, ALLEGANY, LIVINGSTON, WYOMING,
ERIE, AND GENESEE COUNTIES, NY

IN THE MATTER OF AN OFFER OF FINANCIAL ASSISTANCE

Decided: March 29, 2005

By decision served on January 19, 2005, the Board granted authority for Delaware and Hudson Railway Company, Inc. (D&H), to discontinue overhead trackage rights over approximately 229.5 miles of railroad line owned and operated by Norfolk Southern Railway Company (NS) between Lanesboro, PA, and Buffalo, NY (January 19 decision).¹ The authority was scheduled to become effective on February 18, 2005, unless an offer of financial assistance (OFA) to subsidize continued rail service pursuant to 49 U.S.C. 10904 was filed by January 28, 2005.

CNJ Rail Corporation (CNJ) filed an offer to purchase D&H's trackage rights between milepost 210.9 ± in Binghamton and milepost 419.9 ± in Buffalo, as well as interchange and yard facilities required for service. By decision served on February 3, 2005 (February 3 decision), the Director of the Office of Proceedings rejected CNJ's offer on two grounds. First, the rights that CNJ sought to acquire were geographically broader than those for which D&H had sought discontinuance authority. Second, CNJ was not seeking to subsidize continued D&H

¹ Specifically, D&H was granted authority to discontinue overhead trackage rights on the following lines: (1) NS's line between milepost 189.8± in Lanesboro and CP Coles at milepost 210.9± in Binghamton, NY; (2) NS's Southern Tier Line between milepost 217.0± in Binghamton, and milepost 419.8± in Buffalo; (3) NS's Bison Running Track between the point of connection with the Southern Tier Line at milepost 419.8± and the point of connection with the lines of CSX Transportation, Inc. (CSXT), at milepost 423.3± in Buffalo (including NS's SK Yard, which D&H currently operates under an agreement between D&H and Consolidated Rail Corporation dated February 1, 1984), a distance of approximately 3.5 miles; and (4) NS's Howard Street Running Track between the point of connection with the Bison Running Track at milepost 420.15± and the point of connection with the lines of CSXT at milepost 422.3±, a distance of approximately 2.15 miles.

trackage rights operations, but rather to actually acquire the trackage rights itself. The February 3 decision concluded that in both respects, the offer was beyond the scope of 49 U.S.C. 10904.

On February 14, 2005, CNJ filed an appeal of the February 3 decision. CNJ relies on the language of the statute at 49 U.S.C. 10904(c),² which states: “Within 4 months after an application is filed under section 10903, any person may offer to subsidize or purchase the railroad line that is the subject of such application.” CNJ argues that the statute makes no distinction between the abandonment of a line of railroad or discontinuance of trackage rights, and that the statute’s reference to “purchase the railroad line” should be construed to include purchases of trackage rights. CNJ also asserts that, if it is not allowed to acquire through the OFA process access to the additional interchange and yard facilities it seeks, its service would be confined to moving cars between the Class III carriers interchanging with the line, and it would not be able to serve local customers from Buffalo or Binghamton.

On February 22, 2005, Canadian Pacific Railway Company and D&H, jointly, and NS filed replies in opposition to CNJ’s appeal. The railroads argue that the February 3 decision was correct in interpreting section 10904 as not applicable to an offer to purchase trackage rights. The railroads also assert that the OFA process cannot be used for lines beyond those that are the subject of an abandonment or discontinuance request.

DISCUSSION AND CONCLUSIONS

We will deny CNJ’s appeal. CNJ seeks to use the OFA process to substitute its own trackage rights operations for those of D&H over NS’s Buffalo-Binghamton line so that CNJ can provide its own service to shippers in this rail corridor. However, as explained below, under the statute and agency precedent, a party may not use the OFA process to acquire trackage rights over a third party’s line in this situation.³

First, and most importantly, 49 U.S.C. 10904 does not provide for the relief that CNJ seeks. Section 10904 speaks to subsidizing or purchasing a line of railroad, not to acquiring trackage rights over the objection of the line’s owner. CNJ argues that there should be no distinction between acquiring trackage rights and acquiring full ownership of a line under the OFA provisions. However, there are obvious legal differences between tenants and owners.

² CNJ mistakenly cites to former section 49 U.S.C. 10905, but the OFA provisions are now codified at 49 U.S.C. 10904.

³ See Conrail Abandonment of the Cairo Branch Line in Illinois, Docket No. AB-167 (Sub-No. 56N), slip op. at 3-4 (ICC served Mar. 4, 1982); Louisville & Nashville R.R.—Abandonment Between Paducah & Murray, KY, Docket No. AB-2 (Sub-No. 31F), slip op. at 8 (ICC served Jan. 26, 1982) (L&N—Paducah); see also Central R.R. Co. of Indianapolis—Discontinuance of Serv. Exemption—Between Kokomo & Argos in Howard, Miami, Fulton, & Marshall Counties, IN, STB Docket No. AB-289 (Sub-No. 3X), slip op. at 2 (STB served June 7, 1996).

From a regulatory standpoint, when trackage rights are discontinued, a common carrier obligation remains with the line owner. Only when a full abandonment (or discontinuance by the only party with a common carrier obligation) is approved is a complete loss of service threatened. It is this loss of service that may be forestalled by purchase of the line, in the case of an abandonment, or by subsidy of existing operations, in the case of a discontinuance.

Where discontinuance of trackage rights is involved, section 10904 can be used for involuntary subsidization of the trackage rights (as a temporary, transitional measure for up to 1 year, see 49 U.S.C. 10904(f)(4)(B)).⁴ Here, however, CNJ has not offered to subsidize the D&H trackage rights operations. Instead, it wants to acquire the trackage rights for itself. As explained in L&N—Paducah, the agency has no general power to require a carrier to grant another carrier the right to use its lines. Rather, our authority to compel trackage rights arises out of specific provisions of the Interstate Commerce Act namely 49 U.S.C. 11102, when a compelling case has been made for forced terminal trackage rights; 49 U.S.C. 10907(d), when facilities are needed for reasonable interchange in connection with a forced sale under the feeder line development provisions; or 49 U.S.C. 11324, when appropriate as a condition to Board approval of a railroad consolidation.

Interpreting section 10904 in the broader manner suggested by CNJ is neither necessary nor appropriate to achieve the objective of the OFA process: to preserve rail service that would otherwise be lost as a result of a line abandonment or service discontinuance.⁵ Here, customers along NS's line between Buffalo and Binghamton will continue to have multiple options available to them for rail service even in the absence of the discontinued D&H service. See January 19 decision at 3, 5 n.8, 11 (NS direct service, D&H service through switching with NS, D&H service through haulage by NS, and CSXT service over a parallel line). Because there will be no cessation of service over the Buffalo-Binghamton line through the Board's approval of D&H's discontinuance proposal, CNJ may not use the forced sale provisions of section 10904 to obtain trackage rights that NS does not want to give it. It would go beyond the scope of the OFA forced sale provisions to force a new tenant onto the line of an owner that does not want that tenant there.

Finally, in addition to assuming D&H's trackage rights, CNJ seeks access to additional facilities here, so that it can attempt to replicate the competitive situation envisioned some 30 years ago, when the Final System Plan was implemented. But as noted in the February 3 decision, the Final System Plan contemplated that there would be changes in the area network.

⁴ See, e.g., CSX Transportation Inc.—Discontinuance Exemption—in Knox County, TN, STB Docket No. AB-55 (Sub-No. 641X) (STB served Jan. 2, 2004); CSX Transportation, Inc.—Discontinuance Exemption—(Between East of Memphis and Cordova) in Shelby County, TN, STB Docket No. AB-55 (Sub-No. 615X) (STB served July 17, 2002).

⁵ See, e.g., Redmond-Issaquah R.R. Preservation Ass'n v. STB, 223 F.3d 1057, 1061-63 (9th Cir. 2000), aff'g Burlington N. & S.F. Ry.—Abandonment Exemption—In King County, WA, STB Docket No. AB-6 (Sub-No. 380X), slip op. at 5-6 (STB served Aug. 5, 1998) (fundamental purpose of 49 U.S.C. 10904 to continue rail service); Consolidated Rail Corp. v. ICC, 29 F.3d 706, 712 (D.C. Cir. 1994).

And in any event, the OFA provisions, at 49 U.S.C. 10904(c), are directed at a more limited and immediate objective: preserving existing operations over “the railroad line that is the subject of [the abandonment or discontinuance] application.” Section 10904 is not a mechanism for attaining broader purposes using broader facilities than those proposed for abandonment or discontinuance.

Based on the plain language of section 10904 and the other considerations set forth above, we affirm the February 3 decision finding that CNJ’s offer to purchase D&H’s trackage rights and related facilities does not constitute a valid OFA.

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

It is ordered:

1. CNJ’s appeal of the February 3, 2005 decision is denied.
2. This decision is effective on its date of service.

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

Vernon A. Williams

Secretary