

227948

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings

OCT - 8 2010

DOCKET NO. AB-254 (SUB-NO.10)

Part of
Public Record

PROVIDENCE AND WORCESTER RAILROAD COMPANY – ADVERSE
ABANDONMENT – TRACK OF HOUSATONIC RAILROAD COMPANY IN
FAIRFIELD AND NEW HAVEN COUNTIES, CONNECTICUT

HOUSATONIC RAILROAD COMPANY
REPLY TO PETITION FOR WAIVER FILED BY
PROVIDENCE AND WORCESTER RAILROAD COMPANY

On September 10, 2010, Providence and Worcester Railroad Company (“P&W”) filed a “Petition for Waiver” (“Petition”) requesting that the Board waive certain of its regulatory requirements in connection with an adverse abandonment proceeding which P&W plans to file against Housatonic Railroad Company, Inc. (“Housatonic”). While the Board customarily does waive certain of its requirements in connection with an adverse abandonment proceeding, the specific requirements that can appropriately be waived depend on the specific nature of the exempt abandonment application and an examination of the circumstances involved in this case is necessary.

Furthermore, for the reasons summarized below, which will be more fully presented if and when P&W files an adverse abandonment petition against Housatonic, an adverse abandonment petition under the circumstances of this case is improper and not authorized by applicable law. The filing of the Petition for Waiver is predicated on the

assumption that the later filing of an adverse abandonment petition is permissible.

Housatonic's position is that since the planned adverse abandonment has no basis in law, the Petition for Waiver should therefore be denied.

The rail line in question is privately owned, is operated by Housatonic Railroad and is known as the Maybrook Line.¹ The line runs between M.P. 104.7 in Derby, Connecticut, where it connects with the Connecticut DOT "Waterbury Branch", and M.P. 71.2 at the New York state line in Danbury, Connecticut, where it connects with Metro North Railroad's Beacon Line. P&W has trackage rights on the Maybrook Line between Derby and a point in Danbury, a distance of approximately 27 miles, to serve a customer in Danbury. P&W has no ownership interest in the line.

During a portion of the last year, approximately 12.8 miles of the Maybrook Line has been out of service because of track conditions. Currently, approximately 4 miles of the Maybrook Line are out of service. Housatonic plans to restore the remaining track to service and is actively seeking funding to do so. The P&W customer is located in Danbury, Connecticut on a portion of the line that is not included within the 12.8 mile segment referred to in P&W's filing. P&W has trackage rights over a different route which has enabled it to continue service to its customer without interruption.²

P&W seeks to acquire the out of service portion of the Maybrook Line pursuant to an STB order, although it has never offered to purchase it from the owner in a voluntary

¹ The Maybrook Line is owned by Maybrook Railroad Company, an affiliate of Housatonic Railroad Company, Inc.

² P&W originates traffic to the Danbury customer near New Haven, Connecticut and there are two routes which can be used to access the customer. Both routes involve use of trackage rights over Connecticut DOT lines from New Haven to the Housatonic owned Maybrook Line. P&W has existing trackage rights over both routes and has local freight service on the route that it is currently using to avoid the out of service section. *See*, Interstate Commerce Commission, Connecticut Rail Systems, Inc., Acquisition and Operation Exemption, FD 32233, 58 FR 17625.

transaction. P&W asserts that it has no alternative other than acquiring the line to preserve service to its customer, although as indicated above, and for other reasons, this is untrue. P&W acknowledges that Congress enacted the Feeder Line Development procedures to address situations such as alleged by P&W here. 49 U.S.C. §10907. However, as P&W concedes, Congress also determined that the Feeder Line Development procedures should not be available to enable Class II railroads to acquire lines from Class III railroads. 49 U.S.C. §10907(a).

While recognizing that “the Feeder Line Development regulations ... would, except for the Class II railroad restriction, seem to be the appropriate procedure to follow in this situation...”,³ P&W unabashedly admits that it is trying to apply adverse abandonment remedies to circumvent the Feeder Line Development limitations and thereby circumvent the clear intent of Congress.

P&W’s plan is to seek an adverse abandonment under 49 U.S.C. §10903 and, after the abandonment is granted, to make an offer of financial assistance to avoid abandonment under the provisions of 49 U.S.C. §10904. Aside from the logical inconsistency of this approach, it seeks to accomplish indirectly what it can not accomplish directly because of an express congressional prohibition, and it should not be permitted to do so.

Not only should this attempted distortion of abandonment law be denied because it frustrates congressional intent, but it should also be denied because all of the provisions of Chapter 109 of Title 49 should be interpreted consistently and, in particular sections

³ Letter from Edward D. Greenberg, Attorney for Providence and Worcester Railroad Company, to Cynthia T Brown, STB, dated September 10, 2010 requesting a fee waiver at page 2.

10903, 10904, 10905 and 10907 which treat abandonments, must be read as a cohesive statutory scheme.

No STB decision that Housatonic is aware of has permitted an adverse abandonment against a railroad owning a line and in favor of a railroad having trackage rights over the line but that has no ownership or other property interest in the line.⁴ In fact, the clear language of 49 U.S.C. §10903(a)(1) authorizes a rail carrier to “abandon any part of *its* railroad lines” [emphasis added]. And it further provides that “An abandonment or discontinuance may be carried out only as authorized by this chapter.” While this section authorizes Housatonic (the host railroad) to file an adverse discontinuance petition against P&W (the guest railroad), it does not authorize P&W to file an adverse abandonment against Housatonic.⁵

Since the planned adverse abandonment is not legally permissible, Housatonic’s position is that the Petition for Waiver should be denied. However, the Board may decide to defer a decision on whether the adverse abandonment is legally appropriate until the adverse abandonment is actually filed. Accordingly, for purposes of the Petition for Waiver now before the Board, Housatonic will address the specific requests for waiver but, in doing so, reserves the right to continue to assert that the adverse abandonment procedure is not available in this case.

⁴ The decisions cited by P&W in its Motion to Strike are not to the contrary or even on point. In *CSX Corporation*, Docket No. AB-31 (Sub.No. 38) (Feb. 1, 2002) adverse abandonment was granted to terminate the common carrier rights of a lessee railroad in favor of CSX Corporation which owned the line. In *City of Chicago-Chicago Terminal Railroad*, Docket No. AB-1036 (June 16, 2010) the railroad that owned the line supported the abandonment. Finally, in *Cerro Gordo Count, Iowa*, AB-1063 (April 29, 2010) a petition for abandonment has not yet been filed.

⁵ See, *City of South Bend, Indiana v. Surface Transportation Board*, 566 F3d 1166, 1171 (D.C. Cir. 2009), concurring opinion of Judge Kavanaugh which calls into question whether 49 U.S.C. §10903 authorizes third party adverse abandonments following the changes made by the ICC Termination Act of 1995. This issue need not be reached in this case if the Board prohibits P&W from accomplishing indirectly what it is prohibited from accomplishing directly by 49 U.S.C. §10907.

SPECIFIC EXEMPTION REQUESTS

1. **49 C.F.R. §§1152.22(A)(5), 1152.10, 1152.14 System Diagram Map**

Housatonic does not object to the request to waive these requirements.

2. **49 C.F.R. §1152.20 - Notice and Publication Requirements**

Housatonic does not object to P&W's request with respect to these publication requirements.

3. **49 C.F.R. §1152.22 (c), (d), (e), and (g) – Service Provided, Revenue and Cost Data, Rural and Community Impact and Passenger Service**

§1152.22 (c) Service Provided – The proposed abandonment may result in a cessation of service if P&W is unable or unwilling to successfully conclude a purchase under 49 U.S.C. §10904 because of the price set by the board or for other reasons. In any case, P&W should be required to provide the information required in this section about its own service over the line.

§1152.22(d) Revenue and Cost Data - The proposed abandonment may result in a cessation of service if P&W is unable or unwilling to successfully conclude a purchase under 49 U.S.C. §10904 because of the price set by the board or for other reasons. In addition, the revenue and cost data of P&W are relevant in determining an adverse abandonment application. P&W should be required to furnish such of the information as applies to P&W operations set forth in subsections (d)(1) and (d)(2).

§1152.22(e) Rural and Community Impact and §1152.22(g) Passenger Service - Housatonic does not object to the request to waive these requirements.

4. **49 C.F.R. §1105 – Environmental and Historical Requirements**

Housatonic does not object to this request.

5. **49 U.S.C. §1152.20(A)(2)(XII) – Service of Notice on Labor Organization**

Housatonic does not object to the request to waive these requirements.

6. **49 U.S.C. §1152.22(i) – Draft Federal Register Notice**

Housatonic does not comment upon the legal sufficiency of the proposed notice but objects to the following specific matters in the draft notice:

- a. Paragraph 1 – Housatonic’s line is now called the Maybrook Line, not the Danbury Secondary Line
- b. Paragraph 1 – Housatonic objects to the representation that HRRC has refused to maintain the line and that any failure of maintenance prevents P&W from providing service to a customer.
- c. Paragraph 2 – The word “discontinuance” should be changed to “abandonment” in the last line.
- d. Paragraph 4 – The notice should require that protests and comments be filed together with a certificate of service attesting that copies of the comments or protests have been served on Edward J. Rodriguez, Counsel for Housatonic Railroad Company, Inc. 8 Davis Road West, P.O. Box 687, Old Lyme, CT 06371, phone 860-434-4303, fax 860-434-4306 and email: e.rodriguez@hrrc.com.

7. Statutory Requirements – 49 U.S.C. §10903(c)(2) System Diagram Map and 49 U.S.C. §10903(a)(3)(B) – Posting Requirements

Housatonic does not object to the request to waive these requirements.

WHEREFORE, Housatonic urges the Board to reject the Petition for Waiver in its entirety because the proposed adverse abandonment is not authorized by law. If the Board determines to consider the Petition for Waiver and defer the question of whether the adverse abandonment is legally permitted until it is actually filed, Housatonic requests that the Board limit the exemptions and waivers as set forth herein.

Respectfully submitted,
Housatonic Railroad Company, Inc.

By: Edward J. Rodriguez

Edward J. Rodriguez, Esq.
8 Davis Road West
P.O. Box 687
Old Lyme, CT 06371
Telephone: 860-434-4303
Facsimile: 860-434-4306

Dated: October 8, 2010

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply to the Petition for Waiver Filed by Providence and Worcester Railroad Company was served this date upon the following parties:

Edward D. Greenberg
David K. Monroe
GKG Law, P.C.
Canal Square
1054 Thirty-First Street, N.W.
Washington, D.C. 20007

Marie Angelini, Esq.
Providence and Worcester Railroad Co.
75 Hammond Street
Worcester, MA 01610

Dated: October 8, 2010

Edward J. Rodriguez
Edward J. Rodriguez