

## STB DOCKET NO. AB-31 (SUB-NO. 30)

GRAND TRUNK WESTERN RAILROAD INCORPORATED--  
ADVERSE DISCONTINUANCE OF TRACKAGE RIGHTS  
APPLICATION--A LINE OF NORFOLK AND WESTERN RAILWAY  
COMPANY IN CINCINNATI, HAMILTON COUNTY, OH

---

*Decided May 13, 1998*

---

The Board grants the Norfolk and Western Railway Company's (N&W) application for the adverse discontinuance of trackage rights and also exempts N&W from the Offer of Financial Assistance provisions of 49 U.S.C. 10904.

**BY THE BOARD:**

By an application filed January 23, 1998, and supplemented on February 5, 1998, Norfolk and Western Railway Company (NW)<sup>1</sup> seeks "adverse discontinuance"<sup>2</sup> of limited overhead trackage rights by Grand Trunk Western Railroad Incorporated (GTW) over the entire Riverfront Running Track or Riverfront Track extending from NW's milepost 119.3 (at the former Oasis Yard) and milepost 121.5 (at Smith Street), a distance of between 1.6 miles and 2.2 miles,<sup>3</sup> in Cincinnati, Hamilton County, OH. N&W also seeks exemption from the offer of financial assistance (OFA) provisions of 49 U.S.C. 10904. Senator Mike DeWine, of Ohio, the County of Hamilton and NW request expedited consideration. NW filed the application when GTW declined to file,

---

<sup>1</sup> NW is a wholly owned subsidiary of Norfolk Southern Railway Company.

<sup>2</sup> An adverse discontinuance is an application to the Board to find that the public convenience and necessity requires or permits the discontinuance of service by a carrier over a line of railroad, when that application is filed by someone other than that carrier. Such filings are also known as third party applications for abandonment or discontinuance. They are termed adverse applications because they are often, though not always, opposed by the carrier holding authority to operate on the line.

<sup>3</sup> A GTW trackage rights agreement states that the line is 1.6 miles long, while the line appears to be 2.2 miles long based on the mileposts.

or concur in, a notice of exemption for discontinuance of trackage rights over the Riverfront Track. GTW claims to have assigned the trackage rights to the Indiana & Ohio Railway Company (IORY).<sup>4</sup> We requested IORY to participate in this proceeding, but it has not done so.

In a decision served February 12, 1998, NW was granted a waiver of certain regulations and statutory provisions dealing with notice and filing requirements. Notice of the filing of the application was served on February 12, 1998, and published at 63 Fed. Reg. 7194 (1998).

On March 10, 1998, GTW filed a verified statement indicating that it did not oppose NW's adverse discontinuance application as it affects only GTW's, or its successor's, operational rights, but that GTW will seek to preserve the rights of its successor, IORY, to acquire the Riverfront Running Track. GTW says it will do so either by exercising its right of first refusal pursuant to its trackage rights agreement with NW or by an offer of financial assistance in the concurrently filed abandonment proceeding, *Norfolk & W. Ry. Co.--Aban. Exem. -- Cinn., Hamilton County, OH*,<sup>5</sup> 3 S.T.B. 110 (1998). NW replied on March 25, 1998.

#### BACKGROUND

NW acquired its interest in the Riverfront Running Track on April 1, 1976, as part of the Final System Plan under the Regional Rail Reorganization Act of 1973 (3R Act). The trackage rights agreement involved here was also entered into on April 1, 1976, between NW and Detroit, Toledo, and Ironton Railroad Company (DTI). In June 1980, GTW acquired control of the DTI,<sup>6</sup> and DTI later merged into GTW in December 1983. As a result, GTW acquired its interest in the agreement (the GTW trackage rights agreement) as the successor to the DTI. The GTW trackage rights agreement is restricted to the movement

---

<sup>4</sup> GTW and IORY indicate that by letter dated January 29, 1998, they invoked arbitration of the assignment of trackage rights pursuant to the terms of the GTW trackage rights agreement.

<sup>5</sup> In *Norfolk & W. Ry. Co.-- Aban. Exem. -- Cinn., Hamilton County, OH*, 3 S.T.B. 110 (1998), NW has petitioned for an exemption to abandon the Riverfront Running Track between milepost 119.3 and milepost 120.8. NW may only abandon the Riverfront Running Track if it first terminates the trackage rights at issue in this proceeding. Because these proceedings are related, we are issuing decisions in both proceedings concurrently.

<sup>6</sup> See *Norfolk & W. Ry. Co.--Control--Detroit, T & I. R. Co.*, 360 I.C.C. 498 (1979) and 363 I.C.C. 122 (1980).

of overhead traffic over the line for interchange with the Cincinnati, New Orleans and Texas Pacific Railway Company (CNOTP).<sup>7</sup>

Access to CNOTP's Gest Street Yard and the CNOTP High Line, which connects the Riverfront Running Track with the Gest Street Yard, is via trackage rights obtained by GTW in 1982 over a line owned by CSX Transportation Inc. (CSXT). However, a derailment of a CSXT train and ensuing fire rendered part of the CNOTP High Line unsafe for continued operations. From that time until now, GTW overhead traffic that would have moved over the Riverfront Running Track under the GTW trackage rights agreement for interchange with CNOTP has instead been detoured and rerouted over an alternate route. In 1995, NW completed construction of the "Third Main" track along CSXT's right-of-way between Winton Place and Hopple Street, which eased congestion of rail traffic north of Cincinnati and made the unused Riverfront Running Track route unnecessary, even as a backup route for overhead traffic. Due to a damaged bridge on the CNOTP High Line, GTW has been unable to use the line since 1986 for interchange of overhead traffic with the CNOTP, the only permissible purpose under the GTW agreement.

NW asserts that the public convenience and necessity require discontinuance of the trackage rights. According to NW witnesses John T. Moon, II, and M. D. Manion, there are no shippers located on or adjacent to the Riverfront Running Track, no local traffic has moved over the line for over 2 years, and any overhead traffic can be rerouted. Furthermore, they indicate that there is no prospect that any shippers will ever again locate on or adjacent to this line because of the City of Cincinnati's public use projects being constructed on the current railroad right-of-way and adjacent property. Indeed, GTW has not used the line for the only permissible use under the GTW Agreement--interchange of overhead traffic with CNOTP--for more than a decade. Due to damage to the CNOTP High Line, any overhead traffic to CNOTP that might exist cannot use the line and has been rerouted. Moreover, NW asserts that there is no reason to reinstitute service on this long-dormant line, on which no shippers are located.

NW and the City of Cincinnati entered into an agreement, the "Transition Agreement," dated April 11, 1995. The Transition Agreement provides for the City's acquisition of the Riverfront Running Track once all rail carrier interests

---

<sup>7</sup> CNOTP is an NW affiliate whose railroad line connects with the Riverfront Running Track near Smith Street's intersection with Front Street. NW and CNOTP are both subsidiaries of Norfolk Southern Railway Company. They were unaffiliated when GTW's predecessor, DTI, acquired its overhead trackage rights on the line from NW.

have been discontinued and extinguished and NW has abandoned the Line. As part of the same agreement, the City facilitated the construction of a "Third Main" track on an existing rail line through Cincinnati's Millcreek Valley. The construction of the Third Main made available to NW additional operating capacity and thereby making the Riverfront Running Track unnecessary even as a contingency for future increased capacity.

Abandonment of the Riverfront Running Track is an essential component of a 20-year public and private effort to redevelop and revitalize the City of Cincinnati's River Front area. Barriers between the City's central business district and the north bank of the Ohio will be removed by reconfiguring the Fort Washington Way expressway (I-71/U.S. 50); building multi-purpose structured parking lots to replace surface parking lots; and expanding and reconnecting the City's downtown area. Further enhancements to downtown Cincinnati will include Hamilton County's plans to build a new Cincinnati Bengals football stadium; the possibility of a new Cincinnati Reds baseball stadium; a multi-modal passenger transportation center; a possible future commuter rail station; and a regional family-oriented cultural/entertainment district. Discontinuance of trackage rights will allow NW to abandon and remove the Riverfront Running Track, resulting in the culmination of two decades of efforts by the City of Cincinnati and Hamilton County to remove rail traffic from the Riverfront Running Track.

#### DISCUSSION AND CONCLUSIONS

In adverse discontinuance proceedings the primary question to be resolved is whether there exists sufficient public interest in operation of the subject line to merit continued oversight by the Board. As the party seeking abandonment, NW has the burden of proof to establish that the public convenience and necessity permit the proposed discontinuance. The former Interstate Commerce Commission, and now the Board, have determined that a finding of public convenience and necessity terminates our exclusive and plenary abandonment jurisdiction over the line, enabling interested parties to undertake other legal remedies to effectively remove a carrier from a line. *Modern Handcraft, Inc.--Aban.*, 363 I.C.C. 969 (1981); *Kansas City Pub. Ser. Frgt. Operation-Exempt.-Aban.*, 7 I.C.C.2d 216, 224-226 (1990); and *Chelsea Property Owners--Aban.--The Consol. R. Corp.*, 8 I.C.C.2d 773,778 (1992), *aff'd sub nom. Conrail v. ICC*, 29 F.3d 706 (D.C. Cir. 1994).

Here the public convenience and necessity supports the requested grant of discontinuance authority. For the past 11 years, no rail service has been provided on the line. Because of the projected public uses of the railroad right-of-way and surrounding property, there is no public interest in "continuing" and no likelihood of reactivating rail service on the line. GTW does not oppose the discontinuance of the trackage rights. Also, IORY has not filed any opposition to the termination of the trackage rights.<sup>8</sup>

It is unnecessary for us to address whether GTW or IORY is the legal successor to the DTI trackage rights. Any ownership disputes arising from the trackage rights agreement can be resolved elsewhere. Because neither GTW nor IORY has opposed the application, we find that the discontinuance of trackage rights is warranted in that rail service to the public will not be harmed. Clearly, the evidence of record demonstrates that it is in the public interest and the interest of interstate commerce to approve NW's adverse application.

*Other Exemptions.* NW has also framed its request for exemption to extend to 49 U.S.C. 10904, involving OFAs.<sup>9</sup> Exemptions from 49 U.S.C. 10904 have been granted from time to time, but only when the right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service.<sup>10</sup>

We have often said that where no overriding public interest in continuing rail service in interstate commerce exists, we will not allow our jurisdiction to shield a railroad, or any party seeking relief before us, from the legitimate processes of state law. See, *Modern Handcraft, Inc.--Aban.*, 363 I.C.C. 969 (1981) (*Modern Handcraft*); *Kansas City Pub. Ser. Frgt. Operation--Exempt.--Aban.*, 7 I.C.C.2d 216, 224-226 (1990); and *Chelsea Property Owners--Aban.--*

<sup>8</sup> While IORY has not participated in this proceeding, in *Norfolk & W. Ry. Co.-- Aban. Exem. -- Cinn., Hamilton County, OH*, 3 S.T.B. 110 (1998), *supra*, IORY states that, while it is not asserting its right to operate over the Riverfront Running Track as a trackage rights holder, it insists that it has a right to purchase the line as a right of first refusal under the GTW trackage rights agreement.

<sup>9</sup> The issue of an exemption from our OFA provisions is also discussed in the concurrently served decision in *Norfolk & W. Ry. Co. -- Aban. Exem. -- Cinn. Hamilton County, OH*, 3 S.T.B. 110 (1998), *supra*, and that discussion fully supports our finding here.

<sup>10</sup> See, *K & E Railway Company--Abandonment Exemption--In Alfalfa, Garfield, and Grant Counties, OK, and Barber County, KS*, STB Docket No. AB-480X (STB served December 31, 1996) at 4, citing *Southern Pacific Transportation Company--Discontinuance of Service Exemption--In Los Angeles County, CA*, Docket No. AB-12 (Sub-No. 172X), *et al.*, (ICC served December 23, 1994); *Missouri Pacific Railroad Company--Abandonment--In Harris County, TX*, Docket No. AB-3 (Sub-No. 105X) (ICC served December 22, 1992); *Chicago & North Western Transportation Company--Abandonment Exemption--In Blackhawk County, IA*, Docket No. AB-1 (Sub-No. 226X), *et al.*, (ICC served July 14, 1989); and *Iowa Northern Railway Company--Abandonment--In Blackhawk County, IA*, Docket No. AB-284 (Sub-No. 1X) (ICC served April 1, 1988).

*The Consol. R. Corp.*, 8 I.C.C. 773, 778 (1992), *aff'd sub nom. Consolidated Rail Corp. v. ICC*, 29 F.3d 706 (D.C. Cir. 1994). Section 10904 requires us to give preference to arrangements for continued rail service over other alternatives. But, under the statutory standard governing abandonment cases, we cannot view that interest as absolute. *Modern Handcraft* would be rendered a nullity if GTW or IORY could invoke section 10904 to perpetuate our jurisdiction over property that we just found under section 10903 should be subject to the operation of the laws of the City of Cincinnati or those of the State of Ohio.

Because this proceeding involves a discontinuance rather than an abandonment, relief under section 10904 is limited to subsidizing the carrier's losses for a period not to exceed 1 year; 49 U.S.C. 10904(f)(4)(B). As noted, GTW has not operated over the line in more than 11 years, and IORY has never operated over the line. NW has shown that the right-of-way is needed for a valid public purpose, *i.e.*, multi-purpose improvements for the City of Cincinnati's downtown area. There are no shippers currently located on the line and no possibility that new shippers would locate on the line in the future. Overhead traffic has either been rerouted or can be rerouted. Thus, there is no overriding public need for continued rail service. On the other hand, imposition of OFA procedures or a public use condition would only delay transfer of the line for important public purposes and may cause the City to incur substantial monetary penalties for delay in completing certain projects. To accommodate the requests for expedition, we will grant an exemption from 49 U.S.C. 10904 and make the decision effective 10 days from May 13, 1998.<sup>11</sup>

NW has met its burden of proof, and we will grant its application. In approving this application, we must ensure that affected rail employees will be adequately protected. 49 U.S.C. 10903(b)(2). We have found that the conditions imposed in *Oregon Short Line R. Co.--Abandonment--Goshen*, 360 I.C.C. 91 (1979), satisfy the statutory requirements, and we will impose those conditions here.

Because this is a discontinuance proceeding and not an abandonment, trail use/rail banking and public use provisions do not apply.

This proceeding is exempt from environmental reporting requirements under 49 CFR 1105.6(c)(2) and from the historic reporting requirements under 49 CFR 1105.8(b)(3).

---

<sup>11</sup> Having exempted the discontinuance of trackage rights from 49 U.S.C. 10904, we have eliminated the need to extend the effective date to consider OFAs.

*We find:*

1. The present and future public convenience and necessity require and permit the discontinuance of trackage rights by either GTW or IORY over the above-described line of railroad, subject to the employee protective conditions in *Oregon Short Line R. Co.--Abandonment--Goshen*, 360 I.C.C. 91 (1979).

2. Discontinuance of the trackage rights will not result in an adverse impact on rural and community development.

3. Because such matters as public use and trail use/rail banking conditions are not appropriate here and because we have exempted the adverse discontinuance from the offer of financial assistance provisions of 49 U.S.C. 10904, we will accommodate the requests for expedition by allowing the discontinuance of trackage rights by either GTW or IORY to become effective on May 23, 1998.

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

*It is ordered:*

1. NW's application for the adverse discontinuance of the trackage rights described above is granted, and the OFA provisions of 49 U.S.C. 10904 are exempted.

2. This decision is effective on May 23, 1998.

3. Petitions to stay must be filed by May 18, 1998.

4. Petitions to reopen must be filed by June 2, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.