

STB DOCKET NO. AB-290 (SUB-NO. 212X)¹

NORFOLK SOUTHERN RAILWAY COMPANY
 — DISCONTINUANCE EXEMPTION —
 IN HUDSON COUNTY, NJ

Decided March 12, 2001

The Board directs Norfolk Southern Railway Company (NS) and CSX Transportation, Inc. (CSXT), seeking authority to discontinue service provided by Conrail as agent for NS and CSXT over lines in the New Jersey Shared Assets Area, to provide evidence of the costs and revenues each incurs on the lines, rather than merely submitting Conrail data.

BY THE BOARD:

On November 14 and 20, 2000, petitioners, Norfolk Southern Railway Company (NS) and CSX Transportation, Inc. (CSXT), respectively, filed petitions² under 49 U.S.C. 10502 for exemption from the prior approval requirements of 49 U.S.C. 10903 to discontinue service over approximately 3.84 miles of the Weehawken Branch,³ approximately 6.95 miles of the River Line,⁴

¹ This decision embraces STB Docket No. AB-55 (Sub-No. 584X) *CSX Transportation, Inc. — Discontinuance Exemption — in Hudson County*. These proceedings are not consolidated. They are being considered together because the two lines in issue are being operated as a single line as a result of changes made to track alignment and operations.

² Notice was served on December 5, 2000, and published at 65 Fed. Reg. 76,003 (2000) in STB Docket No. AB-290 (Sub-No. 212X) and in STB Docket No. AB-55 (Sub-No. 584X) on December 8, 2000, and published at 65 Fed. Reg. 77,071 (2000).

³ The 3.84-mile segment of the Weehawken Branch extends from the “point of switch in Jersey City[, NJ]” (approximately MP 0.00) “to the southerly R.O.W. line of Baldwin Avenue in Weehawken[, NJ]” (approximately MP 2.84), and includes “the former DL&W Railroad Lead to the Hoboken Freight Yard in Jersey City.” CSXT Petition at 2.

⁴ The 6.95-mile segment is composed of part of Conrail’s River Line: (1) from the connection to the Passaic and Harismus Branch at Controller Point (CP) “Waldo” in Jersey City (approximately MP 0.00) to the south side of Clifton Road in Weehawken (approximately MP 4.7), including the River Yard; and (2) from the south side of Clifton Road in Weehawken (approximately MP 0.00) to the northwest side of Tonnelle Avenue (excluding the portion of line, associated track, and underlying right-of-way necessary to retain access and continue service to Durkee Foods) in North Bergen, NJ (approximately MP 1.53); plus the National Docks Secondary in Jersey City from where it connects with the River Line at CP “Nave,” to the east side of Newark Avenue (approximately 1,350 feet); and the Weehawken Branch (Chicken Yard) in Weehawken, from where it connects
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and associated trackage in Hudson County, NJ. For convenience, the two lines will be referred to jointly as the River Line. NS and CSXT provide service over the River Line through their agent Consolidated Rail Corporation (Conrail).

Conrail filed applications to abandon the two lines on November 14, 2000, in *Conrail — Abandonment of the Weehawken Branch — in Hudson County, NJ*, STB Docket No. AB-167 (Sub-No. 766N), and *Conrail—Abandonment of the River Line — in Hudson County, NJ*, STB Docket No. AB-167 (Sub-No. 1067N). The applications were filed under section 308 of the Regional Rail Reorganization Act of 1973, 45 U.S.C. 748,⁵ which requires that these applications be granted unless offers of financial assistance (OFA) are filed within the 90-day period after the applications were filed. The issuance of decisions authorizing the abandonments was postponed in response to OFAs that were filed by Cognis Corporation (Cognis), one of two active River Line shippers, on February 12, 2001. In a decision served on February 16, 2001, the Director of the Office of Proceedings made a preliminary finding that Cognis is financially responsible and that its offers to subsidize and purchase are sufficiently reasonable to allow the OFA process to go forward.

Cognis filed replies to NS' and CSXT's petitions for exemption on December 28, 2000, and motions to dismiss Conrail's related abandonment applications on January 12, 2001. The New Jersey Transit Corporation (NJT), an instrumentality of the State of New Jersey, filed letters in support of the proposed abandonments and discontinuance exemptions on December 28, 2000, and February 8, 2001. Dykes Lumber Company, Inc. (Dykes), the other active shipper, filed a letter in support of Cognis on January 18, 2001. Conrail, NS, and CSXT filed joint replies to Cognis' replies on January 16, 2001. Conrail replied to Cognis' motions to dismiss on January 24, 2001. Additionally, Cognis filed a motion to strike the joint replies on January 25, 2001, contending that they violated 49 CFR 1104.13(c) and that Conrail had not sought, or been granted, leave to intervene. NS and CSXT filed joint responses on February 6, 2001.

⁴(...continued)

with the River Line on the east side of Willow Avenue to the end of the track (approximately 2,450 feet).

⁵ Section 308 was added by the Northeast Rail Service Act of 1981 (NERSA), enacted as Subtitle E of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35. NERSA established separate, expedited procedures for abandonments filed by Conrail. Section 308(b) applied to abandonment applications filed before December 1, 1981. Section 308(c) applied to abandonment applications filed after December 1, 1981, if prior to November 1, 1983, Conrail filed Notices of Insufficient Revenue (NIR) for lines that were likely to be the subject of future abandonment applications. The authority to file NIRs was subsequently extended from November 1, 1983, to November 1, 1985. Pub. L. No. 98-181, effective November 30, 1983.

In a separate decision being issued today, March 13, 201, we are denying Cognis' motions to strike the joint replies and the motions to dismiss Conrail's abandonment applications. Having reviewed the exemption petitions and Cognis' replies, we have decided to deny Cognis' motions to strike the joint reply here as well, in the interest of a complete record, and, for the reasons discussed *infra*, to require the submission of additional information before issuing a decision on the merits of the exemption petitions.

BACKGROUND

The River Line is one of a number of lines located within the North Jersey Shared Assets Area, which is one of three Shared Assets Areas (SAA) set up and approved in *CSX Corp. et al. — Control — Conrail Inc et al.*, 3 S.T.B. 196 (1998) (Decision No. 89) at 226-228 (*Conrail*), *clarified and modified*, 3 S.T.B. 764 (1998) (Decision No. 96), *petitions for review pending sub nom. Erie Niagara Rail Steering Committee v. STB*, Nos. 98-4285 *et al.* (2d Cir. argued Feb. 5, 2001).⁶ The operation of the SAAs are governed by related Shared Assets Areas Operating Agreements (SAA Agreements) that were also approved in *Conrail*.

NS and CSXT acquired local and overhead operating rights over the River Line and all other lines within the SAAs. Under the SAA Agreements, the two carriers each have exclusive and independent authority to establish rates, charges, service terms, routes, and divisions and to collect freight revenues on any traffic moving within the SAAs for their account. *See Conrail*, at 228. However, Conrail has not been eliminated as a corporate entity; it generally owns and maintains the lines within the SAAs for NS' and CSXT's exclusive benefit. As contemplated by the SAA Agreements, Conrail provides rail service to most customers within the SAAs as NS' and CSXT's agent. Neither NS and CSXT has ever operated over the River Line, which is a branch line. They have limited their operations within the SAAs to those main lines that give them access to rail yards or allow them either to move overhead traffic or unit trains directly to or from certain customers.

NS and CSXT state that they seek to discontinue what they describe as their unused operating rights over the River Line to facilitate the related Conrail abandonments. Citing 49 CFR 1105.6(c), (c)(2), and (c)(6), petitioners claim that environmental documentation is not required because neither their crews nor

⁶ The other SAAs were for South Jersey/Philadelphia and Detroit.

their equipment has operated over the River Line.⁷ NS and CSXT state that they will not discontinue operations over the River Line until Conrail's Northern Branch is reconstructed and that they will implement the discontinuance exemptions to the same extent and at the same time that Conrail exercises its related abandonment authorities.⁸

In support of the proposed exemptions, NS and CSXT rely on the financial and traffic data submitted by Conrail in its related abandonment applications. Those data show that Conrail's operation of the River Line resulted in a base year (September 1999-August 2000) avoidable loss of \$4,703 and is expected to result in a forecast year (September 2000-August 2001) avoidable loss of \$7,752. The data indicate that an estimated \$1,834,630 subsidy would be required to operate the River Line during the projected subsidy year (September 2000-August 2001).⁹ Additionally, Conrail's data show that Cognis originated or terminated 44 shipments in 1999 and 26 shipments in the base year, and that Dykes originated or terminated 32 shipments in 1999 and 36 shipments in the base year.

Petitioners contend that the proposed exemptions are consistent with the objectives of the rail transportation policy (RTP), 49 U.S.C. 10101, and that improved rail freight, rail passenger, and highway transportation would result. Specifically, they state that, by facilitating the abandonment of the River Line, the exemptions would: (1) allow Conrail to save in excess of \$1.8 million on the

⁷ Petitioners requested expedited action, having asked that the exemptions be permitted to become effective on February 12, 2001, the date they expected that the Conrail abandonments would become effective.

⁸ A large part of the real estate and track of the River Line was transferred to NJT on or about October 24, 1995, pursuant to a Freight Relocation and River Line Acquisition Agreement that was entered into in 1985 and formalized in 1989. Under the agreement, NJT acquired the right to reconstruct and use the River Line for light rail commuter passenger service, and Conrail agreed to seek authority to abandon freight service. If we approve the requests for discontinuance authority, the agreement provides that the River Line will be dedicated to passenger service and through freight services will be transferred to Conrail's Northern Branch, which NJT is to reconstruct and upgrade. If we disapprove the requests, under the agreement, operating restrictions will be necessary, and Conrail will be obligated to construct costly safety-related facilities to permit both freight and passenger operations.

⁹ Conrail's revenue is its average cost recovery by carload for the number of carloads it handles for NS and CSXT. Conrail's off-branch costs are the costs of moving cars between the River Line and Bayonne Yard, where Conrail picks up and delivers NS' and CSXT's cars. The estimated subsidy is based on \$1,825,000 in rehabilitation costs that Conrail estimates it would have to spend on the safety-related facilities if the abandonments are denied and the River Line must handle passenger and freight traffic. NJT estimates that the design and construction costs could range from \$1.8 million to over \$4 million.

safety-related facilities necessary for joint rail and passenger service; (2) result in the reconstruction of Conrail's Northern Branch which, in turn, would allow for more efficient through freight service and the elimination of the "at grade" highway or street crossings that adversely affect highway transportation; and (3) allow NJT to operate a light rail passenger service without having to spend additional funds to coordinate joint freight and passenger service operations.

Cognis claims that the petitions for exemption do not satisfy the standards of 49 U.S.C. 10502 or the environmental requirements of 49 CFR 1105 and that they are contrary to the RTP and agency precedent. Cognis requests that the petitions for exemption be scrutinized under 49 U.S.C. 10903 and 49 CFR 1152 and subjected to environmental review under 49 CFR 1105.6(b)(2) and (3).¹⁰

Cognis states that its Hoboken facility is used to process oleochemicals into about 230 products that go into the manufacture of a diverse array of products including cosmetics, cleansers, lubricants, plastics, paints, and coatings. The shipper states that the Hoboken facility primarily relies on rail service to receive inbound shipments of ethoxylated fatty acids (ETOHs), which originate at its Charlotte, NC facility and (to a lesser extent) at other locations. These shipments moved under an NS contract until May 31, 2000, and since then have moved in NS' common carrier service.¹¹ The Hoboken facility also originates outbound tank car shipments of finished products that move to Jacksonville, FL, under a CSXT contract that is to expire on May 31, 2002.

Cognis contends that the loss of rail service would detrimentally affect its Hoboken facility and Dykes' Weehawken facility and would subject them to the abuse of market power by making them totally dependent on motor carriage. The shipper emphasizes that NS and CSXT have not claimed, or offered data to show, that their River Line revenues are insufficient or that the discontinuances are necessary for operational reasons. Cognis also claims that the loss of rail service would result in adding approximately 258 more truckload movements

¹⁰ Cognis also contends that NERSA is out of date and that its use is inappropriate in connection with the Conrail abandonments. The shipper requests that the Conrail abandonments and the NS and CSXT petitions be scrutinized as a single proposal under 49 U.S.C. 10903. As discussed in our contemporaneous decision denying its motions to dismiss the Conrail abandonments, we find no merit to Cognis' contentions.

¹¹ According to Cognis, the Hoboken facility received approximately 40 carloads, or 5.6 million pounds, of ETOHs in 1999 and 14 carloads, or 2.24 million pounds, of ETOHs in 2000. It attributes the reduced carload volume in 2000 to track maintenance and truck shipments originating from a source in Washington, NJ. Cognis contends that the trucking arrangement was terminated and that rail deliveries from Charlotte have resumed and will return to the former level.

annually to the already congested highways and that most of these movements would be the inbound shipments of ETOHs, a hazardous chemical.

Additionally, Cognis argues that a number of the benefits relied on in the decision approving the Conrail acquisition and the creation of the SAAs (*i.e.*, increased safety, competitive rail service, and the diversion of traffic from the highways) would be lost if the exemption requests are granted. Cognis contends that the SAAs were carefully negotiated competitive components of the Conrail acquisition and that the use of the proposed exemptions to alter them would be contrary to the RTP and would adversely affect our jurisdiction to scrutinize the operation of the SAAs over the 5-year oversight period that was adopted. In Cognis' view, the Conrail abandonments and the instant petitions are intended only to relieve Conrail of its contractual obligation to construct the safety-related facilities necessary for the River Line to handle freight and passenger traffic. And, referring to *Conrail*, at 230-231, Cognis notes that it is NS and CSXT that are ultimately responsible for these construction costs because they agreed to guarantee all of Conrail's preexisting obligations.

DISCUSSION AND CONCLUSIONS

The exemption process is designed to minimize the regulatory burdens on carriers and shippers. Exemptions are appropriate when the information submitted by the parties is sufficient under 49 U.S.C. 10502 to permit the Board to make an informed decision as to whether: (1) continued regulation is necessary to carry out the RTP 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.

While we recognize the unusual situation involving the status and operation of the River Line, we are troubled that NS and CSXT have premised their exemption requests entirely on Conrail's abandonment applications and the data contained in them. While they respond to many of the concerns raised by Cognis,¹² they have not submitted any of their own financial data or operational

¹² Petitioners: (1) cite the monthly production and rail transportation figures for Cognis' Hoboken facility to show that Cognis already relies on motor carrier service as its primary mode of transporting inbound and outbound movements; (2) suggest that competitive truck service is available; (3) claim that ETOHs, although technically designated hazardous, are easily handled by truck without need for placarding and waybill notification; (4) claim that Cognis' freight can also move via rail-to-truck transload facilities, that CSXT has such a facility at Elizabeth, NJ, just 15 miles from the Hoboken facility, and that NS has a similar facility at Croxton, NJ; and (5) point out
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considerations or explained why such information would not be relevant to our analysis here. NS and CSXT each incur costs in connection with their ownership and the operation of the River Line, and each derives income from the line. It is unclear from the record, however, whether these costs and revenues are the same or similar to those attributed to Conrail. Accordingly, to ensure that we have a proper record on which to make the necessary findings under 49 U.S.C. 10502 in this unusual situation, we are directing NS and CSXT to file supplemental information addressing our concerns. *See* 49 CFR 1121.4(c). Additionally, we are directing NS and CSXT to submit environmental reports consistent with the requirements in 49 CFR Part 1105.¹³

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

It is ordered:

1. Cognis' motion to strike the joint reply is denied.
2. NS and CSXT are directed to submit the supplemental information and environmental reports discussed above by April 2, 2001.
3. Replies to the supplemental information may be filed by April 13, 2001.
4. This decision is effective on March 13, 2001.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

¹²(...continued)

that Cognis' contract with CSXT applies to numerous origins and destinations and to numerous commodities.

¹³ The notices served on December 5 and 8, 2000, indicated that the carriers were not submitting information required by our environmental regulations at 49 CFR Part 1105 because petitioners had never directly conducted operations over the River Line, but rather, Conrail has conducted operations on their behalf. Now that petitioners are being directed to submit additional information, we are also directing that they prepare environmental reports.