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February 18, 2020

300406

VIA E-FILING

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

ENTERED
Office of Proceedings
February 18, 2020
Part of
Public Record

Re: Ohio Rail Development Commission – Petition for Declaratory Order,
FD 36387

Dear Ms. Brown:

Pursuant to 49 U.S.C. §1321 and 5 U.S.C. §554(e), the Ohio Rail Development Commission, as the successor to the Ohio Rail Transportation Authority and the Ohio Department of Transportation hereby submit a Petition for Declaratory Relief. Please acknowledge receipt and filing of this submission by date stamping the enclosed eleventh copy and returning it to the courier for return to me. The filing fee of \$1,400.00 has been paid via the Board's electronic payment system. If there are any questions about this matter, please contact me directly, either by telephone: 202-663-7831 or by e-mail: czorbaugh@bakerandmiller.com.

Sincerely,



Crystal M. Zorbaugh
Special Counsel for the Ohio Rail Development Commission

Enclosures

cc: Alan Klodell
Matt Dietrich

FEE RECEIVED
February 18, 2020
SURFACE
TRANSPORTATION BOARD

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**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

FD 36387

**OHIO RAIL DEVELOPMENT COMMISSION
– PETITION FOR DECLARATORY ORDER –**

**DAVE YOST
ATTORNEY GENERAL OF OHIO**

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February 18, 2020

**Special Counsel for the Ohio Rail Development
Commission**

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

FD 36387

**OHIO RAIL DEVELOPMENT COMMISSION
– PETITION FOR DECLARATORY ORDER –**

INTRODUCTION

Pursuant to 49 U.S.C. §1321 and 5 U.S.C. §554(e), the Ohio Rail Development Commission (“ORDC”), as successor to the Ohio Rail Transportation Authority (“ORTA”) and the Ohio Department of Transportation (“ODOT”) petitions the Surface Transportation Board (the “Board”) to issue a declaratory order as to whether a line of railroad subject to the Board’s jurisdiction owned by ORDC located in Perry and Muskingum Counties, Ohio, formerly known as the “Glass Rock Branch” (the “Line”) could be converted into a trail pursuant to the National Trails Act (“Trails Act”), upon the Line’s existing operator being granted authority by the Board to discontinue service.

ORDC purchased the Line, which was authorized for abandonment but not fully abandoned, from the Consolidated Rail Corporation (“Conrail”) in 1982, and has continuously contracted with an operator to hold operating authority to provide common carrier services over the Line, since the Line was acquired continuing till the present day. While neither ORDC nor its predecessors have ever been subject to the Board, or its predecessor, the Interstate Commerce Commission’s (“ICC”) jurisdiction, the Line has at all times remained subject to the Board’s jurisdiction because two operators sought and received operating authority for the Line. Given the unique circumstances related to the Line, including the fact that ORTA (1) was not subject to

the Board's jurisdiction, but nevertheless (2) ensured that rail service continued over the Line by contracting with two Board approved rail operators to hold operating authority for the Line for approximately 37 years, interim trails use regulations were inapplicable, until the last Board-approved operator received discontinuance authority. Sometime in the near future, ORDC anticipates the current Board-authorized operator discontinuing service, and at that time ORDC as the owner of the Line would like to rail bank the Line pursuant to the National Trails System Act, 16 U.S.C. § 1247(d) ("Trails Act"), and the Board's interim trails use regulations at 49 C.F.R. § 1152.29 to preserve the Line for reactivation of rail service, if and when needed, which is consistent with the Rail Transportation Policy of 49 U.S.C. § 10101. However, it is unclear from the regulations whether invoking the Trails Act is possible in light of unique considerations involved in this proceeding. As such, ORDC requests that the Board issue a declaratory order and/or provide guidance to resolve the controversy.

RELIEF SOUGHT

Given that the Line which is the subject of this declaratory order has remained subject to the Board's jurisdiction and two operators have held operating authority, since the line was authorized for abandonment in 1982, ORDC is requesting that the Board issue a declaratory order that upon the existing operator receiving discontinuance authority, ORDC may directly rail bank the Line pursuant to the Trails Act, which will continue to preserve the Line for reactivation of rail service, if and when needed.

BACKGROUND

The Line was originally part of the Conrail system and comprised a portion of a larger abandonment for which Conrail sought abandonment authority for on November 30, 1981.¹ The portions of the Line authorized for abandonment but not fully abandoned included in the 1981 NERSA Abandonment, which are the subject of this declaratory order total 14.8 miles and include the Fultonham Running Track from milepost 0.0 to milepost 3.1 (Glass Rock-East) and Z&W Industrial Track from milepost 45.8 to milepost 57.5 (Glass Rock-West). In a decision served March 12, 1982, the ICC approved the 1981 NERSA Abandonment, which as previously stated included the Line.²

Because the 1981 NERSA Abandonment was undertaken pursuant to the Northeast Rail Service Act of 1981 ("NERSA Act"), by statute special restrictions were placed on Conrail's liquidation of the Line and consummation of its abandonment authority.³ A little over three

¹ On November 30, 1981, Conrail filed an Application with the ICC to abandon pursuant to Sections 308(a) and (b) of the Regional Rail Reorganization Act of 1973, as amended by Section 1156 of the Northeast Rail Service Act of 1981, for approval of the abandonment of 40.8 miles of rail lines in the Zanesville Area Cluster in Perry and Muskingum Counties, State of Ohio. See Conrail Abandonment of Lines In Zanesville, OH, AB-167 (Sub-No. 445N) ("Referred to herein as ("1981 NERSA Abandonment").

² See Conrail Abandonment of Lines In Zanesville, OH, AB-167 (Sub-No. 445N) (ICC served Mar 12, 1982)("March 1982 Decision")(authoring abandonment for certain segments of the rail lines proposed for abandonment excluding a segment with a pending offer of financial assistance and establishing the net liquidation value for the remaining segments pursuant to 45 USCS § 748). See Exhibit A.

³ Portions of 45 USCS § 748 state (1) If any application for abandonment is granted under subsection (b) of this section, the Commission shall, as soon as practicable, appraise the net liquidation value of the line to be abandoned, and shall publish notice of such appraisal in the Federal Register....

(3)(A) If, within 120 days after the date on which an appraisal is published in the Federal Register under paragraph (1), the Corporation receives a bona fide offer for the sale, for 75 percent of the amount at which the liquidation value of such line was appraised by the Commission, of the line to be abandoned, the Corporation shall sell such line and the

months elapsed between the ICC authorizing the 1981 NERSA Abandonment in the March 1982 Decision, and ORTA purchasing certain portions of an abandoned rail line, which included the Line pursuant to authority granted to ORTA by 11981.12 of the Ohio Revised Code, and pursuant to approval of the Controlling Board, an Agency of the State of Ohio. Via a quitclaim deed dated July 30, 1982, ORTA purchased approximately 31.4 miles of the rail line authorized for abandonment in the March 1982 Decision from Conrail and acquired title to certain railroad rights-of-way and several adjunct properties, including road, bed, ties, rail, and other improvements collectively used in operation of rail service. At the time ORTA purchased the Line, it was intact, capable of providing rail service, and had not been salvaged because Conrail was statutorily barred from doing so.

At the time of ORTA's acquisition of the Line, 49 C.F.R. §§ 1150.21-1150.24 (1983), set forth special rules, which applied to operations over abandoned rail lines that had been acquired (through purchase or lease) by a State [and which allowed the State to avoid incurring a common carrier obligation] subject to certain requirements. The relevant portions of the regulations state:

The rail line must have fully abandoned, or approved for abandonment by the Commission or a bankruptcy court. As used in these rules, the term "State" includes States, political subdivisions of States, and all instrumentalities through which the State can act. An operator has the option of applying for a modified

Commission shall, unless the parties otherwise agree, establish an equitable division of joint rates for through routes over such lines.

(3)(B) If the Corporation receives no bona fide offer under subparagraph (A), within such 120-day period, the Corporation may abandon or dispose of the line as it chooses, except that the Corporation may not dismantle bridges, or other structures (not including rail, signals, and other rail facilities) for 120 days thereafter. The Secretary may require that bridges or other structures (not including rail, signals, and other rail facilities), not be dismantled for an additional 8 months if he assumes all liability of any sort related to such property. See Exhibit B.

certificate of public convenience and necessity under this subpart or a common carrier certificate under Subpart A of this part....

The acquisition by a State of a fully abandoned line is not subject to the jurisdiction of the Interstate Commerce Commission. The acquisition by a State of a line approved for abandonment and not yet fully abandoned is exempted from the Commission's jurisdiction. If the State intends to operate the line itself, it will be considered a common carrier. However, when a State acquires a rail line described under § 1150.21 and contracts with an operator to provide service over the line, only the operator incurs a common carrier obligation. The operators of these lines are exempted from 49 U.S.C. 10901 and 10903 which are the statutory requirements governing the start-up and termination of operations. Operators exempted from these requirements must comply with the requirements of this part and must apply for a modified certificate of public convenience and necessity. The operator is a common carrier and incurs all benefits and responsibilities under 49 U.S.C. Subtitle IV; however, the State through its operational agreement or the operator of the line may determine certain preconditions, such as payment of a subsidy, which must be met by shippers to obtain service over the line....

See 49 C.F.R. §§ 1150.21-1150.22 (1983), included as Exhibit C.⁴

ORTA, which acquired the Line to preserve the Line for rail service never intended to operate the Line itself, but rather intended to contract operations to an ICC licensed rail common carrier. After purchasing the Line, ORTA spent several months looking for an operator that met the

⁴ 49 C.F.R. §§ 1150.23-1150.24 (1983) established criteria for operators to seek a Modified Certificate of Public Convenience and Necessity and provided a 60-day "notice process" for said operators to discontinue service, without applying for discontinuance authority from the Board.

State's criteria. On March 7, 1983, Moxahala Valley Railway Company ("MOXV") filed an application for a modified certificate of public convenience and necessity to operate the Line and one other connecting rail line which was authorized for abandonment in the March 1982 Decision after ORTA and MOXV came to terms on an agreement to govern said operations.⁵ In a decision served March 23, 1983, the ICC authorized MOXV "to provide service over a portion of the Lines abandoned by Conrail" in 1981 NERSA Abandonment, including the Line. MOXV operated over the Line for several years.⁶

In the fall of 1986, ODOT, as the successor to ORTA, provided formal notice to terminate and vacate MOXV's operations for default after a 60-day transition period.⁷ ODOT also notified MOXV that a new operator had been selected. ODOT requested that MOXV notify shippers immediately that its operations would terminate and file notice of its discontinuance of service with the ICC.

On January 21, 1987, Ohi-Rail Corporation ("Ohi-Rail") d/b/a Ohio Southern Railroad filed a Notice of Exemption ("1987 Notice") to lease and operate the Line and a connecting rail line.⁸ In a decision served February 27, 1986, the ICC published the exemption for Ohi-Rail's acquisition pursuant to 49 U.S.C. 10901, and explained in a footnote:

⁵ The agreement entitled "Lease and Purchase Agreement between the Ohio Rail Transportation Authority and Blue Mountain Management Service and Moxahala Valley Railway Company," dated January 25, 1983, gave MOXV the right to operate and maintain the rail lines and make improvements, and contained an option to purchase, which was never executed.

⁶ See Moxahala Valley Railway Company – Operation – In Zanesville, OH, FD 30141 (STB served March 23, 1983). See Exhibit D.

⁷ See 49 C.F.R. § 1150.24 (1983).

⁸ See In the Matter of: Ohi-Rail Corporation d/b/a Ohio Southern Railroad Company – Exemption – Operation of a Line of Railroad in Perry and Muskingum Counties, Ohio, FD 30986 (Filed January 21, 1987). Ohi-Rail replaced MOXV as the operator of the Line on September 25, 1986 after Ohi Rail and Ohi DOT entered into a Lease/Operation Agreement. Please note, originally Ohi-Rail did not believe it needed authority to operate because ODOT acquired the

the purchase by Ohio of the Conrail line under section 308(e) of the 3R Act did not require Commission authorization under 49 U.S.C. 10901 or 11343.... However, the subsequent lease and operation of the line by OSRR is subject to the requirements of 49 U.S.C. 10901.⁹

Ohi-Rail has held authority to operate the Line ever since, though freight rail service has not occurred over the Line in several decades.¹⁰

At this time, ORDC does not anticipate any existing need for freight rail service on the Line, and as such have been exploring their options for the Line. ORDC believes the ideal solution would be to allow a local municipality to create a recreational trail, which would benefit the public at large, while continuing to preserve the Line's right-of-way for future reactivation of rail service if and when necessary. While ORDC could enter into private negotiations to establish trails upon Ohi-Rail receiving discontinuance authority, such private negotiations would not ensure the preservation of the corridor as a railroad transportation asset.¹¹ The only vehicle that would allow both interim trails and

Line pursuant to NERSA. As a result, Ohi-Rail ended up seeking authority to operate the Line after already having commenced operations.

Ohi-Rail purchased the connecting Line segment from ORDC in 2007, while ORDC retained ownership of the Line.

⁹ Ohi-Rail Corp., d/b/a Ohio Southern Railroad Co., Lease and Operation Exemption; Ohio Department of Transportation, FD 30986 (ICC served February 27, 1987) ("Ohi-Rail Decision"). See Exhibit E.

¹⁰ Currently, ORDC leased a small portion of the Line to a tourist operator (Newark, Heath and Buckeye Lake Scenic Railway) in February 2018.

¹¹ See Consolidated Rail Corporation – Abandonment Exemption – Lancaster and Chester Counties, PA, AB 167 (Sub-1095X) (STB served April 12, 2004) (explaining that a trail-use arrangement may also be reached by private agreement of the parties after an abandonment is authorized and consummated, or fully exercised, at which time the property is no longer a part of the national transportation system or subject to the Board's jurisdiction.

preservation of the line is if ORDC is allowed to rail bank the Line pursuant to the Trails Act upon Ohi-Rail being granted discontinuance authority.

The Board's predecessor, the ICC, confirmed in Rail Abandonments – Use of Rights-of-Way As Trails; (49 C.F.R. Pts. 1105 and 1052), EP 274 (Sub-No. 13), 2 I.C.C. 2d 591, 1986 ICC Lexis 339, at *23-*26 and *51-*53 (ICC served April 16, 1986) ("EP 274") that even rail lines authorized for abandonment pursuant to NERSA, were eligible for trails pursuant to the Trails Act.¹² However, the regulations established for Conrail NERSA abandonments, did not address the availability of trails in the event that Conrail was to sell the Line to State, rather than immediately pursue rail banking pursuant to the Trails Act, and whether the timeline established for implementing trails would be tolled should rail service continue on the rail line.

ARGUMENT

ORDC wishes to pursue rail banking for the Line; the question is whether it can do so directly per authority of the Board or whether it must take additional steps, such as seeking revocation of its exemption from regulation and exercising the Board's abandonment procedures¹³ to get to the Trails Act. To be clear, ORDC's objectives are to

¹² The ICC concluded that trails provisions "apply to Conrail abandonments under NERSA. There is no express exclusion of Conrail abandonments under NERSA from the amendment, and the amendment refers to "any established railroad rights-ofway," which would include Conrail's." See EP 274, at *23-*24.

The decision also set forth a process and timeline for filing for interim trail use.

¹³ Under this scenario, the Board would partially revoke the exemption that the Owners now hold for the limited purposes of allowing the Owners to avail themselves of the Board's abandonment statute (49 U.S.C. §10903) and the corresponding class exemption procedures at 49 C.F.R. pt. 1152, subpart F; to permit interim trails use in accordance with 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29.

If the Board concludes that an abandonment proceeding is a necessary prerequisite to interim trails use, then ORDC requests that the partial revocation extend only so far as is necessary to

negotiate a trails use arrangement intended to preserve the corridor for the possible future restoration of railroad common carrier service and ensure that the Line remains subject to the Board's jurisdiction. Given that the Line since authorized for abandonment has at all times remain subject to the Board's jurisdiction, ORDC is seeking advice from the Board on how to achieve its desired outcome.

A. A Decision by the Board Allowing Direct Access¹⁴ to the Trails is Warranted and Consistent with Precedent.

As stated previously, ORDC is categorically exempt from the Board's jurisdiction¹⁵ and the regulatory provisions governing NERSA and trails use did not contemplate a scenario in which Conrail would sell a rail line, which was authorized for abandonment, but not fully abandoned, to a state entity to allow a state entity, which was not subject to the Board's jurisdiction, to continue rail service over a line. Put a different way, the regulations did not account for a scenario in which consummation of abandonment and invocation of the Trails Act would be delayed by years, no less over three decades while rail operations continued on the Line.

Since purchasing the Line with its infrastructure intact and capable of providing rail service, ORDC's predecessors' contracted with two operators, both of which sought and received authority to operate over the Line to ensure the continuation of rail service and

facilitate ORDC's objective. Thus, ORDC requests that, if at all possible, it remain exempt from the Board's jurisdiction for purposes of (a) 49 U.S.C. § 10904 (offers of financial assistance) and the corresponding Board regulations at 49 C.F.R. § 1152.27; and (b) 49 U.S.C. § 10905 (public use conditions) and the corresponding Board regulations at 49 C.F.R. § 1152.28.

¹⁴ To clarify if the Board agrees that "direct access" to the Trails Act is permissible upon termination of Ohi-Rail's operating authority then the process for establishing a NITU would be as follows: the Trails proponent would file a Notice of Interim Trails Use ("NITU") under the Trails Act, ORDC would consent, and the parties would negotiate and enter into a Trails Use Agreement which would allow for trails subject to reactivation of rail service, if and when necessary.

¹⁵ See Ohi-Rail Decision.

that the Line has at all times remained subject to the Board's jurisdiction. The Line's first operator, MOXV, operated pursuant to a modified certificate, and the Board has historically recognized that the modified certificate program was intended to "give states the opportunity to take over lines that either have been abandoned or have been authorized for abandonment, [as is the situation here] to keep them in the national rail system without being subject to full regulation."¹⁶ As such, the Board made the entry and exit procedures for lines operated pursuant to a modified certificate minimal because the modified certificate process was developed "to promote continuation of rail service by removing certain regulatory constraints from the States and thus encouraging rail continuation programs." Id.

Based on the same rationale, the Board held that for operations conducted pursuant to a modified certificate, upon the operator discontinuing service, should the state owner of the rail line "find an interested party to use the ROW for interim trail use, that outcome would be permissible, provided that it is pursued under the applicable statutory and regulatory requirements of the Trails Act." Id. at 9. Allowing trails upon the termination of a modified certificate completely makes sense because both the modified certificate process and "interim trail use/rail banking preserves a local rail line for future interstate rail service and is in the public interest." Id. The Board's prior holding on the permissibility of invoking the Trails Act when operations conducted pursuant to a modify certificate terminate, would seem to apply, but for the fact that the current operator acquired its authority pursuant to 10901 rather than by obtaining a modified certificate. Yet, the

¹⁶ Beaufort Railroad Company, Inc. – Modified Rail Certificate, FD 34943, slip op at 5 (STB served March 19, 2008).

underlying rationale supports the relief requested - allowing the Trails Act to be directly invoked, upon the termination of Ohi-Rail's operating authority

Another consideration in favor of allowing direct access to the Trails Act is that despite Conrail receiving abandonment authority, it was statutorily barred from exercising such authority or salvaging the line for 120 days after the ICC set the net liquidation value for the line to be abandoned and afforded other potential operators the opportunity to purchase the rail line for continued rail operations. See 45 USCS § 748. Less than four months elapsed between the ICC setting the net liquidation value and ORTA purchasing certain portions of the railroad line authorized for abandonment, which included the Line. Thus, ORTA's purchase of the Line and execution of a contract with MOXV to continue jurisdictional rail service became a barrier to the consummation of the abandonment authority given to Conrail for the Line in 1982. As the Board has noted time and again, abandonment authority for a rail line cannot be exercised, so long as jurisdictional operations continue over a rail line authorized for abandonment. See Norfolk and Western Railway Company – Abandonment Exemption – Between Kokomo and Rochester in Howard, Miami, and Fulton Counties, IN, AB-290 (Sub-No. 168X), slip op at 2 (STB served May 4, 2005)(“Kokomo”)(holding that despite Norfolk Southern Railway Company receiving authority to abandon 38.4 miles of rail line in Indiana, it could not exercise authority over a portion of the rail line because Indiana Hi-Rail Corporation (“IHRC”) (which was operating in bankruptcy) still had trackage rights over a 21.4-mile segment of line, and as such abandonment authority could not be exercised for that segment until the bankruptcy court authorized the discontinuance of IHRC's trackage rights.

The Board also recognized in the Kokomo decision that even though the rail line was authorized for abandonment, the Trails Act could not be invoked and a Notice of Interim Trails

Use issued for the 38.4-mile portion over which IHRC held trackage rights until such time as IHRC trackage rights are discontinued. Id. Analogous to the facts involved in Kokomo, ORDC and its predecessors contracted for the continuation of rail service, as such invoking the Trails Act was premature until such time that jurisdictional freight rail operations terminated.

Finally, a 2018 decision by the Board in City of Fishers, City of Noblesville & Hamilton County, IND. – Petition For Partial Revocation of Exemption, FD 36137 (STB served May 31, 2018) (“City of Fishers”) also weighs strongly in favor of the Board allowing the Trails Act to be directly invoked, upon the termination of Ohi-Rail’s operating authority. The circumstances involved in the City of Fishers, which are closely akin to those involved in this proceeding are as follows: several public entities purchased a rail line, which was authorized for abandonment in 1991; like ORDC the entities were exempt from Board jurisdiction albeit based on a different regulatory provision;¹⁷ the entities purchased the rail line with the rail line’s rail infrastructure in place because they contemplated using the rail corridor for transit purposes; and, the entities never manifested an intent to remove the rail line from the national rail system. See City of Fishers. The principle difference between the facts involved in City of Fishers and this proceeding is that ORDC’s predecessors contracted with two Board approved rail operators, the first operated pursuant to a modified certificate, fully consistent with the Board’s holding in City of Fishers while the second operated the Line pursuant to an exemption pursuant to 49 U.S.C. 10901.

¹⁷ See Common Carrier Status of States, State Agencies & Instrumentalities, & Political Subdivisions (Common Carrier Status of States), 363 I.C.C. 132 (1980), aff’d sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982).

In City of Fishers, the Board held the Petitioners may invoke the Trails Act: even though the rail line was authorized for abandonment, the rail line was sold to the cities in 1995 with the trackage intact; rail operations continued following the sale; the Board found no record of abandonment consummation; and there was no other evidence indicating the Petitioners' had an intent to withdraw the Line from the national rail network. Accordingly, the Line remained subject to the Board's jurisdiction and Petitioners may invoke the Trails Act. Similarly in this proceeding, ORDC and its predecessors ensured that the Line remained subject to the Board's jurisdiction after being authorized for abandonment and has never evidenced an intent to withdraw the rail line from the national rail network.

The Board allowed the Proponents in City of Fishers direct access to rail bank the Line pursuant to the Trails Act and the Board's related regulations because it had allowed similarly situated line owners to do so on lines acquired under Common Carrier Status of States. See Port of Tillamook Bay R.R., FD 31676, slip op. at 2; see also Sammamish Transp. Co., FD 33398 (Sub-No. 1), slip op. at 1. Interestingly, in City of Fishers, the state entity never actually procured an operator for the rail line to conduct operations pursuant to a modified certificate. Yet, the Board still allowed the City of Fishers direct access to rail bank the Line pursuant to the Trails Act because "the reasoning behind the availability of trail use procedures in those cases is not tied to the modified certificate operations, but rather only to the willingness of the owner of the rail line to enter into negotiations for trail use on a line authorized for abandonment that remains within the Board's jurisdiction. The Board should likewise find in the proceeding because ORDC is willing to enter into negotiations for trail use on the Line which while authorized for abandonment has always

remained in the Board's jurisdiction, direct access to the Trails Act is not only warranted but consistent with precedent. There is simply no reason to treat ORDC differently, just because its second operator received a 10901 exemption, rather than a modified certificate to operate the Line.

However, if the Board disagrees that ORDC may directly access the Trails Act, as previously stated ORDC is prepared to take additional steps, such as seeking revocation of its exemption from regulation and exercising the Board's abandonment procedures to get to the Trails Act.

B. In the Event The Board Disagrees Direct Access to the Trails is Appropriate, ORDC Requests Guidance on How It May Rail Bank the Line.

As stated previously, ORDC is prepared to take additional action should the Board deem it necessary for ORDC to do so to rail bank the Line. For example, if required, ORDC is prepared to seek partial revocation of the exemption that the Owners now hold for the limited purposes of allowing the Owners to avail themselves of the Board's abandonment statute (49 U.S.C. §10903) and the corresponding class exemption procedures at 49 C.F.R. pt. 1152, subpart F; to permit interim trails use in accordance with 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29. Of course, the Board's decision in the City of Fishers in discussing Caldwell suggests that it is not necessary for a state to revoke its exemption and commence a new abandonment proceeding, for a Line which was previously authorized for abandonment.

Regardless, if the Board concludes that an abandonment proceeding is a necessary prerequisite to interim trails use, then ORDC requests that the partial revocation extend only so far as is necessary to facilitate ORDC's objectives. Thus, ORDC requests that, if at all possible, it remains exempt from the Board's jurisdiction for purposes of (a) 49 U.S.C. § 10904 (offers of financial assistance) and the corresponding Board regulations at 49 C.F.R. § 1152.27; and (b) 49

U.S.C. § 10905 (public use conditions) and the corresponding Board regulations at 49 C.F.R. § 1152.28.

In deciding whether to revoke an exemption, the Board considers the statutory standard set forth at 49 U.S.C. § 10502(d), which provides that the agency may revoke an exemption "when it finds that application in whole or in part of a provision of this part to the person, class or transportation is necessary to carry out the transportation policy of [49 U.S.C. § 10101]."The Board will revoke an exemption if a petitioner has demonstrated conduct that frustrates the [Rail Transportation Policy] and the Board has determined that the reinstated regulatory provisions could ameliorate the alleged harms." Caldwell R.R. Commission-Exemption from 49 U.S.C. Subtitle IV, FD 32659 (Sub-No. 1), slip op. at 2 (STB served Nov. 26, 2014) ("Caldwell"). Rail banking is fully consistent with the Rail Transportation Policy of 49 U.S.C. § 10101, and would support the revocation of ORDC's exemption should the Board deem it necessary for ORDC to get access to the Trails Act.

Put simply, ORDC is prepared to take additional steps to get access to the Trails Act, should the Board require it; however, ORDC needs direction from the Board on what specific steps the Board believes are necessary for ORDC to pursue rail banking for the Line.

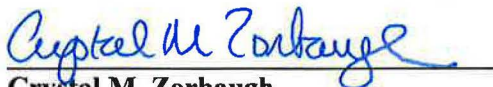
CONCLUSION

In adopting the regulations and policies governing the Trails Act, the ICC made it clear that such provisions apply to Conrail abandonments under NERSA. The very reason the Board created the exemptions (both the provisions which governed ORTA's acquisition of the Line and the provisions for Common Carrier Status) was to afford states the opportunity to take over lines that either have been abandoned or have been authorized for abandonment, to ensure that they remain in the national rail system consistent with the Rail Transportation Policy of 49 U.S.C. §

10101, without subjecting the states that own the rail lines to full regulation. ORTA acquired the Line to preserve it for rail service and contracted with two Board regulated carriers in order to do the same. Moreover, ORTA, ODOT, and ORDC have ensured the preservation of the Line for over three decades, and ORDC looks to do so for decades to come, by pursuing rail banking pursuant to the National Trails System Act, 16 U.S.C. § 1247(d) (Trails Act), and the Board's interim trails use regulations at 49 C.F.R. § 1152.29, upon the current operator, Ohi-Rail, being granted discontinuance authority. Unfortunately, it is unclear from the regulations whether invoking the Trails Act is possible in this proceeding. For the reasons explained herein, ORDC requests that the Board issue a declaratory order that upon the existing operator receiving discontinuance authority, ORDC may directly rail bank the Line pursuant to the Trails Act, and preserve the Line for reactivation of rail service, if and when needed.

Respectfully submitted,

DAVE YOST
ATTORNEY GENERAL OF OHIO



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February 18, 2020

**Special Counsel for the Ohio Rail Development
Commission**

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

FD 36387

**OHIO RAIL DEVELOPMENT COMMISSION
– PETITION FOR DECLARATORY ORDER –**

Exhibit A

SERVICE DATE

MAR 12 1982

RECEIVED

MAR 15 1982

INTERSTATE COMMERCE COMMISSION

CERTIFICATE AND DECISION

Docket No. AB-167 (Sub-No. 445N)

OFFICE OF COUNSEL
FEDERAL INTERSTATE COMMISSION OF OHIO

CONRAIL ABANDONMENT OF LINES IN ZANESVILLE, OH

RECEIVED

MAR 16 1982

OFFICE OF COUNSEL
FEDERAL INTERSTATE COMMISSION OF OHIO

Decided: March 8, 1982

On November 30, 1981, Consolidated Rail Corporation (Conrail) filed an application pursuant to section 308 of the Regional Rail Reorganization Act of 1973^{1/} to abandon 40.8 miles of its rail line in Zanesville, OH.

Under section 308(b) the Commission must grant any application for abandonment filed by Conrail before December 1, 1981, within 90 days after the date such application is filed unless an offer of financial assistance is made pursuant to section 308(d) during that 90-day period.

On February 22, 1982, Brockway Glass Company, Inc. (Brockway) filed a timely offer of financial assistance to purchase portions of (a) the Zanesville Secondary from milepost 18.2 to milepost 18.7, a distance of .5 mile and (b) the Zanesville Terminal RR Ind. Track from milepost 1.3 to milepost 3.4, a distance of 2.1 miles, for a total distance of approximately 2.6 miles.

On March 8, 1982, the Director of the Commission's Office of Proceedings found that Brockway's offer was bona fide. As a result, he postponed issuance of the certificate and decision authorizing abandonment of the segments Brockway requested. He also noted that Conrail would be authorized to abandon the remaining portions of the line.

Because no bona fide offer was filed to acquire portion of the following: (1) Zanesville Yard Running Track from milepost 14.1 to milepost 16.5; (2) Zanesville Secondary Track from milepost 16.5 to milepost 18.2 and milepost 18.7 to milepost 22.5; (3) Roseville Secondary Track from milepost 22.5 to milepost 36.0; (4) Zanesville Terminal RR Industrial Track from milepost 0.7 to milepost 1.3; (5) Fultonham Running Track from

^{1/} This section was added by the Northeast Rail Service Act of 1981. Pub. L. 97-35.

milepost 6.0 to milepost 3.1; (6) Y & W Industrial Track from milepost 45.8 to milepost 57.9 and (7) Crooksville Running Track from milepost 65.8 to milepost 64.3, a distance of approximately 38.2 miles. Conrail is now authorized to abandon these segments.

Congress has directed the Commission to appraise the net liquidation value of each Conrail line being abandoned. Under Section 108(e) any interested party would be able to purchase such a line at 75 percent of the value set by the Commission.

With its application Conrail submitted a statement that its estimate of the line's net liquidation value is \$1,043,396. Since we are only authorizing abandonment of 38.2 miles of the 40.8 miles sought and since Conrail did not provide us with a breakdown of the net liquidation value for the individual segments we have estimated the value of the 38.2 miles by assuming all of the line's segments are of equal value. Thus, we assume that net liquidation value of that segment is \$976,905.

The Commission intends to adopt this estimate unless, within 15 days from date of service of this order, an interested party requests that the Commission independently appraise the line. If such a request is made, the Commission will, as soon as practicable, set a value for the line based on any information available. That determination will be published in the Federal Register and is not appealable. If no request is made the Commission will publish Conrail's estimate in the Federal Register.

If any interested parties have pertinent data on the net liquidation value of this line, they should submit it to the Commission's Section of Finance, Room 5414, 12th and Constitution Ave., NW., Washington, DC 20423.

It is certified: Conrail is authorized to abandon the above-described line segments, a distance of approximately 38.2 miles in Zanesville, OH.

It is ordered:

The certificate and decision are effective upon service.

By the Commission, Review Board Number 1, Members Parker, Chandler and Fortier (Board Member Chandler not participating).

(SEAL)

Agatha L. Mergenovich
Secretary

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

FD 36387

**OHIO RAIL DEVELOPMENT COMMISSION
– PETITION FOR DECLARATORY ORDER –**

Exhibit B

45 USCS § 748

Current through Public Law 116-47, approved August 21, 2019.

United States Code Service > **TITLE 45. RAILROADS (Chs. 1 — 22)** > **CHAPTER 16. REGIONAL RAIL REORGANIZATION (§§ 701 — 797m)** > **CONSOLIDATED RAIL CORPORATION (§§ 741 — 748)**

§ 748. Abandonments

(a) **General.** The Corporation may, in accordance with this section, file with the Commission an application for a certificate of abandonment for any line which is part of the system of the Corporation. Any such application shall be governed by this section and shall not, except as specifically provided in this section, be subject to the provisions of chapter 109 of title 49, United States Code [*49 USCS §§ 10901 et seq.*].

(b) **Applications for abandonment.** Any application for abandonment that is filed by the Corporation under this section before December 1, *1981*, shall be granted by the Commission within 90 days after the date such application is filed unless, within such 90-day period, an offer of financial assistance is made in accordance with subsection (d) of this section with respect to the line to be abandoned.

(c) **Notice of insufficient revenues.**

(1) The Corporation may, prior to November 1, 1985, file with the Commission a notice of insufficient revenues for any line which is part of the system of the Corporation.

(2) At any time after the 90-day period beginning with the filing of a notice of insufficient revenues for a line, the Corporation may file an application for abandonment for such line. An application for abandonment that is filed by the Corporation under this subsection for a line for which a notice of insufficient revenues was filed under paragraph (1) shall be granted by the Commission within 90 days after the date such application is filed unless, within such 90-day period, an offer of financial assistance is made in accordance with subsection (d) of this section with respect to such line.

(d) **Offers of financial assistance.**

(1) The provisions of *section 10904 of title 49, United States Code* (including the timing requirements of subsection (d) thereof), shall apply to any offer of financial assistance under subsection (b) or (c) of this section.

(2) The Corporation shall provide any person that intends to make an offer of financial assistance under subsection (b) or (c) of this section with such information as the Commission may require.

(e) **Liquidation.**

(1) If any application for abandonment is granted under subsection (b) of this section, the Commission shall, as soon as practicable, appraise the net liquidation value of the line to be abandoned, and shall publish notice of such appraisal in the Federal Register.

(2) Appraisals made under paragraph (1) shall not be appealable.

(3)

(A) If, within 120 days after the date on which an appraisal is published in the Federal Register under paragraph (1), the Corporation receives a bona fide offer for the sale, for 75 percent of the amount at which the liquidation value of such line was appraised by the Commission, of the line to be abandoned, the Corporation shall sell such line and the Commission shall, unless the parties otherwise agree, establish an equitable division of joint rates for through routes over such lines.

(B) If the Corporation receives no bona fide offer under subparagraph (A), within such 120-day period, the Corporation may abandon or dispose of the line as it chooses, except that the Corporation may not dismantle bridges, or other structures (not including rail, signals, and other rail facilities) for 120 days thereafter. The Secretary may require that bridges or other structures (not including rail, signals, and other rail facilities), not be dismantled for an additional 8 months if he assumes all liability of any sort related to such property.

(4) If the purchaser under paragraph (3)(A) of this subsection of any line of the Corporation abandons such line within five years after such purchase, the proceeds of any track liquidations shall be paid into the general fund of the Treasury of the United States.

(f) **Employee protection.** The provisions of section 10903(b)(3) of title 49, United States Code, shall not apply to any abandonment granted under this section. Any employee who was protected by the compensatory provisions of title V of this Act immediately prior to the effective date of the Northeast Rail Service Act of 1981, who is deprived of employment by such an abandonment shall be eligible for employee protection under section 701 of this Act.

History

HISTORY:

Act Jan. 2, 1974, P. L. 93-236, Title III, § 308, as added Aug. 13, 1981, P. L. 97-35, Title XI, Subtitle E, Part 6, § 1156(a), 95 Stat. 679; Nov. 30, 1983, P. L. 98-181, Title II, § 2003(c)(2), 97 Stat. 1297; Dec. 29, 1995, P. L. 104-88, Title III, Subtitle B, § 327(4), 109 Stat. 952.

Annotations

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

FD 36387

**OHIO RAIL DEVELOPMENT COMMISSION
– PETITION FOR DECLARATORY ORDER –**

Exhibit C



HeinOnline

Fri Sep 6 11:33:10 2019

Citations:

Bluebook 20th ed.

CERTIFICATE TO CONSTRUCT, ACQUIRE, OR OPERATE RAILROAD LINES, CFR, 1983 ed. 314 (1983).

Chicago 7th ed.

, "CERTIFICATE TO CONSTRUCT, ACQUIRE, OR OPERATE RAILROAD LINES," Code of Federal Regulations (1983): 314-319

McGill Guide 9th ed.

, "CERTIFICATE TO CONSTRUCT, ACQUIRE, OR OPERATE RAILROAD LINES" [1983] Code of Federal Regulations 314.

MLA 8th ed.

"CERTIFICATE TO CONSTRUCT, ACQUIRE, OR OPERATE RAILROAD LINES." Code of Federal Regulations, , 1983, p. 314-319. HeinOnline.

OSCOLA 4th ed.

, 'CERTIFICATE TO CONSTRUCT, ACQUIRE, OR OPERATE RAILROAD LINES' (1983) CFR, 1983 ed 314

§ 1143.7 Contents of the reply.

Replies and petitions to intervene shall include: (1) Written argument detailing the reasons the State's action was reasonable; and (2) Certification that a copy has been served on the petitioner's representative(s) (if any). Replies and petitions may also address any new evidence submitted by the carrier. Petitions to intervene shall also include a statement of good cause why an appearance was not entered in the State proceeding and why an appearance is appropriate in this proceeding.

§ 1143.8 Rebuttal by the carrier.

Rebuttals to reply statements shall be filed within 20 days of the filing date of the petition. Rebuttal to intervention petitions shall be filed within 10 days of the filing of the petitions.

PARTS 1144—1149—[RESERVED]

PARTS 1150—1169—LICENSING PROCEDURES

PARTS 1150—1159—RAIL LICENSING PROCEDURES

PART 1150—CERTIFICATE TO CONSTRUCT, ACQUIRE, OR OPERATE RAILROAD LINES

Subpart A—Applications Under 49 U.S.C. 10901

Sec.

- 1150.1 Introduction.
- 1150.2 Overview.
- 1150.3 Information about applicant(s).
- 1150.4 Information about the proposal.
- 1150.5 Operational data.
- 1150.6 Financial information.
- 1150.7 Environmental and energy data.
- 1150.8 Additional support.
- 1150.9 Notice.
- 1150.10 Procedures.

Subpart B—Designated Operator

- 1150.11 Introduction.
- 1150.12 Information about the designated operator.
- 1150.13 Relevant dates.
- 1150.14 Proposed service.
- 1150.15 Information about offeror.
- 1150.16 Procedures.

Sec.

Subpart C—Modified Certificate of Public Convenience and Necessity

- 1150.21 Scope of Rules.
- 1150.22 Exemptions and common carrier status.
- 1150.23 Modified certificate of public convenience and necessity.
- 1150.24 Termination of service.

AUTHORITY: 49 U.S.C. 10321 and 10505 and 5 U.S.C. 559.

SOURCE: 47 FR 8199, Feb. 25, 1982, unless otherwise noted. Redesignated at 47 FR 49581, Nov. 1982.

Subpart A—Applications Under 49 U.S.C. 10901

§ 1150.1 Introduction.

(a) *When an application is required.* This subpart governs applications under 49 U.S.C. 10901 for a certificate of public convenience and necessity authorizing the construction, acquisition or operation of railroad lines. Noncarriers require Commission approval under section 10901 to construct, acquire or operate a rail line in interstate commerce. Existing carriers require approval under section 10901 only to construct a new rail line or operate a line owned by a noncarrier, since acquisition by a carrier of an active rail line owned by a carrier is covered by 49 U.S.C. 11343. We have exempted from these requirements the acquisition by a State entity of a rail line that has been approved for abandonment, as well as operations over these lines. See Subpart C of this part. In addition, where appropriate, we have granted individual exemptions from these certification requirements. See 49 U.S.C. 10505.

(b) *Content of the application.* Applications filed under this subpart shall include the information set forth in §§ 1150.2 through 1150.9. The applicant must also comply with the Energy and Environmental Regulations, at 49 CFR Parts 1106 and 1105 (including consulting with the Commission's Energy and Environmental Branch at least 6 months prior to filing an application, to begin the scoping process to identify environmental issues and outline procedures

for analysis of this aspect of the proposal).

§ 1150.2 Overview.

(a) A brief narrative description of the proposal.

(b) The full name and address of applicant(s).

§ 1150.3 Information about applicant(s).

(a) The name, address, and phone number of the representative to receive correspondence concerning this application.

(b) Facts showing that applicant is either a common carrier by railroad or has been organized to implement the proposal for which approval is being sought.

(c) A statement indicating whether the rail line will be operated by applicant. If not, the operator which has been selected must join in the application, and provide all information required for an applicant. If the operator has not yet been selected, state who is being considered.

(d) A statement indicating whether applicant is affiliated by stock ownership or otherwise with any industry to be served by the line. If so, provide details about the nature and extent of the affiliation.

(e) Date and place of organization, applicable State statutes, and a brief description of the nature and objectives of the organization.

(f) If a corporation, submit:

(1) A list of officers, directors, and 10 principal stockholders of the corporation and their respective holdings. A statement whether any of these officers, directors or major shareholders control other regulated carriers. Also a list of entities, corporation(s) individual(s), or group(s) who control applicant, the extent of control, and whether any of them control other common carriers.

(2) As exhibit A, any resolution of the stockholders or directors authorizing the proposal.

(g) If a partnership or individual, submit the name and address of all general partners and their respective interests, and whether any of them control other carriers.

(h) If applicant is an entity other than as described in paragraphs (e) or

(f) of this section, submit name, title, and business address of principals or trustee, and whether the entity controls any other common carriers.

(i) If applicant is a trustee, receiver, assignee, or a personal representative of the real party in interest, details about the appointment (including supporting documents, such as the court order authorizing the appointment and the filing) and about the real party in interest.

(j) If applicant is an existing carrier, it may satisfy the informational requirements of paragraphs (f)–(i) of this section by making appropriate reference to the docket number of prior applications that have been filed within the previous three years in which the information has been submitted.

§ 1150.4 Information about the proposal.

(a) A description of the proposal and the significant terms and conditions, including consideration to be paid (monetary or otherwise). As exhibit B, copies of all relevant agreements.

(b) Details about the amount of traffic and a general description of commodities.

(c) The purposes of the proposal and an explanation of why the public convenience and necessity require or permit the proposal.

(d) As exhibit C, a map which clearly delineates the area to be served including origins, termini and stations, and cities, counties and States. The map should also delineate principal highways, rail routes and any possible interchange points with other railroads. If alternative routes are proposed for construction, the map should clearly indicate each route.

(e) A list of the counties and cities to be served under the proposal, and whether there is other rail service available to them. The names of the railroads with which the line would connect, and the proposed connecting points; the volume of traffic estimated to be interchanged; and a description of the principal terms of agreements with carriers covering operation, interchange of traffic, division of rates or trackage rights.

(f) The time schedule for consummation or completion of the proposal.

(g) If a new line is proposed for construction:

(1) The approximate area to be served by the line.

(2) The nature or type of existing and prospective industries (e.g., agriculture, manufacturing, mining, warehousing, forestry) in the area, with general information about the age, size, growth potential and projected rail use of these industries.

(3) Whether the construction will cross another rail line and the name of the railroad(s) owning the line(s) to be crossed. If the crossing will be accomplished with the permission of the railroad(s), include supporting agreements. If a Commission determination under 49 U.S.C. 10901(d)(1) will be sought, include such requests.

§ 1150.5 Operational data.

As exhibit D, an operating plan, including traffic projection studies; a schedule of the operations; information about the crews to be used and where employees will be obtained; the rolling stock requirements and where it will be obtained; information about the operating experience and record of the proposed operator unless it is an operating railroad; any significant change in patterns of service; any associated discontinuance or abandonments; and expected operating economies.

§ 1150.6 Financial information.

(a) The manner in which applicant proposes to finance construction or acquisition, the kind and amount of securities to be issued, the approximate terms of their sale and total fixed charges, the extent to which funds for financing are now available, and whether any of the securities issued would be underwritten by industries to be served by the proposed line. Explain how the fixed charges will be met.

(b) As exhibit E a recent balance sheet. As exhibit F, an income statement for the latest available calendar year prior to filing the application.

(c) A present value determination of the full costs of the proposal. If construction is proposed, the costs for

each year of such construction (in a short narrative or by chart).

(d) A statement of projected net income for 2 years, based upon traffic projections. Where construction is contemplated, the statement should represent the 2 years following completion of construction.

§ 1150.7 Environmental and energy data.

As exhibit H, information and data prepared under 49 CFR Part 1105, and the "Revision of the Nat'l. Guidelines Environmental Policy Act of 1969," 363 I.C.C. 653 (1980), and in accordance with "Implementation of the Energy Policy and Conservation Act of 1975," 49 CFR Part 1106.

§ 1150.8 Additional support.

Any additional facts or reasons to show that the public convenience and necessity require or permit approval of this application. The Commission may require additional information to be filed where appropriate.

§ 1150.9 Notice.

A summary of the proposal which will be used to provide notice under § 1150.10(f).

§ 1150.10 Procedures.

(a) *Waivers.* Prior to filing an application, prospective applicants may seek an advance waiver, either on a permanent or temporary basis, of required information which is unavailable or not necessary or useful in analysis of the proposal. However, if the information is clearly not applicable to the individual proposal, a waiver is not necessary and need not be sought. A petition must specify the sections for which waiver or clarification is sought and the reasons why it should be granted. No replies will be permitted. Parties may, upon an appropriate showing, demonstrate their need to examine data which have previously been waived. In such circumstances, the Commission only requires that it be produced under § 1150.8 above.

(b) *Filing procedures.* The original and five copies of the application and all documents shall be filed with the Secretary. A \$700 fee is required to file an application. (49 CFR 1002.2(d)(1).)

Copies of documents shall be furnished promptly to interested parties upon request. The application shall include a stamped self-addressed envelope to be used to notify applicant of the docket number. Additionally, if possible, telephonic communication of the docket number shall be made.

(c) *Signatures.* The original of the application shall be signed by applicants (if a partnership, all general partners must sign; and if a corporation, association, or other similar form of organization, the signature should be that of the executive officer having knowledge of the matters and designated for that purpose). Applications shall be made under oath and shall contain an appropriate certification (if a corporation, by its secretary) showing that the affiant is duly authorized to verify and file the application. Any persons controlling an applicant shall also sign the application.

(d) *Related applications.* Applicant shall file concurrently all directly related applications (e.g., to issue securities, control motor carriers, obtain access to terminal operations, acquire trackage rights). All such applications will be considered with the main application.

(e) *Service.* As soon as the docket number is obtained the applicant shall serve a conformed copy of the application by first-class mail upon the Governor (or Executive Officer), Public Service Commission, and Department of Transportation of each State in which any part of the properties involved in the proposed transaction is located. Within 2 weeks of filing, applicant shall submit to the Commission a copy of the certificate of service indicating that all persons so designated have been served a copy of the application.

(f) *Publication.* Within 2 weeks of filing, applicant shall have published the summary of the application (prepared under § 1150.9) in a newspaper of general circulation in each county in which the line is located. The notice should inform interested parties of the date by which they must advise the Commission of their interest in the proceeding. This date shall be calculated as the 35th day after the filing of the application which is neither a

Saturday, Sunday, or legal holiday in the District of Columbia. Applicant must file an affidavit of publication immediately after the publication has been completed. The Commission will, as soon as practicable, either publish the notice summary in the *FEDERAL REGISTER* or reject the application if it is incomplete.

(g) *Public participation.* Written comments (with five copies) must be filed within 35 days of the filing of the application. Comments must contain the basis for the party's position either in support or opposition. Applicant must be served with a copy of each comment. On the basis of the comments and the assessment by the Energy and Environmental Branch, the Commission will decide if a hearing is necessary. A hearing may be either oral or through receipt of written statements (modified procedure). (See 49 CFR 1112.1 *et seq.*) If there is no opposition to the application, additional evidence normally need not be filed, and a decision will be reached using the information in the application.

(h) *Replies to written comments.* Applicant's replies will be considered by the Commission provided they are filed and served within 5 days of the due date of the pleadings they address.

Subpart B—Designated Operators

§ 1150.11 Introduction.

A certificate of designated operator will be issued to an operator providing service pursuant to a rail service continuation agreement under section 304 of the Regional Rail Reorganization Act of 1973, as amended by the Railroad Revitalization and Regulatory Reform Act of 1976. The designated operator (D-OP) may commence and terminate the service in accordance with the terms of the agreement. When service is terminated the D-OP must notify all shippers on the line. To obtain a D-OP certificate, the information in this subpart must be filed with the Commission. A copy of the certificate of designated operator shall be served on the Association of American Railroads.

§ 1150.12 Information about the designated operator.

(a) The name and address of the D-OP.

(b) If a new corporation or other new business entity, a copy of the certificate of incorporation or, if unincorporated, the facts and official organizational documents relating to the business entity.

(c) The names and addresses of all officers and directors, with a statement from each which indicates present affiliation, if any, with a railroad.

(d) Sufficient information to establish its financial responsibility for the proposed undertaking, unless the D-OP is a common carrier by railroad. The nature and extent of all liability insurance coverage, including insurance binder or policy number, and name of insurer.

§ 1150.13 Relevant dates.

The exact dates of the period of operation which have been agreed upon by the D-OP, the offeror of the rail service continuation payment, and the owner of the line to be operated, in their lease and operating agreements.

§ 1150.14 Proposed service.

(a) A copy of all agreements between the D-OP, the offeror of the rail service continuation payment, and the owner of the line to be operated.

(b) Any additional information which is necessary to provide the Commission with a description of:

(1) The line over which service is to be provided (e.g., U.S.R.A. Line); and

(2) All interline connections, including the names of the connecting railroads.

§ 1150.15 Information about offeror.

(a) The name and address of the offeror of the rail service continuation payment.

(b) Sufficient information to establish the financial responsibility of the offeror for the proposed undertaking, or if the offeror is a State or municipal corporation or authority, a statement that it has authority to perform the service or enter into the agreement for subsidy.

§ 1150.16 Procedures.

Upon receipt of this information, the matter will be docketed by the prefix initials "D-OP." Operators may begin operating immediately upon the filing of the necessary information (plus three copies). Although the designated operator will not be required to seek and obtain authority from the Commission either to commence or to terminate operations, the designated operator is a common carrier by railroad subject to all other applicable provisions of 49 U.S.C. Subtitle IV. However, we have exempted designated operators from some aspects of regulation. See "Exempting of Certain Designated Operators from section 11343, 361 ICC 379 (1979), as modified by No. 79-2457, John W. McGinness, Brotherhood of Locomotive Engineers and Railway Labor Executives' Association v. Interstate Commerce Commission and United States of America." (U.S.C.A. D.C. Cir., decided August 17, 1981).

Subpart C—Modified Certificate of Public Convenience and Necessity

§ 1150.21 Scope of rules.

These special rules apply to operations over abandoned rail lines, which have been acquired (through purchase or lease) by a State. The rail line must have fully abandoned, or approved for abandonment by the Commission or a bankruptcy court. As used in these rules, the term "State" includes States, political subdivisions of States, and all instrumentalities through which the State can act. An operator has the option of applying for a modified certificate of public convenience and necessity under this subpart or a common carrier certificate under Subpart A of this part. A copy of the modified certificate shall be served on the Association of American Railroads.

§ 1150.22 Exemptions and common carrier status.

The acquisition by a State of a fully abandoned line is not subject to the jurisdiction of the Interstate Commerce Commission. The acquisition by

a State of a line approved for abandonment and not yet fully abandoned is exempted from the Commission's jurisdiction. If the State intends to operate the line itself, it will be considered a common carrier. However, when a State acquires a rail line described under § 1150.21 and contracts with an operator to provide service over the line, only the operator incurs a common carrier obligation. The operators of these lines are exempted from 49 U.S.C. 10901 and 10903 which are the statutory requirements governing the start up and termination of operations. Operators exempted from these requirements must comply with the requirements of this part and must apply for a modified certificate of public convenience and necessity. The operator is a common carrier and incurs all benefits and responsibilities under 49 U.S.C. Subtitle IV; however, the State through its operational agreement or the operator of the line may determine certain preconditions, such as payment of a subsidy, which must be met by shippers to obtain service over the line. The operator must notify the shippers on the line of any preconditions. The modified certificate will authorize service to shippers who meet these preconditions and the operator will be required to provide complete common carrier service under this certificate only to those shippers. (See 363 ICC 132.)

§ 1150.23 Modified certificate of public convenience and necessity.

(a) The operator must file a notice with the Commission for a modified certificate of public convenience and necessity. Operations may commence immediately upon the filing; however, the Commission will review the information filed, and if complete, will issue a modified certificate notice.

(b) A notice for a modified certificate of public convenience and necessity shall include the following information:

(1) The name and address of the operator and, unless the operator is an existing rail carrier:

(i) Its articles of incorporation or, if it is unincorporated, the facts and organizational documents relating to its formation;

(ii) The names and addresses of all of its officers and directors and a statement indicating any present affiliation each may have with a rail carrier; and

(iii) Sufficient information to establish the financial responsibility of the operator.

(2) Information about the prior abandonment, including docket number, status and date of the first decision approving the abandonment.

(3) The exact dates of the period of operation which have been agreed upon by the operator and the State which owns the line (if there is any agreement, it should be provided);

(4) A description of the service to be performed including, where applicable, a description of:

(i) The line over which service is to be performed;

(ii) All interline connections including the names of the connecting railroads;

(iii) The nature and extent of all liability insurance coverage, including binder or policy number and name of insurer; and

(iv) Any preconditions which shippers must meet to receive service.

(5) The name and address of any subsidizers, and

(6) Sufficient information to establish the financial responsibility of any subsidizers (if the subsidizer is a State, the information should show that it has authority to enter into the agreement for subsidized operations).

(c) The service offered and the applicable rates, charges, and conditions must be described in tariffs published by the operator to the Commission's rules.

§ 1150.24 Termination of service.

The duration of the service may be determined in the contract between the State and the operator. An operator may not terminate service over a line unless it first provides 60 days' notice of its intent to terminate the service. The notice of intent must be: (a) Filed with the State and the Commission, and (b) mailed to all persons that have used the line within the 6 months preceding the date of the notice.

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

FD 36387

**OHIO RAIL DEVELOPMENT COMMISSION
– PETITION FOR DECLARATORY ORDER –**

Exhibit D

SERVICE DATE

MAR 23 1983

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 30141

MOXANALA VALLEY RAILWAY COMPANY - OPERATION
IN ZANESVILLE, OH

Modified Rail Certificate

NOTICE:

March 17, 1983

On March 7, 1983, a notice was filed by the Moxanala Valley Railway Company for a modified certificate of public convenience and necessity under 49 C.F.R. 1150 (Subpart B). As of this date, that carrier is authorized to provide service over a portion of the lines abandoned by ConRail pursuant to authorization of the Commission in No. AB-167 (Sub-No. 445H), served March 12, 1982. The lines to be operated are located between (1) South Zanesville (milepost 19.4) and Wilbren, OH (milepost 36.0), (2) Fultonham Switch (milepost 0.0), and East Fultonham, OH (milepost 3.1), and (3) Fultonham (milepost 57.47) and Glass Rock, OH (milepost 45.60).

The lines are owned by the State of Ohio.

This notice shall be served upon the Association of American Railroads (Car Service Division) as agent of all railroads subscribing to the car-service and car-hire agreement, and upon the American Short Line Railroad Association.

By the Commission, *Reber P. Hardy*
Reber P. Hardy, Director, Office of
Proceedings.

Agatha L. Mergenovich
Agatha L. Mergenovich
Secretary

(SEAL)

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

FD 36387

**OHIO RAIL DEVELOPMENT COMMISSION
– PETITION FOR DECLARATORY ORDER –**

Exhibit E

INTERSTATE COMMERCE COMMISSION

NOTICE OF EXEMPTION

SERVICE DATE

FEB 27 1987

Finance Docket No. 30486

OHIO-RAIL CORPORATION, d/b/a OHIO SOUTHERN RAILROAD COMPANY -
LEASE AND OPERATION EXEMPTION - OHIO DEPARTMENT OF
TRANSPORTATION

Ohio-Rail Corporation (Ohio-Rail), d/b/a Ohio Southern Railroad Company (OSRR), a Class I¹ rail carrier, has filed a notice of exemption to lease and operate a line of railroad extending from milepost 4.0 near Glass Rock and milepost 13.4 near South Zanesville, thence to milepost 36.0 near Mt. Lexington, in Perry and Muskingum Counties, OH.² This line of railroad was purchased by the Ohio Department of Transportation (Ohio DOT) from the Consolidated Rail Corporation (Conrail) pursuant to section 308(e) of the Regional Rail Reorganization Act of 1973 (RR Act), after Conrail had filed a application under section 308 to abandon the line.³

Any comments must be filed with the Commission and

1/ This notice of exemption was filed under 49 C.F.R. 1182.2(d)(2) as an exemption from the requirements of 49 U.S.C. 11343. However, since the transaction involves the lease and operation by a carrier of rail property owned by a non-carrier, the transaction falls under 49 U.S.C. 10901. Accordingly, this notice is treated as a notice of exemption, under 49 C.F.R. 1156.31, from the requirements of section 10901.

2/ The purchase by Ohio of the Conrail line under section 308(e) of the RR Act did not require Commission authorization under 49 U.S.C. 10901 or 11343. Finance Docket No. 23867, Delaware Otsego Corporation - Exemption From 49 U.S.C. 10753(c)(3), 10901, 11301, and 11343 (not printed), served April 15, 1982. However, the subsequent lease and operation of the line by OSRR is subject to the requirements of 49 U.S.C. 10901.

served on: Kelvin J. Lowd, Glover & Loftus, 1224
Seventeenth Street, NW, Washington, DC 20036.

This notice is filed under 49 C.F.R. 1150.31.3/ If the
notice contains false or misleading information, the
exemption is void ab initio. Petitions to revoke the
exemption under 49 U.S.C. 10505(d) may be filed at any
time. The filing of a petition to revoke will not
automatically stay the transaction.

Dated: February 17, 1987

By the Commission, Jane R. McQueen, Director, Office of
Proceedings

Noreta R. McGee

Noreta R. McGee
Secretary

(SEAL)

^{3/} The Railway Labor Executives' Association (RLEA) filed an
unsupported request for labor protection claiming that this
transaction is subject to the mandatory labor protection
provisions of 49 U.S.C. 11347. Since this transaction
involves an exemption from 49 U.S.C. 10901, RLEA's request
is rejected. See Class Exemption - Acq. & Oper. of R. Lines
Under 49 U.S.C. 10901, 1 I.C.C.2d 510 (1985).