

SERVICE DATE – JULY 10, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1329X

ELKHART & WESTERN RAILROAD CO. LLC—DISCONTINUANCE OF TRackage
RIGHTS EXEMPTION—IN MARSHALL AND FULTON COUNTIES, IND.

Digest:¹ This decision allows Elkhart & Western Railroad Co. LLC to discontinue service over approximately 11.7 miles of rail line in Marshall and Fulton Counties, Ind., subject to standard employee protective conditions and denies a motion to compel discovery.

Decided: July 7, 2023

On March 24, 2023, Elkhart & Western Railroad Co. LLC (E&W), filed a petition under 49 U.S.C. § 10502 for exemption from the prior approval requirements of 49 U.S.C. § 10903 to discontinue trackage rights over approximately 11.7 miles of rail line owned by Fulton County, L.L.C. (FC), extending from milepost I-108.6 near Argos, Ind., to milepost I-96.9 at Rochester, Ind., in Marshall and Fulton Counties, Ind. (the Line). Notice of the petition was served and published in the Federal Register on April 13, 2023 (88 Fed. Reg. 22,513). A motion to compel and one comment regarding the proposed discontinuance were filed by FC. The Board will grant the petition for exemption, subject to standard employee protective conditions, and deny the motion to compel.

BACKGROUND

According to E&W, until recently, it was the exclusive service provider on the Line, pursuant to a trackage rights agreement (Agreement) with FC. (E&W Pet. 1.) E&W states that the Agreement expired on March 15, 2023, and, on the same day, Patriot Rail Company, LLC (Patriot), which indirectly controls E&W, embargoed the Line due to alleged unsafe track conditions. (Id. at 1-2, 3-4.) E&W notes that FC has a common carrier obligation on the Line as well as a plan for a corporate affiliate, Rochester & Erie Railway, LLC (RERY), to take over operation of the Line. (Id.); see also RERY, Notice of Exemption, Rochester & Erie Ry.—Operation Exemption—Fulton Cnty., LLC, FD 36671.² Therefore, according to E&W, RERY

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

² The exemption became effective on April 21, 2023. See Rochester & Erie Ry.—Operation Exemption—Fulton Cnty., LLC, FD 36671, slip op. at 2 (STB served Apr. 7, 2023).

will be the Line's operator, and shippers will have access to common carrier service, should FC and RERY determine that operations can be resumed safely.

On May 2, 2023, FC filed a motion to compel responses to discovery. FC states that it served document requests on E&W, and that E&W declined to provide any documents in response, arguing that the requests were not relevant to the discontinuance petition. (FC Mot. 1-2.) FC therefore asks the Board to order E&W to respond to the document requests. FC argues that its requests are directed to representations regarding E&W and Patriot's assessments of the condition of the Line and the work alleged to be necessary to make the Line safe. (Id. at 3.) FC argues that its requests are relevant because, in the petition, E&W claims that the condition of the Line, the embargo, and the need for "substantial track rehabilitation" demonstrate that "the discontinuance petition is meritorious." (Id. at 3.)

On May 2, 2023, FC also filed a motion for an extension of time to file a reply. In a decision served on May 3, 2023, the Board extended the reply deadline. FC filed its reply to the petition on May 8, 2023, arguing that E&W's common carrier obligation continues despite the expiration of the Agreement "until the Board authorizes the discontinuance." (FC Reply 5-6.) FC further argues that E&W misrepresents the condition of the Line and that the embargo was initially unjustified and improperly continued. (Id. at 6-9.) FC also claims that E&W interfered with RERY's ability to use necessary interchange rights with Norfolk Southern Railway, delaying RERY's ability to begin service. (Id. at 10.) FC argues that E&W has harmed shippers by depriving them of and delaying RERY's service, (id. at 6-10), and that these actions have "raise[d] issues as to whether full regulatory control is required," (id. at 10). FC requests that in any Board decision granting discontinuance authority, the Board "acknowledge that E&W's common carrier obligations continued despite the expiration of the [Agreement] and despite the filing of the E&W discontinuance petition through and until the Board authorizes discontinuance." (Id. at 11.) FC also asks that the Board not make any findings that "the [e]mbargo was properly issued or maintained, that the Line needed substantial repairs, or that customers on the Line were not harmed by E&W's abrupt cessation of service on March 15 and during the pendency of the E&W Petition." (Id.)

E&W filed a consolidated reply to FC's reply³ and motion to compel on May 12, 2023. E&W denies that its petition relies upon misrepresentations, (E&W Reply 4), arguing that it raised the embargo and the Line's condition as context for the petition, but that they are not material to the outcome of the proceeding, (id. at 7). E&W also denies that it interfered with the transition to RERY service. (Id. at 4.) E&W states that it does not object to FC's two requests so long as (1) the Board recognizes, "in keeping with longstanding precedent, that a carrier such as E&W may lawfully (and temporarily) suspend common carrier service under an embargo, and may do so as a precursor for abandonment or discontinuance (where promptly pursued), where good cause exists to invoke an embargo," and (2) the Board does not rule on the merits of

³ E&W requests leave to file a reply to FC's reply. (E&W Reply 1-2.) Although a reply to a reply is not permitted under 49 C.F.R. § 1104.13(c), the Board will accept it in the interests of a complete record. See City of Alexandria, Va.—Pet. for Declaratory Ord., FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing a reply to a reply "[i]n the interest of compiling a full record").

E&W's embargo in this proceeding. (*Id.* at 5.) E&W further argues that the Board should grant its petition in light of the fact that FC does not object to the petition, (*id.*), and of FC's plan to replace E&W with another operator, (*id.* at 2, 5). In response to the motion to compel, E&W also argues that the information sought is not relevant to the outcome of the proceeding given FC's lack of objection to the petition. (*Id.* at 6-8.)

DISCUSSION AND CONCLUSIONS

Motion to compel. In Board proceedings, parties are entitled to discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding." 49 C.F.R. § 1114.21(a)(1). "The requirement of relevance means that the information might be able to affect the outcome of a proceeding." Waterloo Ry.—Adverse Aban.—Lines of Bangor & Aroostook R.R. & Van Buren Bridge Co. in Aroostook Cnty., Me., AB 124 (Sub-No. 2), et al., slip op at 2 (STB served Nov. 14, 2003). Parties seeking discovery in abandonments and discontinuances must demonstrate relevance and need. See Del. & Hudson Ry.—Discontinuance of Trackage Rights Exemption—in Broome Cnty., N.Y., AB 156 (Sub-No. 27X), slip op. at 2 (STB served Aug. 10, 2015). The Board will deny the motion.

FC argues that its discovery requests are relevant to possible misrepresentations made in this proceeding. The representations about which FC seeks discovery relate to the Line's condition, E&W's embargo of the Line, the transition to RERY service, and impacts on shippers during the embargo. Those facts do not appear to be relevant to the outcome of this proceeding. FC does not argue that E&W's petition should be denied because of these representations, or that the representations should affect the outcome of the proceeding in any way. In fact, FC does not object to a grant of discontinuance authority and intends to replace E&W as the operator of the Line. FC also suggests that more information is needed so that the Board can provide additional regulatory oversight, but FC does not explain what such oversight would accomplish with regard to this discontinuance exemption proceeding, where both parties appear to agree that the exemption should be granted. As discussed below, the Board concludes that further regulatory oversight in this proceeding is not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101. Therefore, FC has not shown how the information FC seeks would affect the outcome of the proceeding, and the motion will be denied.

Exemption from 49 U.S.C. § 10903. Under 49 U.S.C. § 10903, a rail carrier may not discontinue operations without the prior approval of the Board. Under 49 U.S.C. § 10502, however, the Board must exempt a transaction or service from regulation when it finds that (1) continued regulation is not necessary to carry out the RTP; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not needed to protect shippers from the abuse of market power.

Detailed scrutiny of the proposed discontinuance under 49 U.S.C. § 10903 is not necessary to carry out the RTP in this case. An exemption would expedite regulatory decisions by minimizing the need for regulatory control of E&W's operation of the Line, reduce regulatory barriers to exit for E&W, and provide for the expeditious handling and resolution of the proceeding by facilitating a transition of operations from E&W to RERY, the new operator of the

Line. See 49 U.S.C. § 10101(2), (7), (15). Other aspects of the RTP would not be adversely affected by the use of the exemption process.

Although FC suggests additional regulatory oversight is needed because E&W's actions have limited service to shippers on the Line,⁴ it is not necessary to reach the service and embargo allegations in order to determine whether the discontinuance exemption should be granted. Granting the discontinuance exemption will facilitate introduction of a new operator, and no parties to the proceeding object to the discontinuance. Accordingly, consideration of the issues raised by FC is not necessary to carry out the RTP in this proceeding.

Regulation of the proposed discontinuance is also not needed to protect shippers from the abuse of market power.⁵ As described above, any customers on the Line can request service from RERY, which has received authority to operate and has a common carrier obligation over the Line.

Employee Protection. Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, the Board will impose upon E&W the employee protective conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979).

Offers of Financial Assistance (OFA), Interim Trail Use/Rail Banking, Public Use, and Environmental Review. Because no formal expressions of intent to file an OFA to subsidize continued rail service were filed by the April 24, 2023 deadline, the Board will not consider subsidy OFAs in this case. See 49 C.F.R. § 1152.27(c)(1)(i). And, because this is a discontinuance and not an abandonment, the Board need not consider OFAs to acquire the Line, interim trail use/rail banking requests under 16 U.S.C. § 1247(d), or requests to negotiate for public use of the Line under 49 U.S.C. § 10905. Lastly, because there will be an environmental review if abandonment is sought in the future, environmental review is unnecessary here.

It is ordered:

1. Under 49 U.S.C. § 10502, the Board exempts from the prior approval requirements of 49 U.S.C. § 10903 the discontinuance of service over the Line by E&W, as described above, subject to the employee protective conditions set forth in Oregon Short Line Railroad—

⁴ In response to FC's request that the Board address when E&W's common carrier obligation ends, the Board notes that, as in any exemption proceeding where the Board grants discontinuance authority, the permissive authority to discontinue operations, thereby ending the common carrier obligation, becomes effective on the effective date of the exemption.

⁵ Because regulation is not necessary to protect shippers from the abuse of market power, the Board need not determine whether the transaction is limited in scope. See 49 U.S.C. § 10502(a)(2).

Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979).

2. This exemption will be effective August 9, 2023.
3. Petitions to reopen and petitions to stay the effectiveness of the exemption must be filed by July 25, 2023.
4. FC's motion to compel is denied.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.