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SERVICE DATE – OCTOBER 31, 2018

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1270

PORT OF BENTON, WASH.—ADVERSE DISCONTINUANCE OF RAIL SERVICE— TRI-CITY RAILROAD COMPANY, LLC

Digest:¹ This decision waives certain requirements that normally must be satisfied when filing discontinuance and abandonment applications, but would be unnecessary, difficult, or impossible for the Port of Benton, Wash., to comply with when it files an application for adverse discontinuance. This decision also denies a petition to stay or dismiss filed by Tri-City Railroad Company, LLC.

Decided: October 30, 2018

In a petition filed on August 28, 2018, the Port of Benton, Wash. (the Port), seeks waiver of certain Board regulations and exemption from related statutory provisions in connection with its planned filing of a third-party, or adverse, discontinuance application. The Port states that it intends to file an application for adverse discontinuance authority to terminate the operating authority held by Tri-City Railroad Company, LLC (Tri-City), over a rail line owned by the Port in Richland, Wash.

Tri-City filed a petition on September 12, 2018 (and supplemented on September 19, 2018) to stay or dismiss the proceeding, and, if the Board denies that request, a partial opposition to the Port's requests for waivers and exemptions.

As discussed below, the Board will grant in part the Port's petition and deny Tri-City's petition.

BACKGROUND

The Port states that it intends to file for adverse discontinuance of railroad operations currently conducted by Tri-City over approximately 11 miles of main line track (16 miles including sidings and connecting spur tracks), from MP 18.84 at Richland Junction, to MP 29.73 at Horn Rapids Road in Richland, Wash. (the Line). (Port Pet. 2.) According to the Port, the Line was originally constructed in 1947 to provide rail service to the Hanford Nuclear

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 Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

Reservation, and that predecessors of BNSF Railway Company (BNSF) and Union Pacific Railroad Company (UP) received operating rights to serve that facility and other customers on the Line. (*Id.* at 3.) The Port states that it acquired the Line in 1998² and that BNSF and UP remained as operators on the Line. The Port further states that Tri-City has been operating over the Line pursuant to a lease agreement with the Port dated August 1, 2002 (the Lease).³ (*Id.*) According to the Port, Tri-City has not maintained the Line and its bridges as required under the terms of the Lease, and Tri-City has attempted to impose a maintenance surcharge without obtaining the Port’s consent, as required by the Lease. (*Id.* at 3-4.) The Port states that efforts to resolve those “defaults” have not been successful, and therefore, the Port wishes to terminate the Lease and evict Tri-City from the Line. (*Id.* at 4.) The Port states that service to customers will not be affected because both BNSF and UP hold operating rights to serve all customers and have stated their willingness to provide all service once Tri-City service ends. (*Id.*) With respect to its planned discontinuance petition, the Port requests (1) waiver of certain Board regulations and (2) exemption from certain statutory provisions in connection with the adverse or third-party application it plans to file. (*Id.* at 4-10.) According to the Port, the Board has recognized that several of the regulatory requirements for discontinuances are inapplicable in an adverse discontinuance application. (*Id.* at 2-3.)

Tri-City, a Class III rail carrier, disputes the Port’s allegation that it has defaulted on its obligations under the Lease. (Tri-City Pet. 4.) Tri-City further states that there is federal litigation pending between Tri-City and the Port in which the question of whether Tri-City has defaulted on the Lease is directly at issue. (*Id.*; Tri-City Pet. Supp. 2-3.) Tri-City states that a “court is required to rule on the validity of [the underlying lease] before the Board can rule on the Port’s adverse discontinuance application.” (Tri-City Pet. 4.) Thus, according to Tri-City, the Board should stay or dismiss this proceeding until the federal court has addressed whether there has been a default under the Lease and it has been lawfully terminated. (*Id.* at 5.)⁴ However, should the Board address the Port’s petition, Tri-City partially opposes the Port’s requests. (*Id.*)

The Port filed a reply in opposition to Tri-City’s petition to stay or dismiss on September 27, 2018, in which it argued that a stay would unnecessarily delay the proceeding, and, citing CSX Corp.—Adverse Abandonment Application—Canadian National Railway, AB 31 (Sub-No. 38) (STB served Feb. 1, 2002), that adverse discontinuance would remove the

² See Port of Benton—Acquis. & Operation Exemption—U.S. Dept. of Energy Rail Line in Richland, Wash., FD 33653 (STB served Oct. 6, 1998.) The mile markers in the Port’s petition do not match those in Docket No. FD 33653. The Port should explain this discrepancy in an application for adverse discontinuance of the Line.

³ See Tri-City R.R.—Lease & Operation Exemption—Hanford Site Rail Sys. in Richland, Wash., FD 34203 (STB served May 30, 2002).

⁴ In its supplement to its petition, Tri-City states that, in the federal litigation, the Port admits that “no court has declared that the lease has been terminated, but further admits that the Port has declared a default.” (Tri-City Suppl. 3.)

Board's exclusive jurisdiction and enable the parties to seek state law remedies on the Line that would otherwise be barred. (Port Reply 5.)

PRELIMINARY MATTERS

Tri-City's petition to stay or dismiss is premature. Tri-City's petition argues that the Port's planned adverse discontinuance application will be based on a contract dispute that is currently before a federal court and that, as a result, no discontinuance should be granted until the court has issued a decision on that contract dispute. The Port, however, has yet to file an application for adverse discontinuance. The appropriate time to consider an argument to stay or dismiss such an application is after an application is actually filed, and not in the context of a pre-application request for waivers and exemptions. See City of Chi., Ill.—Adverse Aban.—Chi. Terminal R.R. in Chi., Ill., AB 1036, slip op. at 2-3 (STB served July 10, 2009). Therefore, the Board will deny Tri-City's petition to stay or dismiss and proceed to consider the merits of the Port's petition for waivers and exemptions.

DISCUSSION AND CONCLUSIONS

The discontinuance of rail service by common carriers is governed by 49 U.S.C. § 10903 et seq., and the Board's regulations governing discontinuance applications are found at 49 C.F.R. part 1152 subparts B & C. In appropriate circumstances, however, such as the filing of a third-party, or adverse, discontinuance application, the Board may waive inapplicable and unneeded regulations and grant exemptions from statutory provisions. See State of S.D. ex rel. Dept. of Transp.—Adverse Discontinuance of Operating Auth.—Napa-Platte Reg'l R.R. Auth., AB 1253 (STB served May 31, 2017); Bos. & Me. Corp.—Adverse Discontinuance of Operating Auth.—Milford-Bennington R.R., AB 1256 (STB served June 23, 2017).

Form of Notice of Intent. The Port seeks a waiver from the prescribed form of the notice of intent found at 49 C.F.R. § 1152.21. Specifically, the Port proposes a modified notice, stating that the prescribed form is inappropriate for an adverse discontinuance application. (Port Pet. 4 & App. 2.) Tri-City does not oppose this request. (See Tri-City Pet. 5.)

The Board has approved form changes in adverse discontinuance and abandonment cases when the substitute notice is in substantial compliance with the requirements of 49 C.F.R. § 1152.21. See State of S.D., AB 1253, slip op. at 5; Alloy Prop. Co.—Adverse Aban.—Chi. Terminal R.R. in Chi., Ill., AB 1258, slip op. at 4 (STB served Aug. 16, 2017). The Port's proposed notice of intent is in substantial compliance with the requirements of 49 C.F.R. § 1152.21. Therefore, the Board will grant the Port's request to modify the notice of intent.

System Diagram Map. The Port requests waivers of 49 C.F.R. §§ 1152.10-14 and § 1152.24(e)(1), which govern the filing and amending (and providing notice to the public) of a carrier's system diagram map (SDM), and establishes a two-month waiting period between the filing of SDM amendments and a corresponding discontinuance application. In addition, the Port seeks waiver of 49 C.F.R. § 1152.22(a)(5), which requires reference to the inclusion of the rail line subject to the discontinuance request on the carrier's SDM or narrative, the date on which the line was first listed there for abandonment or discontinuance, and a copy of the line

description that accompanies the carrier's map. The Port also seeks an exemption from the corresponding SDM requirement at 49 U.S.C. § 10903(c)(2). (Port Pet. 5.) In support, the Port notes that waiver of the SDM regulations is customary in adverse proceedings where the adverse discontinuance is intended to result only in a change in operators. (Id. (citing Town of N. Judson, Ind.—Adverse Discontinuance—In LaPorte, Porter, & Starke Ctys., Ind., AB 1232, slip op. at 3 (STB served July 27, 2015)).) Tri-City does not oppose these requests. (See Tri-City Pet. 5.)

The Board will waive 49 C.F.R. §§ 1152.10-14, § 1152.24(e)(1), and 49 C.F.R. § 1152.22(a)(5), and, as explained in the exemption analysis below, exempt the Port from the requirements of 49 U.S.C. § 10903(c)(2). As the Port correctly notes, waiver and exemption of the SDM requirements are customary in adverse discontinuance proceedings where, as here, it would result only in a change of operators. See, e.g., State of S.D., AB 1253, slip op. at 2.

Physical Condition of the Line. The Port seeks a waiver of 49 C.F.R. § 1152.22(b), which requires a description of the present physical condition of the line, including any operating restrictions and estimate of deferred maintenance and rehabilitation costs. The Port seeks a waiver of this regulation on the grounds that an adverse discontinuance applicant generally does not have access to detailed information regarding the physical condition of the involved rail segment. (Port Pet. 6.) Here, the Port asserts that, while it owns the Line, it has contracted out the maintenance of the Line to a third party (currently Tri-City). According to the Port, Tri-City has both failed to maintain the Line and to provide the Port with maintenance records. (Id.)

Tri-City opposes a waiver of 49 C.F.R. § 1152.22(b). (Tri-City Pet. 5.) According to Tri-City, the Port acknowledges that it has both verbal and documentary information on the Line's physical condition, and "[t]here is no valid reason why the Port should not provide that information." (Id. (citing Port Pet. 6).)

The Board will grant the requested waiver in part. In the Port's petition, it claims that Tri-City has failed to maintain the line in violation of the Lease. In particular, the Port asserts that BNSF, UP, and Federal Railroad Administration (FRA) officials informed the Port of the maintenance problems, and the Port responded with x-ray inspections of the Line. The Port asserts that the x-rays confirmed that the majority of the Line has fallen from a Class 3 FRA standard to a Class 1 FRA standard, and further that the FRA has threatened to take the Yakima River Bridge out of service due to defects and violations. (Port Pet. 6.) It is clear from its petition that the Port has certain information regarding the physical condition of the Line, and therefore there is no need for a full waiver of the requirements at 49 C.F.R. § 1152.22(b). (See id.) Accordingly, the Port should provide the information it possesses concerning the physical condition of the Line. To the extent the Port, a prospective third-party applicant, does not have all of the information required by 49 C.F.R. § 1152.22(b), the Board will grant the requested waiver.

Other Line Attributes. The Port also seeks a waiver of 49 C.F.R. § 1152.22(c), (d), and (e), which require a description of service provided, revenue and cost data, and rural and community impact. The Board will grant the Port's requests for these waivers, as this type of information is typically not available to an adverse discontinuance applicant. See Hartwell First

United Methodist Church—Adverse Aban. & Discontinuance—Hartwell R.R & The Great Walton R.R., in Hart Cty. Ga., AB 1242, slip op. at 4 (STB served Aug. 30, 2016) (citing Norfolk S. Ry.—Adverse Aban.—St. Joseph Cty., Ind., AB 290 (Sub-No. 286), slip op. at 5 (STB served Oct. 26, 2006).) Additionally, this information is not necessary here because there would only be a change of operators and not a complete discontinuance of service. Bos. & Me. Corp., AB 1256, slip op. at 3. Tri City does not oppose these requests. (See Tri-City Pet. 5.)

Federal Register Notice. The Port seeks a partial waiver to modify the draft Federal Register notice form, set forth in 49 C.F.R. § 1152.22(i), that an applicant must submit to the Board along with its adverse discontinuance application. The Port requests that it instead be permitted to utilize the draft Federal Register notice form set forth in Appendix 3 of its petition. (Port Pet. 5-6.) The Port asserts that the form prescribed in 49 C.F.R. § 1152.22(i) is inappropriate for an adverse discontinuance application. (Id.) Tri-City does not oppose this request. (See Tri-City Pet. 5.) The Board finds that the substitute notice is in substantial compliance with the requirements of 49 C.F.R. § 1152.22(i). The Board will therefore grant the Port's request. See State of S.D., AB 1253, slip op. at 5.

Environmental and Historic Report. The Port requests waiver of the environmental and historic reporting requirements set forth at 49 C.F.R. § 1152.22(f).⁵ The Port asserts that it is seeking this waiver because service would be continued by BNSF and UP following termination of service by Tri-City. (Port Pet. 8-9.) Additionally, the Port argues that “the Board does not require the preparation and service of environmental and historic reports where the only activity contemplated is discontinuance of rail service and not abandonment and does not result in significant changes that exceed the thresholds established in Section 1105.7.” (Port Pet. 9 (citing Lackawaxen-Honesdale Shippers Ass’n—Adverse Discontinuance of Operating Auth.—in Wayne & Pike Ctys., Pa., AB 1110, slip op. at 3 (STB served Jan. 23, 2014).)) Tri-City does not oppose this request. (See Tri-City Pet. 5.)

Because this proceeding is intended to result merely in the substitution of operators and would not result in operations that would exceed the thresholds in 49 C.F.R. § 1105.7, the Board will grant the requested waivers. See State of S.D., AB 1253, slip op. at 3.

Offers of Financial Assistance. The Port requests exemption from the offers of financial assistance (OFA) requirements under 49 U.S.C. § 10904.⁶ The Port argues that a decision

⁵ The Port does not specifically reference the accompanying requirement at 49 C.F.R. § 1152.20(c) to submit the environmental and historic reports described at 49 C.F.R. §§ 1105.7 and 1105.8 at least 20 days prior to filing an application. However, given the Port's requested waiver of 49 C.F.R. § 1152.22(f), the Board assumes the Port intended also to seek a waiver from the requirements at § 1152.20(c). The Board will grant the waiver.

⁶ The Port does not specifically reference the applicable regulation, 49 C.F.R. § 1152.27 (regarding financial assistance procedures). However, given the Port's requested exemption from the applicable statutory provision, 49 U.S.C. § 10904, the Board assumes the Port intended also to seek a waiver from the requirements at § 1152.27.

authorizing adverse discontinuance is irreconcilable with an OFA for continued rail operation. (Port Pet. 9.) Additionally, the Port asserts that BNSF and UP have stated their willingness to provide all service required over the Line.⁷ The Port also argues that the OFA statutory provisions are not necessary to carry out the rail transportation policy (RTP) at 49 U.S.C. § 10101. (*Id.*) Tri-City does not oppose this request. (*See* Tri-City Pet. 5.) The Board agrees that an OFA to subsidize a current operator would be irreconcilable with a Board decision granting adverse discontinuance. *See Town of N. Judson*, AB 1232, slip op. at 5. For these reasons, the Board will waive the OFA regulations at 49 C.F.R. § 1152.27.

One Year Authorization Limit for Notice of Consummation. The Port seeks waiver of 49 C.F.R. § 1152.29(e)(2). This request is unnecessary because § 1152.29(e)(2) does not apply to discontinuances. Consequently, this request will be denied as moot.

Exemption Criteria. The Port seeks exemption from the following statutory provisions: 49 U.S.C. § 10904 (Offers of Financial Assistance); 49 U.S.C. § 10905 (Public Use); 49 U.S.C. § 10903(c)(2) (SDM); and 49 U.S.C. § 10903(a)(3)(B) (Posting) and (a)(3)(D) (Notice of Intent). (Port Pet. 9-10.) Tri-City does not oppose these requests. (*See* Tri-City Pet. 5.) With the exception of the Port's request for an exemption from 49 U.S.C. § 10905,⁸ the Board will grant these exemptions because the application of these provisions is not necessary to carry out the RTP of 49 U.S.C. § 10101. Rather, these exemptions would provide the Port with a reasonable opportunity to make its case that there is no overriding present or future public need for Tri-City to have common carrier operating rights over the Line. Exemptions would promote the RTP by eliminating unnecessary procedures and thus expediting the Board's decision in this case (§ 10101(2)) and foster sound economic conditions in transportation (§ 10101(9)). Other aspects of the RTP would not be adversely affected. Additionally, application of the statutory provisions from which the Board is granting exemptions is not necessary to protect shippers from an abuse of market power because the Port indicates that service will continue over the Line by BNSF and UP.

It is ordered:

1. The Port's petition is granted in part and denied in part as discussed above.
2. Tri-City's petition to stay or dismiss is denied.

⁷ The Port also asserts that, if the Board grants the Port's application, "[the Board] would be withdrawing its exclusive jurisdiction over the Line to permit the application of state or local real estate law so [the Port] could commence eviction proceedings." (Port Pet. 9.) This assertion is incorrect, as a Board decision granting adverse discontinuance would not remove the Board's jurisdiction over the Line; rather, it would remove the Board's jurisdiction over Tri-City's operations.

⁸ The Port's request for an exemption from the public use provision of 49 U.S.C. § 10905 is unnecessary because public use requirements do not apply to discontinuances. *See Town of N. Judson*, AB 1232, slip op. at 5. Consequently, this request will be denied as moot.

3. This decision is effective on its date of service.

By the Board, Board Members Begeman and Miller.