

SERVICE DATE – AUGUST 16, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1258

ALLOY PROPERTY COMPANY, LLC—ADVERSE ABANDONMENT—CHICAGO
TERMINAL RAILROAD IN CHICAGO, ILL.

Digest:¹ This decision exempts and waives certain requirements that normally pertain to abandonment applications, but would be unnecessary, difficult, or impossible for Alloy Property Company, LLC, to comply with should it file an application for adverse abandonment.

Decided: August 14, 2017

By petition filed June 1, 2017, Alloy Property Company, LLC (Alloy), seeks a waiver of certain Board regulations and exemptions from related statutory provisions regarding the filing of a third-party, or “adverse,” application for abandonment. Alloy intends to ask the Board to terminate the operating authority of the Chicago Terminal Railroad (CTM)² over the remaining portions of the C&E and Bloomingdale lines in Chicago, Cook County, Ill., originating at Union Pacific’s North Avenue Yard and proceeding east and south to Goose Island to a terminus near the intersection of Chicago Avenue and Halsted Street, a distance of approximately 2.875 miles (the Line). CTM filed a reply on June 21, 2017.³ The Board issued a Protective Order on August 9, 2017.

BACKGROUND

In 2006, CTM obtained acquisition and operation authority over 4.5 miles of rail line, including track that makes up the Line in this proceeding. See Chi. Terminal R.R.—Acquis. &

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).

² Although Alloy refers to Chicago Terminal Railroad by the initials CTR, Chicago Terminal Railroad refers to itself as “CTM.” Per CTM’s preference, that is the designation the Board will use as well.

³ On June 28, 2017, Alloy filed a letter (along with a request for leave to file) in response to CTM’s June 21 reply. On July 6, 2017, CTM filed a reply to Alloy’s letter and on July 7, 2017, Alloy filed a response to CTM’s July 6 reply. In the interest of compiling a full record, the Board will allow these replies.

Operation Exemption—Soo Line R.R., FD 34968 (STB served Dec. 22, 2006). In 2010, the Board approved an adverse abandonment of the Lakewood and Diversey branches, which reduced the size of the Line to its current 2.875 miles. See City of Chi., Ill.—Adverse Aban.—Chi. Terminal R.R. in Chi., Ill., AB 1036 (STB served June 16, 2010). Alloy contends that CTM is no longer providing rail service to shippers on the Line and has removed or has authorized the removal of some of its tracks. (Pet. 3.) Alloy states that it will apply for adverse abandonment because the Line crosses portions of its property that it intends to develop, and that such development is constrained by the existence of the unused Line. (Pet. 2.) In anticipation of filing an adverse abandonment application, Alloy seeks waivers of, and exemptions from, application requirements that it argues are inapplicable or irrelevant to the issues presented here.

CTM, a Class III rail carrier that owns and operates the Line, states that the Line is not unused and has been undergoing repairs to address a series of incidents of vandalism. (CTM Reply 4, June 21, 2017.) Prior to the vandalism, CTM claims, it had been providing freight rail service over the Line to several customers. (*Id.*) CTM further states that it has completed the repairs and is ready to resume service. (*Id.*) Accordingly, CTM states that it intends to oppose any application to adversely abandon the Line and that it opposes some of Alloy's waiver and exemption requests. (*Id.* at 2, 11-13.)

PRELIMINARY MATTERS

In its July 6, 2017 letter, CTM argues that the Board's consideration of the petition for waivers and exemptions is premature and states that Alloy has submitted a substantial discovery request to CTM. (CTM Letter 2, July 6, 2017.) CTM suggests the Board should not rule on Alloy's petition until after a July 21, 2017 meeting scheduled between the parties. (*Id.*) CTM, however, does not explain how such a discovery request would affect the Board's ability to rule on Alloy's petition. Furthermore, the Board has not received any notification from CTM regarding the outcome of the July 21, 2017 meeting. Thus, the Board will decide the merits of Alloy's petition for waivers and exemptions.

DISCUSSION AND CONCLUSIONS

The Board's regulations impose requirements on abandonment and discontinuance applications under 49 C.F.R. pt. 1152 subparts B and C. In appropriate circumstances, however, such as the filing of an adverse abandonment or discontinuance application, the Board may waive inapplicable and unneeded regulations and grant exemptions as appropriate from statutory provisions. See Riverview Trenton R.R.—Adverse Aban.—in Wayne Cty., Mich., AB 1230 (STB served Apr. 10, 2015); Lackawaxen-Honesdale Shippers Ass'n—Adverse Discontinuance of Operating Auth.—in Wayne & Pike Ctys., Pa., AB 1110 (STB served Jan. 23, 2014).

System Diagram Map. Alloy 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 establish a 60-day waiting period between SDM amendments and a corresponding abandonment application. Alloy also seeks an exemption from the corresponding SDM requirement at 49 U.S.C. § 10903(c)(2). (*See* Pet. 12.) In support,

Alloy contends a waiver is appropriate because it does not own the Line and cannot amend, file, or publish the SDM. (*Id.*) CTM does not oppose this request. (CTM Reply 11.)

The Board will grant Alloy's waiver request as to the SDM requirements because a third party generally does not have access to the SDM. See City of Chi., Ill.—Adverse Aban.—Chi. Terminal R.R. in Chi., Ill., AB 1036, slip op. at 5 n.7 (STB served July 10, 2009). Further, as explained in the exemption analysis below, the Board will exempt Alloy from the requirements of 49 U.S.C. § 10903(c)(2).

Service of Notice on Significant Users. Stating that there are no users of the Line, Alloy asks that the requirement that it serve notice upon all significant users of the Line under 49 C.F.R. § 1152.20(a)(2)(i) and 49 U.S.C. § 10903(a)(3)(D) be waived. (Pet. 12-13.) CTM opposes this request, arguing that there are present and potential users of rail service on the Line. (CTM Reply 11.)

The Board will deny this request on the condition that CTM provide additional information to Alloy. Although CTM argues that, in fact, current and potential users of the Line exist, CTM does not identify them. (*See id.*) Therefore, to avoid waiver of this notice requirement, CTM must provide the identity of these users to Alloy by August 28, 2017, so that Alloy may serve notice on them. CTM also must contemporaneously certify to the Board that it has done so. Should CTM fail to make the required disclosures, the Board will grant this waiver.

Service of Notice on Labor Organizations. Alloy seeks a waiver of the 49 C.F.R. § 1152.20(a)(2)(xii) requirement to serve notice upon the headquarters of all labor organizations representing employees on affected rail lines. (Pet. 13.) Alloy argues that there is no ongoing rail service on the Line, so there would be no employees affected by an adverse abandonment. (*Id.*) Alloy also notes it has no information on whether CTM employees are represented by a union. CTM does not oppose this waiver request, but argues that there has been and will be service on the Line. (CTM Reply 12.) In the interest of protecting the rights of railroad employees, the Board will deny this request and require that CTM identify any duly certified labor organizations that represent its employees to Alloy, by August 28, 2017, and contemporaneously certify to the Board that it has done so. Should CTM fail to make the required disclosures, the Board will grant this waiver.

Posting at Stations and Terminals. Noting that there are no stations or terminals on the Line, Alloy also seeks a waiver of the requirement under 49 C.F.R. § 1152.20(a)(3) and 49 U.S.C. § 10903(a)(3)(B) to post notice at each station and terminal on the Line. (Pet. 13.) CTM does not oppose this request. (CTM Reply 12.) The Board will grant this request. Hartwell First United Methodist—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).

Form of Notice of Intent. Alloy further seeks a waiver from the prescribed form of the notice of intent found at 49 C.F.R. § 1152.21. Specifically, Alloy proposes a modified notice, stating that the prescribed form is inappropriate for an adverse abandonment proceeding. (Pet. 13 & App. B.) CTM objects to Alloy's modification "insofar as it incorrectly suggests that there is an absence of current use for the Line and a lack of any reasonable future use for rail

service.” (CTM Reply 12.) CTM also argues that Alloy should be required to state the reason for the proposed abandonment. (Id.)

The Board has approved form changes in adverse abandonment cases when the substitute notice is in substantial compliance with the requirements of 49 C.F.R. § 1152.21. See Hartwell First United Methodist, AB 1242, slip op. at 3; Norfolk S. Ry.—Adverse Aban.—St. Joseph Cty., Ind. (St. Joseph), AB 290 (Sub-No. 286), slip op. at 3 (STB served Oct. 26, 2006).

Alloy’s notice of intent—including its stated purpose for seeking adverse abandonment—is in substantial compliance with the requirements of 49 C.F.R. § 1152.21. CTM, however, disputes Alloy’s language indicating that there is no current or future need for service on the Line. Accordingly, the Board will grant in part Alloy’s request to modify the notice of intent and require that Alloy amend the language “The reasons for the proposed abandonment include (i) the absence of current use of the Line; (ii) the lack of any reasonably foreseeable future need for rail service on the Line . . .” to “The reasons for the proposed abandonment include (i) the alleged absence of current use of the Line; (ii) the alleged lack of any reasonably foreseeable future need for rail service on the Line . . .” See Hartwell First United Methodist, AB 1242, slip op. at 3 (requiring a similar modification to a notice of intent).

Contents of Application. Alloy seeks a waiver of several, and modification of one, of the required elements to be included in its adverse abandonment application under 49 C.F.R. § 1152.22. Specifically, Alloy seeks a waiver of § 1152.22(a)(5) (SDM information), § 1152.22(b) (condition of property), § 1152.22(c) (service provided), and § 1152.22(d) (revenue and cost data), and modification to the draft Federal Register notice required under § 1152.22(i).

CTM does not oppose waivers of § 1152.22(a)(5), (b), (c), or (d), (CTM Reply 12-13), and the Board will grant these waivers. See Hartwell First United Methodist, AB 1242, slip op. at 2, 4; St. Joseph, AB 290 (Sub-No. 286), slip op. at 5.

CTM does oppose Alloy’s proposed modification to the Federal Register notice to the extent that the notice implies that the Line is unused and does not include language pertaining to offers of financial assistance (OFAs). (Id. at 13.) Alloy’s modified notice is in substantial compliance with 49 C.F.R. § 1152.22(i). See Lake Cty., Or.—Adverse Discontinuance of Rail Serv.—Modoc Ry. & Land Co., AB 1035, slip op. at 5 (STB served June 15, 2009). Nevertheless, Alloy is directed to remove the term “unused” from the first sentence of the modified notice. Alloy and CTM dispute the use of, and need for service on, the Line, and it is not necessary for the Federal Register notice to state whether the Line is used or unused. For the reasons discussed below, Alloy’s omission of language pertaining to OFAs is permissible.

Notice of Consummation. Alloy seeks a waiver of the requirement under 49 C.F.R. § 1152.29(e)(2) that the abandonment be consummated within one year after the abandonment application is granted. (Pet. 15-16.) CTM does not oppose this request. (CTM Reply 13.) The Board will grant this request. Hartwell First United Methodist, AB 1242, slip op. at 5.

Offers of Financial Assistance. Alloy requests waiver of the Board’s procedures for OFAs at 49 C.F.R. § 1152.27 and an exemption from the corresponding OFA requirements under

49 U.S.C. § 10904. (Pet. 16-17.) CTM opposes this requested exemption, stating that it is seeking to protect the rights of rail customers. (CTM Reply 13.)

Alloy's request for waiver of the OFA requirements at 49 C.F.R. § 1152.27 and an exemption from the corresponding OFA requirements under 49 U.S.C. § 10904 will be granted. The effect of granting an adverse abandonment is that the Board's primary jurisdiction is withdrawn, thus permitting state, local, or other Federal law to apply where there is no overriding Federal interest in interstate commerce. Hartwell First United Methodist, AB 1242, slip op. at 5; St. Joseph, AB 290 (Sub-No. 286), slip op. at 3. If the Board ultimately finds that the public convenience and necessity require or permit withdrawal of its regulatory authority in this adverse abandonment proceeding, it would be fundamentally inconsistent with the rationale underlying the adverse abandonment sought here to provide for further Board regulation under the OFA provisions of 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27. Hartwell First United Methodist, AB 1242, slip op. at 5.

Exemption Criteria. As indicated, Alloy seeks exemptions from the following statutory provisions corresponding to Board regulations previously discussed: 49 U.S.C. § 10903(c)(2) (SDMs); § 10903(a)(3)(B) (posting); and § 10904 (OFAs). The Board will grant these related exemptions because the application of these provisions of the Interstate Commerce Act is not necessary here to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101. Rather, these exemptions would provide Alloy with a reasonable opportunity to make its case that there is no overriding present or future need for CTM's continued service on the Line. The exemptions would promote the RTP by eliminating unnecessary procedures, and thus would expedite regulatory decisions (§ 10101(2)) and foster sound economic conditions in transportation (§ 10101(5)). Other aspects of the RTP would not be adversely affected. Alloy also seeks exemption from § 10903(a)(3)(D), but as discussed above, the Board is denying that request for exemption on the condition that CTM provide Alloy with a list of significant users on the Line so that Alloy may serve notice to those users.

It is ordered:

1. The petition for waivers and exemptions is granted in part and denied in part as discussed above.
2. CTM is directed to provide the information to Alloy, as detailed above, by August 28, 2017, and certify to the Board that it has done so.
3. This decision is effective on its service date.

By the Board, Board Members Begeman, Elliott, and Miller.