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SERVICE DATE – NOVEMBER 16, 2016

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1245X

MICHIGAN SOUTHERN RAILROAD COMPANY, D/B/A NAPOLEON, DEFIANCE &  
WESTERN RAILWAY—DISCONTINUANCE OF SERVICE EXEMPTION—IN HENRY  
COUNTY, OHIO

Digest:<sup>1</sup> This decision permits Michigan Southern Railroad Company, d/b/a Napoleon, Defiance & Western Railway, to discontinue rail service over approximately 5.43 miles of rail line in Henry County, Ohio, subject to standard employee protective conditions.

Decided: November 15, 2016

By petition filed on August 11, 2016, Michigan Southern Railroad Company, d/b/a Napoleon, Defiance & Western Railway (NDW), a Class III rail carrier, seeks an exemption under 49 U.S.C. § 10502 from the provisions of 49 U.S.C. § 10903 to discontinue service over approximately 5.43 miles of rail line between milepost TN 28.0, near Liberty Center, Ohio, and milepost TN 33.43, near Napoleon, Ohio, in Henry County, Ohio (the Line).

On August 26, 2016, the Ohio Department of Transportation, District 2 (Ohio DOT) filed a statement in support of the petition. Notice of the exemption proceeding was served and published in the Federal Register on August 31, 2016 (81 Fed. Reg. 60,112). No further comments concerning the proposed discontinuance were filed. The Board will grant the exemption from 49 U.S.C. § 10903, subject to standard employee protective conditions.

BACKGROUND

According to NDW, the Line was originally part of the larger Wabash Railroad Company. A 51-mile segment of that railroad, referred to by NDW as the former Wabash Line, was eventually acquired by Norfolk and Western Railway Company and later became part of the Norfolk Southern Railway Company. NDW states that, over the past 23 years, ownership of the former Wabash Line has transferred four times, the condition of the line worsening each time.<sup>2</sup>

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<sup>1</sup> 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).

<sup>2</sup> Ind. Hi-Rail Corp.—Lease & Operation Exemption—Norfolk & W. Ry. Between Liberty Center, Ohio & Woodburn, Ind., FD 31514 (STB served Oct. 13, 1989); Maumee & W.,  
(Continued . . .)

In December of 2012, NDW acquired the former Wabash Line. See Mich. S. R.R.—Acquis. & Operation Exemption—RMW Ventures, L.L.C., FD 35696 (STB served Dec. 14, 2012). NDW states that approximately seven miles of the former Wabash Line has little to no traffic and does not routinely serve any active industries. According to NDW, the Line is part of that seven miles that has little to no traffic.

NDW states that the Line is stub-ended and has served only one shipper in recent years, Glenn Hunter & Associates, Inc. (GHA), a transload operator who ships brickbats. According to the petition, GHA shipped six carloads in 2015, and 13 carloads of brickbats this year. NDW submitted a letter from GHA with its petition, in which GHA states that it is relocating its facility to a better location on NDW's line and that it supports the discontinuance petition. (Pet., Ex. A.) NDW further states that the avoidable costs to provide this service were approximately \$16,910.33, not including maintenance costs, and to restore the Line to FRA Class I standards would cost approximately \$498,000. There is no overhead freight traffic on the Line.

NDW also states that the discontinuance is supported by the Ohio Rail Development Commission (ORDC) due to safety concerns at an existing crossing. NDW submitted a letter from ORDC with its petition, in which ORDC states that the Line crosses U.S. Highway 24, a divided four-lane, limited access highway, which ORDC believes should be closed as soon as possible. (Pet., Ex. A.)

Ohio DOT also supports the proposed discontinuance. In its submission, Ohio DOT states that it is very concerned about the safety of the at-grade crossing of U.S. Highway 24 on the Line. Ohio DOT states that it, ORDC, and NDW have reached an agreement on the proposed removal of the crossings on the segment and improvements to NDW's remaining track.

## DISCUSSION AND CONCLUSIONS

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 rail transportation policy (RTP) of 49 U.S.C. § 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

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( . . . Continued)

L.L.C.—Acquis. & Operation Exemption—Norfolk & W. Ry., FD 33478 (STB served Oct. 31, 1997); RMW Ventures, L.L.C.—Control Exemption—C&NC, L.L.C., FD 33565 (STB served Mar. 10, 1998); and Mich. S. R.R.—Acquis. & Operation Exemption—RMW Ventures, L.L.C., FD 35696 (STB served Dec. 14, 2012).

Detailed scrutiny of NDW's proposed discontinuance of freight operations on the Line under 49 U.S.C. § 10903 is not necessary to carry out the RTP in this case. The Line's only shipper has not opposed the proposed discontinuance and has indicated that it is relocating its facility. An exemption from the application process would minimize expenses, reduce regulatory barriers to exit, and result in the efficient and expeditious handling and resolution of this unopposed proceeding. 49 U.S.C. §§ 10101(2), (7), & (15). Further, allowing NDW to discontinue service over the Line would promote a safe and efficient rail transportation system by allowing NDW to avoid losses and facilitate its ability to earn adequate revenues, as well as eliminate an at-grade crossing, which has raised safety concerns for two state agencies. 49 U.S.C. § 10101(3). Other aspects of the RTP would not be adversely affected by the exemption.

The Board finds that regulation under 49 U.S.C. § 10903 is not necessary to protect shippers from the abuse of market power. As discussed earlier, no comments have been filed opposing the proposed discontinuance and the Line's only shipper, GHA, states that it plans to relocate its facility to another part of the former Wabash Line. Nevertheless, to ensure that the remaining shipper is informed of this proceeding and of our action, the Board will direct NDW to serve a copy of this decision on GHA so that it receives it within five days of the service date of this decision, and to certify to the Board contemporaneously that it has done so.<sup>3</sup>

Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, the Board will impose on NDW 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).

Because this is a discontinuance of service and not an abandonment, the Board need not consider offers of financial assistance (OFAs) under 49 U.S.C. § 10904 to acquire the Line for continued rail service, trail use requests under 16 U.S.C. § 1247(d), or requests to negotiate for public use of the segments under 49 U.S.C. § 10905. However, the OFA provisions under 49 U.S.C. § 10904 for a subsidy to provide continued rail service do apply to discontinuances.

Because there would be environmental review during any subsequent proceeding for authority to abandon, discontinuance proceedings do not require an environmental review.

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<sup>3</sup> Because the Board finds that regulation of the proposed discontinuance is not necessary to protect shippers from the abuse of market power, there is no need to determine whether the proposed discontinuance is limited in scope.

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 operations by NDW over the above-described segments of rail line, subject to the employee protective conditions set forth in Oregon Short Line.

2. NDW is to serve a copy of this decision on GHA so that it receives it within five days after the service date of this decision, and to certify contemporaneously to the Board that it has done so.

3. An OFA under 49 C.F.R. § 1152.27(b)(2) to subsidize continued rail service must be received by NDW and the Board by November 28, 2016, subject to time extensions authorized under 49 C.F.R. § 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27(c)(1). Each OFA must be accompanied by the filing fee, which currently is set at \$1,700. See Regulations Governing Fees for Servs. Performed in Connection with Licensing & Related Servs.—2016 Update, EP 542 (Sub-No. 24) (STB served Aug. 2, 2016).<sup>4</sup>

4. OFAs for subsidy and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: “**Office of Proceedings, AB-OFA.**”

5. Petitions to stay must be filed by December 1, 2016. Petitions to reopen must be filed by December 12, 2016.

6. Provided no OFA to subsidize continued rail service has been received, this exemption will be effective on December 16, 2016.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.

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<sup>4</sup> Consistent with Board precedent, any person seeking to file an OFA must provide evidence that there is some shipper that would make use of common carrier service. See, e.g., CSX Transp., Inc.—Aban. Exemption—in Wash. Cty., Md., AB 55 (Sub-No. 727X) (STB served Oct. 24, 2013); Union Pac. R.R.—Aban. Exemption—in Pottawattamie Cty., Iowa, AB 33 (Sub-No. 300X) (STB served Jan. 20, 2012).