

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1310X

NORTHWESTERN PACIFIC RAILROAD COMPANY
—DISCONTINUANCE OF SERVICE EXEMPTION—
IN MARIN, NAPA, AND SONOMA COUNTIES, CAL.

Digest:¹ This decision allows Northwestern Pacific Railroad Company to discontinue service over approximately 87.65 miles of rail line in Marin, Napa, and Sonoma Counties, Cal., subject to standard employee protective conditions.

Decided: June 11, 2021

On February 22, 2021, Northwestern Pacific Railroad Company (NWPCO) filed a petition under 49 U.S.C. § 10502 for exemption from the prior approval requirements of 49 U.S.C. § 10903 to discontinue service over a rail line extending between approximately milepost NWP 89 near the Sonoma-Mendocino County, Cal., border and approximately milepost SP 63.4 at Lombard, Cal., a distance of approximately 87.65 miles, in Marin, Napa, and Sonoma Counties, Cal. (the Line).

On March 12, 2021, notice of the exemption proceeding was served and published in the Federal Register (86 Fed. Reg. 14,175). The Train Riders Association of California (TRAC) filed comments in response to NWPCO's petition, and NWPCO and Sonoma-Marín Area Rail Transit District (SMART) responded to TRAC's comments. The Board will grant the petition for exemption, subject to standard employee protective conditions.

BACKGROUND

In August 2007, NWPCO acquired Board authority to lease the Line from the North Coast Railroad Authority (NCRA). See Nw. Pac. R.R.—Change in Operators Exemption—N. Coast R.R. Auth., FD 35073 (STB served Aug. 30, 2007). NWPCO states that NCRA owns the portion of the Line between the Sonoma-Mendocino County border and NWP milepost 68.2, in Healdsburg, Cal., and that NCRA has a freight rail operating easement on the portion of the Line between Healdsburg and Lombard, which is owned by SMART. (Pet. 3); see also Sonoma-Marín Area Rail Transit Dist.—Acquis. Exemption—Nw. Pac. R.R. Auth., FD 34400 (STB served Mar. 10, 2004). NWPCO explains that, in a separate transaction, NCRA is expected to

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).

transfer its property interests and common carrier obligations on the Line to SMART, and that SMART has filed for acquisition and operating authority. (Pet. 3); see Sonoma-Marín Area Rail Transit Dist.—Acquis. & Operation Exemption—N. Coast R.R. Auth., FD 36481 (STB served Feb. 18, 2021).² According to NWPCO, SMART’s intended operation on the Line as a rail common carrier³ would render NWPCO’s service unnecessary, and no customer on the Line would lose or have an interruption in service as a result of the proposed discontinuance.⁴ (Pet. 3-4.)

On April 1, 2021, TRAC, a statewide rail advocacy organization, filed a comment in opposition to NWPCO’s petition. NWPCO and SMART responded to TRAC’s comment on April 16, 2021, and April 20, 2021, respectively.⁵ The merits of TRAC’s arguments are addressed below.

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 needed to protect shippers from the abuse of market power.

Detailed scrutiny 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 NWPCO’s operation of the Line, reduce regulatory barriers to exit for NWPCO, and provide for the expeditious handling and resolution of the proceeding by facilitating an agreed-upon transition of operations from NWPCO to SMART. See 49 U.S.C. § 10101(2), (7), (15).

² SMART’s acquisition and operation exemption became effective on March 4, 2021. See Sonoma-Marín Area Rail Transit Dist., FD 36481, slip op. at 2.

³ According to NWPCO, at least temporarily, SMART intends to engage NWPCO as SMART’s contract operator on the Line. (Pet. 3-4 n.6.) NWPCO states that, thereafter, “SMART will evaluate whether to provide services directly or continue with a contract operator.” Id.

⁴ The petition states that, for the immediate future, NWPCO intends to retain operating authority over a segment of rail line north of the Line from milepost 89 to milepost 142.5. (Pet 10.) NWPCO asserts, however, that it has never offered service on this portion of rail line due to an emergency order by the Federal Railroad Administration prohibiting railroad operations since 1998. (Id.)

⁵ On April 22, 2021, TRAC filed a motion for leave to file a surreply. NWPCO and SMART filed motions to strike the surreply on April 27, 2021, and April 28, 2021, respectively. In the interest of a more complete record, the Board will grant TRAC’s motion and accept its surreply into the record. See City of Alexandria—Pet. for Declaratory Order, 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”).

Other aspects of the RTP would not be adversely affected by the use of the exemption process. Regulation of the proposed transaction under 49 U.S.C. § 10903 is also not necessary to protect shippers from the abuse of market power.⁶ As described above, customers on the Line would receive service directly from SMART, which has obtained authority to acquire and operate the Line.

TRAC's Opposition. TRAC argues that the Board should reject NWPCO's petition for exemption because SMART is financially unfit and has obtained acquisition and operating authority in bad faith, having no intention of providing rail service. (TRAC Comment 2-3, 6.) Among other things, TRAC cites an August 7, 2019 presentation by the SMART Board of Directors, which TRAC contends raises questions about SMART's financial condition. (See *id.* at 2, Ex. 2.) TRAC also cites a 2018 email from, according to TRAC, a former Chief Consultant of the California Assembly Transportation Committee that states, "freight operations w[ould] cease upon the elimination of NCRA." (See *id.* at 2, Ex. 1.) In their separate replies, NWPCO and SMART argue that TRAC's criticisms of SMART are not the subject of this proceeding or a basis for denying the discontinuance proposed by NWPCO. (NWPCO Reply 2; SMART Reply 6.) SMART contends that the 2019 Board presentation cited by TRAC was published almost two years ago and attaches more recent information that it claims "demonstrates that SMART has the financial resources to assume responsibility for freight operations" on the Line. (SMART Reply 6.) SMART further asserts that the email cited by TRAC was not in response to SMART's proposed transaction here; was not asserted by a SMART representative; nor was it indicative of SMART's present intent to provide freight rail service over the Line. (*Id.* at 8.)

The Board agrees with NWPCO and SMART that TRAC's arguments should have been raised in Docket No. FD 36481, where SMART obtained acquisition and operating authority over the Line, effective on March 4, 2021. See Sonoma-Marin Area Rail Transit Dist., FD 36481, slip op. at 2.⁷ This proceeding is not the appropriate forum in which to challenge that transaction.⁸ The Board further notes that the Interstate Commerce Act provides recourse should

⁶ Because this decision finds that 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).

⁷ TRAC suggests that it did not receive proper notice of the proceeding in Docket No. FD 36481, stating that it asked for, but did not receive, notice from the Board of any filing by NWPCO or SMART. (TRAC Comment 2.) TRAC acknowledges, however, that it was aware prior to the filing of SMART's verified notice of exemption that SMART had voted to acquire NWPCO's freight operating rights. (*Id.*) Moreover, all filings with the Board are publicly available on the Board's website, and the Board served and published in the Federal Register notice of SMART's filing. See Sonoma-Marin Area Rail Transit Dist.—Acquis. & Operation Exemption—N. Coast R.R. Auth., 86 Fed. Reg. 10,157 (2021).

⁸ Any party seeking to challenge that transaction would need to file a petition to revoke the exemption in that docket pursuant to 49 C.F.R. § 1121.4(f).

a carrier fail to carry out its common carrier obligation. See, e.g., 49 U.S.C. §§ 11101(a), 11701.⁹

Even if the Board were to consider TRAC's arguments in this proceeding concerning NWPCO's request for discontinuance authority, the Board finds that TRAC's arguments are unavailing. Regarding the 2019 presentation by SMART, which reflected SMART's financial projections from that time, TRAC does not explain how the information in that presentation shows that SMART would be financially unfit or unwilling to provide rail service on the Line. And although TRAC has stated that SMART's primary source of funding was not extended when a sales tax extension ballot measure failed in March 2020, (TRAC Comment 2), SMART has provided its amended budget for FY 2020-21, dated February 3, 2021, that reflects SMART's financial resources to assume responsibility for freight rail operations on the Line, (SMART Reply 6, Ex. A).

Nor has TRAC demonstrated that SMART has failed to act in good faith. As evidence of SMART's alleged lack of good faith, TRAC cites: (1) the 2018 email, described earlier, from an employee of the California legislature to a member of the public suggesting the future cessation of freight operations, (TRAC Comment 2); (2) SMART's decision to use 115-lb. rail, the standard for light rail, rather than 136-lb. rail typically used for freight rail, on the Healdsburg-to-Ignacia segment, (*id.* at 3); (3) SMART's decision to design certain passenger stations south of Ignacio (off of the Line) in a way that would not accommodate freight traffic, (*id.*); (4) the removal of switches to certain industrial spurs, (*id.*); and (5) various alleged inadequacies in a report to the California legislature that led to the decision for SMART to become a freight rail operator, (*id.*). None of this is persuasive.

First, it is not clear from the context of the 2018 email that the transaction at issue here was being contemplated by the author of that email. Even if it was, the author was not a SMART representative. Second, SMART explains that its design team concluded that 115-lb. rail would be adequate for the anticipated freight rail traffic expected on the Healdsburg-to-Ignacio segment. (SMART Reply 9-10.) Third, SMART notes that it has no freight operating authority on the segment south of Ignacio. (*Id.* at 10) (citing Nw. Pac. R.R.—Discontinuance Exemption—Operations in Marin Cnty., Cal., AB 14 (Sub-No. 6X) (ICC served Jun. 16, 1989)). Fourth, SMART explains that it did not rehabilitate the switches at issue due to a lack of shipper

⁹ TRAC further argues that the proposed discontinuance should be denied based upon, among other things, the controversy regarding the segment of rail line north of the Line from milepost 89 to milepost 142.5. (TRAC Reply 6.) According to TRAC, the conveyance of the common carrier obligation over the Line to SMART would leave unresolved the status or future of the northern rail segment. (*Id.*) Notwithstanding TRAC's concerns, the Board notes that the rail segment extending between milepost 89 and milepost 142.5 is not the subject of this proceeding. Further, although that segment has been subject to an FRA safety order, since 1998, prohibiting freight rail operations, it remains an active line of railroad, as NWPCO has not sought, nor received, discontinuance authority over that segment. Finally, to the extent TRAC suggests that conveyance of the common carrier obligation on the Line to SMART will effectively strand shippers north of the Line because SMART has no intention of providing freight rail service, that argument is unpersuasive for the reasons given below.

interest. (SMART Reply 7-9.) Fifth, as TRAC recognizes, it is not the Board's role to second-guess the State of California's decision to have SMART become a freight operator, provided that SMART complies with the Board's statutory and regulatory requirements.

In any event, SMART notes that it is evaluating ways to grow freight traffic and that it has retained a contractor to conduct an analysis of the existing and potential freight customers throughout the North Bay Area—actions that demonstrate neither an intent to cease rail operations nor hostility towards shippers. (SMART Reply 11.) Finally, SMART has clearly stated here and in its verified notice of exemption that it is willing and able to provide rail service upon reasonable request, consistent with 49 U.S.C. § 11101(a). (SMART Reply 12; SMART Verified Notice 3, Sonoma-Marín Area Rail Transit Dist., FD 36481). Thus, based upon the foregoing, the Board finds that TRAC's assertions are not persuasive.

Labor Protection. In its petition, NWPCO also requests that the Board decline to impose labor protection conditions, asserting that the Line over which it seeks discontinuance authority represents the entire scope of its "active rail service." (Pet. 10.) 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. However, it has been the longstanding policy of the agency that a railroad that is abandoning its entire system generally is not required to provide labor protection. Northampton & Bath R.R.—Aban. near Northampton & Bath Junction in Northampton Cnty., Pa., 354 I.C.C. 784, 785-86 (1978). The policy has also been applied to entire-system discontinuances involving lines not owned by the discontinuing carrier. See, e.g., Mo. & Valley Park R.R.—Discontinuance of Serv. Exemption—in St. Louis Cnty., Mo., AB 1057X, slip op. at 1, 2 (STB served June 15, 2010).

Here, the Board finds that NWPCO's proposed transaction is not an entire-system discontinuance. As noted above, see supra note 4, NWPCO retains operating authority over a segment of rail line north of the Line from milepost 89 to milepost 142.5, notwithstanding that it has never provided service over that segment due to a safety-related embargo. Because NWPCO has not sought and received discontinuance authority over that portion of line, that segment remains an active line of railroad. Should NWPCO receive a reasonable request for service over that portion of line, it could be obligated to make repairs and provide service. See Cent. Or. & Pac. R.R.—Coos Bay Rail Line, FD 35130, slip op. at 6 (STB served Apr. 11, 2008) (ordering carrier to show cause why its ongoing failure to provide service on embargoed line was not unlawful, and why the Board should not require carrier either to repair line and resume rail service or to seek abandonment authority). Thus, the Line here does not constitute NWPCO's entire system, and the "entire system" exception does not apply.

NWPCO suggests that the Board should expand the entire-system exception to situations where a carrier abandons or discontinues all of its "active" lines because, like an entire-system abandonment or discontinuance, an abandonment or discontinuance of all of a rail carrier's active lines would leave the carrier without revenues to pay labor protection. (Pet. 11.) However, where, as here, a rail carrier does not abandon or discontinue its entire system but retains operating authority over some portion of rail line, there remains the possibility of future revenue-generating operations, without further authorization from the Board, through use of the retained operating authority. For that reason, and to keep the exception narrowly tailored and

administratively manageable, the Board declines to extend the entire-system exception to the circumstances here. Accordingly, as a condition to granting this exemption, the Board will impose upon NWPCO 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 and Environmental Review. Because no formal expressions of intent to file an offer of financial assistance (OFA) to subsidize continued rail service were filed by the March 22, 2021 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 on the Line by NWPCO, as described above, subject to the employee protective conditions in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979).

2. TRAC's motion for leave to file a surreply is granted, and its surreply is accepted into the record.

3. This exemption will be effective on July 11, 2021.

4. Petitions to reopen and petitions to stay the effectiveness of the exemption must be filed by June 28, 2021.

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