FR-4

SURFACE TRANSPORTATION BOARD

[Docket No. AB 578X]

Austin Area Terminal Railroad, Inc—Discontinuance of Service Exemption—In Bastrop, Burnet, Lee, Llano, Travis, and Williamson Counties, Texas

On December 30, 2022, the Board, by decision of the Director of the Office of Proceedings (Director), rejected the verified notice of exemption filed by Austin Area Terminal Railroad, Inc. (AATR) to discontinue service over an approximately 162-mile line in Texas because the required certification concerning the absence of local traffic on the line was deficient. AATR appealed that decision. For the reasons discussed below, the Board will deny the appeal. Nevertheless, the Board will grant on its own motion an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 permitting AATR to discontinue common carrier rail service over the line.

BACKGROUND

On November 30, 2022, AATR filed a verified notice of exemption under 49 CFR 1152.50 to discontinue common carrier rail service over approximately 162 miles of rail line owned by Capital Metropolitan Transportation Authority, located between milepost AUNW-MP 0.0 (SPT-MP 57.00), west of Giddings, and milepost AUNW-MP 154.07 (SPT-MP 99.04), at Llano, including the Marble Falls Branch (6.43 miles), the Scobee Spur (3.3 miles), and the Burnet Spur (0.93 miles) in Bastrop, Burnet, Lee, Llano, Travis, and Williamson Counties, Tex. (the Lines).

According to AATR, it received Board authority to provide common carrier service over the Lines in 2002, replacing its parent company, Trans-Global Solutions Inc., as operator. See Austin Area Terminal R.R.—Change in Operators Exemption—Trans-Glob. Sols., Inc., FD 33972 (STB served Dec. 20, 2000); see also Trans-Glob.

Sols., Inc.—Operation Exemption—Cap. Metro. Transp. Auth., FD 33860 (STB served Apr. 4, 2000). AATR's verified notice states, however, that it has not operated over the Lines in many years and that the Lines are presently operated by Austin Western Railroad, L.L.C. (AWRR), a rail carrier unaffiliated with AATR. (Verified Notice 1-2.)[1]

On December 30, 2022, the Director rejected the notice, noting that, under 49 CFR 1152.50(b), "[a]n abandonment or discontinuance of service or trackage rights is exempt if the carrier certifies that no local traffic has moved over the line for at least 2 years . . . ." The Director observed that, although AATR certified that *it* had not provided service over the Lines for at least two years, AATR also noted that the Lines were "presently operated" by AWRR. Austin Area Terminal R.R.—Discontinuance of Service Exemption—in Bastrop, Burnet, Lee, Llano, Travis, & Williamson Cntys., Tex., AB 578X, slip op. at 1 (STB served Dec. 30, 2022). Thus, because AATR had not certified that there had been *no* local traffic on the Lines during the preceding two years, the Director found that the verified notice did not meet the requirements of the two-year out-of-service provision at 49 CFR 1152.50.

On appeal, AATR argues, among other things, that granting its appeal would be consistent with certain agency precedent accepting carrier-specific, two-year-out-of-service certifications—allowing invocation of the discontinuance class exemption when a carrier has certified that it has handled no traffic (local or otherwise) for at least two years, regardless of whether the line in question has hosted common carrier operations by other railroads in the past two years. (AATR Appeal 6.) AATR further asserts that not allowing carrier-specific certifications would unnecessarily increase regulatory barriers to

[1] See Austin W. R.R.—Operation Exemption—Cap. Metro. Transp. Auth., FD 35072 (STB served Sept. 14, 2007).

industry exit and, in turn, would discourage honest and efficient management of railroads, contrary to the objectives of 49 U.S.C. 10101(7) and (9).[2] (AATR Appeal 10.)

DISCUSSION AND CONCLUSIONS

Under 49 CFR 1011.7(a)(2)(x), the Board has delegated to the Director the authority to determine whether to issue notices of exemption. The Board, however, has reserved for itself the consideration and disposition of all appeals of initial decisions issued by the Director. See 49 CFR 1011.2(a)(7). In this proceeding, AATR argues that the Director erred in rejecting its verified notice of exemption. On appeal, the Board considers whether the notice was properly rejected under the circumstances presented. See, e.g., Ill. Cent. R.R.—Aban. Exemption—in Champaign Cnty., Ill., AB 43 (Sub-No. 189X), slip op. at 3 (STB served July 2, 2015).

The Board finds that the verified notice was properly rejected. First, the Director's application of 49 CFR 1152.50(b) is consistent with the literal language of the regulation, which states that "[a]n abandonment or discontinuance of service or trackage rights is exempt if the carrier certifies that *no local traffic* has moved over the line for at least 2 years . . . ." (emphasis added). Indeed, the final rule adopting the discontinuance class exemption noted that the meaning of "out of service" for the purpose of that exemption is the same as in the rulemaking establishing the class exemption for abandonments. Exemption of Out of Serv. Rail Lines (Discontinuance of Serv. & Trackage Rts.), 1 I.C.C.2d 55, 56 (1984). The abandonment rulemaking defined "out of service" rail lines as those lines where there had been "*no* traffic originating or terminating on the line for at least 2 years." Exemption of Out of Serv. Rail Lines, 366 I.C.C. 885, 887 (1983) (emphasis added). Further, the final rule adopting the

[2] AWRR and its parent company, Watco Holdings, Inc., filed a joint pleading on January 20, 2023, confirming AWRR's role providing common carrier service on the Lines and noting their general support for AATR's discontinuance efforts.

discontinuance class exemption noted that such discontinuances were limited in scope, having "little or no competitive or operational impact," because they "w[ould] usually pertain to short-line segments with *no* shippers," and that regulation was "not needed to protect shippers from the abuse of market power, because the lines *would not have been used by shippers* for at least 2 years." Exemption of Out of Serv. Rail Lines (Discontinuance of Serv. & Trackage Rights), 1 I.C.C.2d at 57 (emphasis added).

The Director's ruling was also consistent with the discussion in CSX Transportation in Jefferson & Indiana Counties, Pa., AB 55 (Sub-No. 453X) (ICC served Nov. 27, 1992), cited by the Director in the challenged order. There, the agency explained that the "test [under the regulation] is not whether [the discontinuing carrier] has provided any local service over the line in the past 2 years but whether there has been any local service on the line during that period." CSX Transp., AB 55 (Sub-No. 453X), slip op. at 2.[3] Although AATR characterizes CSX Transportation as "obscure," (AATR Appeal 6), in none of the cases AATR cites did the agency squarely address the issue here: whether the regulation requires the discontinuing carrier to certify that no local traffic at all—as opposed to just its own—has moved over the line for at least two years. Nor did any party in the decisions cited by AATR challenge the adequacy of a carrier-specific certification versus one covering all local traffic on the line.[4]

---

[3] The ICC later acknowledged the findings in CSX Transportation in a subsequent decision by the entire Commission. See Buffalo & Pittsburgh R.R.—Discontinuance & Aban. Exemption—Between DC Tower & Homer City, in Jefferson & Ind. Cntys., Pa., AB 369 (Sub-No. 2X) et al., slip op. at 2 n.3 (ICC served Nov. 17, 1993) (explaining that the notice in CSX Transportation was "rejected because CSXT had failed to certify that there was no local traffic on the Line").

[4] AATR notes that in Delaware & Hudson Railway—Discontinuance of Trackage Rights Exemption—in Broome County, N.Y., AB 156 (Sub-No. 27X) (STB served Oct. 18, 2016), the Board rejected several challenges to the notice of exemption, "including one focused on the accuracy of [the carrier's] certification." (AATR Appeal 9.) Questions were raised in that proceeding about whether the discontinuing carrier had in fact conducted local traffic on the relevant lines in the last two years. See, e.g., Reply to D&H Reply to Pet. to Revoke at 7, May 12, 2015, Del. & Hudson, AB 156 (Sub-No.

The Board acknowledges that carrier-specific certifications in two-year-out-of-service discontinuance proceedings have been more recently accepted without challenge or controversy. See, e.g., Minn. Com. Ry.—Discontinuance of Trackage Rts. Exemption—in Anoka, Hennepin, Ramsey, & Wash. Cntys., Minn., AB 882 (Sub-No. 4X) (STB served May 20, 2020); Wheeling & Lake Erie Ry.—Discontinuance of Serv. Exemption—in Erie Cnty., Ohio, AB 227 (Sub-No. 13X) (STB served Mar. 22, 2019); All. Terminal R.R.—Discontinuance of Serv. & Discontinuance of Trackage Rts. Exemption—in Denton & Tarrant Cntys., Tex., AB 1262X (STB served Apr. 23, 2018). Moreover, as the Board has explained previously, discontinuance of trackage rights that have not been operated for at least two years is unlikely to negatively impact shippers, "especially . . . because a discontinuance of trackage rights still leaves [at least the] line owner in place to conduct service." See Norfolk S. Ry.—Acquis. & Operation—Certain Rail Lines of the Del. & Hudson Ry., FD 35873, slip op. at 20 (STB served May 15, 2015).

Nevertheless, to resolve the inconsistency, the Board clarifies that the regulation should be applied as written and as intended at the time of its adoption. Carriers using the two-year-out of-service notice must certify that *no local traffic* has moved over the line for two years, not just their own traffic. The Board further notes that carriers may petition for individual exemptions under 49 U.S.C. 10502(a). While the individual exemption process is less streamlined than the class exemption procedures, it still

---

27X) (arguing that if any of the traffic that "D&H carries" on the trackage rights lines is local traffic, then the "Exemption Notice fails"). But no party in Delaware & Hudson argued that carrier-specific certifications, in general, do not qualify for the class exemption, and the Board accepted the certification there—as it did in all the decisions cited by AATR—without discussing the issue raised in the Director's order or in CSX Transportation.

provides an avenue for obtaining "expedite[d] decisions" with "minimize[d] regulatory burdens" in uncontested or noncontroversial proceedings involving rail line abandonments and discontinuances. See, e.g., Minn. N. R.R.—Aban. Exemption—Between Redland Junction & Fertile, in Polk Cnty., Minn., AB 497 (Sub-No. 2X), slip op. at 11 n.17 (STB served Nov. 14, 1997) ("Detailed revenue and cost analysis is generally reserved for the application process . . . .") Indeed, the Board has readily granted petitions for exemption to discontinue unused trackage rights in appropriate circumstances where there would be no impact on service. See, e.g., Idaho N. & Pac. R.R.—Discontinuance of Trackage Rts. Exemption—in Canyon, Payette, & Wash. Cntys., AB 433 (Sub-No. 4X) (STB served Jan. 3, 2013) (granting discontinuance authority for one set of overhead trackage rights that had not been used for 17 years, and another that had not been used for three years); BNSF Ry.—Discontinuance of Trackage Rts.—in Peoria & Tazewell Cntys., Ill., AB 6 (Sub-No. 470X) (STB served June 4, 2010) (granting discontinuance authority for overhead trackage rights that had not been used in 28 years).

Therefore, based upon the foregoing, AATR's appeal of the Director's decision rejecting the notice of exemption will be denied. However, as discussed below, the Board will grant on its own motion the discontinuance of rail service by AATR over the lines at issue.

The Sua Sponte Exemption

In rejecting a verified notice of exemption, the Board often requires or suggests that a party file an application or petition for exemption to obtain the necessary authority it seeks. Under the circumstances here, however, and given the sufficiency of the current

record, the Board will minimize the burden on AATR by granting an exemption for discontinuance authority over the Lines sua sponte.

Under 49 U.S.C. 10903, a rail carrier may not discontinue operations without the Board's prior approval. Pursuant to 49 U.S.C. 10502(a), however, the Board shall, to the maximum extent possible, exempt a transaction or service from regulation upon finding that (1) 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.

Here, detailed scrutiny under 49 U.S.C. 10903 of discontinuance by AATR is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of the application or petition process, an exemption would reduce regulatory barriers to exit. See 49 U.S.C. 10101(2), (7), (15). An exemption would also encourage efficient management by relieving AATR of the responsibility of operating over rail lines it has not used in more than 15 years. See 49 U.S.C. 10101(9). Further, other aspects of the RTP would not be adversely affected.

Regulation of the proposed discontinuance is also not needed to protect shippers from the abuse of market power.[5] AATR has not operated over the Lines in many years, and shippers may request service from AWRR, which offers common carrier service over the Lines.

Employee Protection. 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 the employee protective conditions set forth in Oregon Short Line Railroad—

[5] Given the Board's finding regarding market power, it need not be determined whether the proposed discontinuance is limited in scope.

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

Offers of Financial Assistance, Interim Trail Use/Rail Banking, Public Use, and Environmental Review. Typically, in individual exemption proceedings, formal expressions of intent to file an offer of financial assistance (OFA) to subsidize continued rail service are due within 10 days of the Federal Register publication giving notice of the petition for exemption. See 49 CFR 1152.27(c)(1)(i). These filings must indicate the intent to file an OFA for subsidy and demonstrate that the filers are preliminarily financially responsible. See 49 CFR 1152.27(c)(2)(i). In this case, given the Board's sua sponte grant of an exemption, formal expressions of intent must be filed by November 13, 2023.

Provided no formal expression of intent to file an OFA to subsidize continued rail service has been received, this exemption will be effective on December 3, 2023, unless stayed pending reconsideration. And, because this is a discontinuance and not an abandonment, the Board need not consider OFAs to acquire the Lines, interim trail use/rail banking requests under 16 U.S.C. 1247(d), or requests to negotiate for public use of the Lines 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.

In sum, the Board permits the discontinuance of rail service by AATR over the above-described rail lines, and notice of AATR's exemption will be published in the Federal Register.

It is ordered:

1. AATR's appeal of the Director's decision is denied.

2. Under 49 U.S.C. 10502, the Board exempts from the prior approval requirements of 49 U.S.C. 10903 the discontinuance of service by AATR on the above-described lines, 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).

3. Notice of the exemption will be published in the Federal Register.

4. This exemption will be effective December 3, 2023.

5. Formal expressions of intent to file an offer of financial assistance (OFA) to subsidize continued rail service are due November 13, 2023**.**

6. Petitions to reopen and petitions to stay the effectiveness of the exemption must be filed by November 20, 2023.

7. This decision is effective on its service date.

Decided: November 2, 2023.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz. Board Member Fuchs concurred with a separate expression.

BOARD MEMBER FUCHS, concurring:

I agree with today's decision (Decision) that the Director's interpretation of "no local traffic"—requiring a line-specific certification—is consistent with the plain meaning of the regulation, Decision 3, and supported by the relevant legal history.[1] I

[1] The Decision accurately traces the relationship of the discontinuance rulemaking to the abandonment rulemaking, and it faithfully quotes multiple statements in the discontinuance rulemaking preamble that treat phrases such as "out of service" and "no local traffic" as applying to all carriers on the line, not just the filing carrier. Decision 3. Yet I am troubled that the Federal Register notices accompanying the proposed and final rules in the discontinuance proceeding state the exemption can apply when "no traffic has been handled locally on the line *by the carrier seeking the discontinuance* for at least 2 years." Exemption of Out of Service Lines (Discontinuance of Service and Trackage Rights), 48 FR 27584 (June 16, 1983) (emphasis added). Ultimately, I find Federal Register notices contain a drafting error because the phrase "by the carrier seeking the discontinuance" does not appear in the related regulation or preamble. I also note that, after the agency issued the final rule and associated Federal Register notice, the D.C. Circuit—in upholding a remand decision that embraced both the abandonment and discontinuance exemption proceedings—stated that the "originally proposed definition of 'out of service,' which encompassed only rail lines carrying *no traffic at all* for at least two years, had been expanded in the final rule to include lines carrying overhead traffic, i.e., traffic that neither originates nor terminates on a line and

write separately to suggest that the Board ought to consider changing this regulation. AATR's appeal understandably cites an extensive list of cases in which the agency has allowed carrier-specific "no local traffic" certifications via the notice process, (AATR Appeal 8-9), and—in considering this overwhelming precedent—I find that the Board, to carry out the rail transportation policy (RTP) at 49 U.S.C. 10101, need not routinely subject carriers to the different, more burdensome petition process in similar future cases. Over more than 30 years, the Board has rightly saved taxpayers and many entities, including small businesses, substantial resources by cutting up to 90 days out of the exemption process and eliminating a significant number of unneeded filings and decisions. See 49 CFR part 1121 (procedures for petitions for exemption), 49 CFR 1152.60 (special rules for abandonment and discontinuance petitions for exemptions); 49 CFR 1152.50 (exempt abandonments and discontinuances); see also 49 U.S.C. 10101(2) (minimizing the need for regulatory control over the rail transportation system), section 10101(7) (reducing regulatory barriers to entry and exit), section 10101(15) (providing for expeditious handling of proceedings). Though not the highest agency priority, the Board should consider, at the appropriate time, amending its discontinuance exemption regulations to allow carrier-specific certifications and once again achieve these savings.[2]

---

can be rerouted over other lines." Ill. Com. Comm'n v. ICC, 848 F.2d 1246, 1249 (D.C. Cir. 1988) (emphasis added).

[2] As part of the rulemaking process, the Board should consider any necessary protections for when a carrier-specific certification would raise problems relevant to carrying out the RTP, particularly with respect to competition. But precedent shows such problems are far from the norm. The suggested future rulemaking could also address any problems or inconsistencies with the agency's treatment of atypical cases. See e.g., Consol. R. Corp.—Exemption—Aban. of the Weirton Secondary Track in Harrison & Tuscarawas, Cntys., Ohio, AB 176 (ICC decided June 7, 1989) (revoking a class exemption as applied to the proposed abandonment at issue and finding that a more thorough review of the transaction was necessary to carry out the national rail transportation policy).

Jeffrey Herzig,

Clearance Clerk

[FR Doc. 2023-24672 Filed: 11/7/2023 8:45 am; Publication Date: 11/8/2023]