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SERVICE DATE – JUNE 26, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1239 (Sub-No. 3X)

CITY OF TACOMA, DEPARTMENT OF PUBLIC UTILITIES, D/B/A TACOMA RAIL—  
DISCONTINUANCE OF SERVICE EXEMPTION—IN PIERCE COUNTY, WASH.

Docket No. AB 1328X

CITY OF TACOMA, DEPARTMENT OF PUBLIC WORKS, D/B/A TACOMA RAIL  
MOUNTAIN DIVISION—DISCONTINUANCE OF SERVICE EXEMPTION—  
IN PIERCE COUNTY, WASH.

Digest:<sup>1</sup> This decision allows Tacoma Rail and Tacoma Rail Mountain Division, two separate departments of the City of Tacoma, Wash., to discontinue rail service over approximately 3.5 miles of rail line in Thurston County, Wash., subject to standard employee protective conditions.

Decided: June 25, 2023

On March 8, 2023, the City of Tacoma, Wash., Department of Public Utilities d/b/a Tacoma Rail (Tacoma Rail or TMBL), a Class III common carrier, filed in Docket No. AB 1239 (Sub-No. 3X) a petition under 49 U.S.C. § 10502 for exemption from the prior approval requirements of 49 U.S.C. § 10903 to discontinue rail service over approximately 3.5 miles of rail line extending from milepost 2.11 at East C Street (USDOT Grade Crossing Inventory Number 396640U) to milepost 5.61 at McKinley Avenue (USDOT Grade Crossing Inventory Number 396659L), in Pierce County, Wash. (the Line). Notice of Tacoma Rail’s petition was served and published in the Federal Register on March 28, 2023 (88 Fed. Reg. 18,362).

On March 14, 2023, the non-operating owner of the Line, City of Tacoma, Department of Public Works d/b/a Tacoma Rail Mountain Division (Tacoma Rail Mountain Division or TRMW),<sup>2</sup> a Class III common carrier, filed in Docket No. AB 1328X, a separate petition under § 10502 for exemption from the prior approval requirements of § 10903 to discontinue rail service over the Line. Notice of Tacoma Rail Mountain Division’s petition was served and

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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 Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> This decision will refer to Tacoma Rail and Tacoma Rail Mountain Division collectively, where appropriate, as “the City.”

published in the Federal Register on April 3, 2023 (88 Fed. Reg. 19,707). Comments opposing the proposed discontinuances were filed. The Board will grant the petitions for exemption, subject to standard employee protective conditions.

## BACKGROUND

The City seeks authority to discontinue all common carrier service over the Line, asserting the Line hosts minimal, sporadic, non-remunerative traffic levels. (TMBL Pet. 1-2; TRMW Pet. 2.)<sup>3</sup> TRMW also states that discontinuing service on the Line is part of its current strategic plans for its rail assets. (TRMW Pet. 2.) According to the City, only four local carloads have moved over the Line in the past seven years—one in April 2021 and three in 2016. (TMBL Pet. 2; TRMW Pet. 2.) The City states that it does not anticipate new shippers or significant traffic increases if the Line were to remain active. (TMBL Pet. 2; TRMW Pet. 2.) The City also states that no overhead traffic currently exists on the Line, and that, if such traffic did exist, it could be handled over other through routes. (TMBL Pet. 2; TRMW Pet. 2.)

According to the petitions, the City advised the only shipper on the Line, Tacoma Steel Supply, Inc. (Tacoma Steel Supply), of its plan to seek authority to discontinue service over the Line and stated in the petitions that it had no reason to believe that Tacoma Steel Supply would object to the City's discontinuance plans. (TMBL Pet. 2, AB 1239 (Sub-No. 3X); TRMW Pet. 2, AB 1328X.) However, in responses filed in both dockets on April 12, 2023, Tacoma Steel Supply and the owner of the real property on which Tacoma Steel Supply is located, TSSI, LLC (collectively, Tacoma Steel), state that they *do* object to the petitions and assert that Tacoma Steel Supply never advised the City that it would not object to discontinuance plans. (Tacoma Steel Opp'n 2, Apr. 12, 2023, AB 1239 (Sub-No. 3X); Tacoma Steel Opp'n 2, Apr. 12, 2023, AB 1328X.)

Tacoma Steel argues the Line is not only an efficient means of transporting large loads of steel but has great value for Tacoma Steel Supply and adds to the value of the real property for TSSI, LLC. (Tacoma Steel Opp'n 4, AB 1239 (Sub-No. 3X); Tacoma Steel Opp'n 4, AB 1328X.) Tacoma Steel asserts that the COVID-19 pandemic detrimentally affected domestic steel transactions but argues that there is nothing to suggest the Line will not be utilized in the future based upon the negotiation of future domestic steel transactions. (Tacoma Steel Opp'n 4, AB 1239 (Sub-No. 3X); Tacoma Steel Opp'n 4, AB 1328X.) Tacoma Steel also asserts that the Line might be used in the future, by "TSA rail service," to service the public in East Pierce County<sup>4</sup> and argues that, if the Line is abandoned, this could cut off the potential for that rail service. (Tacoma Steel Opp'n 3, 4, AB 1239 (Sub-No. 3X); Tacoma Steel Opp'n 3, 4, AB 1328X.) Tacoma Steel states the Line was used in the past for deliveries to Tacoma Steel Supply, including in 2007 when Tacoma Steel Supply used the Line for "as many as ten

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<sup>3</sup> Citations to "TMBL Pet." are to the petition filed by TMBL in Docket No. AB 1239 (Sub-No. 3X). Citations to "TRMW Pet." are to the petition filed by TRMW in Docket No. AB 1328X.

<sup>4</sup> Tacoma Steel does not explain what it means by "TSA rail service." However, in a surreply filed in both dockets, the City states that it understands that this refers to a local commuter rail system. (Joint Surreply 4.)

carloads” for a contract with the Department of Defense. (Tacoma Steel Opp’n 4, AB 1239 (Sub-No. 3X); Tacoma Steel Opp’n 3, AB 1328X.) Tacoma Steel argues that the Line has had other commercial uses in the past, including tourism rail service to Mt. Rainier, Wash., and asserts generally that there is a strong public interest in maintaining rail service on the Line. (Tacoma Steel Opp’n 3, 5, AB 1239 (Sub-No. 3X); Tacoma Steel Opp’n 3, 5, AB 1328X.) Tacoma Steel argues that the record has not been sufficiently developed for the Board to decide on an expedited basis whether to grant the petitions, and therefore asks the Board to deny them. (Tacoma Steel Opp’n 5, AB 1239 (Sub-No. 3X); Tacoma Steel Opp’n 5, AB 1328X.)

On April 24, 2023, the City filed, in both dockets, a surreply and a related request for leave to file.<sup>5</sup> The City asserts that Tacoma Steel’s primary interest in continued rail service is related to the facility’s property value. (Joint Surreply 2.) The City states that it has found no agency precedent that supports the proposition that a railroad must maintain service over a line in order to protect a shipper’s business resale value, and it argues that such a position would conflict with the rail transportation policy (RTP) of 49 U.S.C. § 10101 generally, and particularly § 10101(5), which provides that “[i]n regulating the railroad industry, it is the policy of the United States Government . . . to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes.” (Joint Surreply 2-3.) The City notes that Tacoma Steel does not dispute that the Line has hosted very little local traffic over the past several years and that Tacoma Steel has not offered any assurances of future traffic prospects or commitments. (*Id.* at 3.)

The City goes on to certify that, as of April 23, 2023, the eligibility requirements for a discontinuance of service class exemption pursuant to 49 C.F.R. part 1152, subpart F, have been met for the Line, noting that the last known local shipment was transported on April 23, 2021. (*Id.*) The City argues that it would be legally and procedurally incongruous for the Board to deny its petitions because, under the class exemption regulations, the Line would now be presumptively qualified for discontinuance authority. (*Id.*)

The City also argues that Tacoma Steel’s arguments regarding future use of the Line as part of a commuter rail system are unpersuasive because (1) the local commuter rail system prospects for the Line are beyond the scope of the Board’s regulatory mandate, and (2) the

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<sup>5</sup> The City argues that, as a petitioner seeking relief from the Board, it is entitled to address Tacoma Steel’s objections and to close the record. (Joint Surreply 2.) On April 25, 2023, Tacoma Steel replied in opposition to the City’s request for leave, arguing, without specific facts or cites to authority, that (1) the City has not demonstrated the required prejudice to allow for leave to file a surreply, (2) the surrebuttal contains hearsay not supported in the record, and (3) the Board should not grant the petitions, but rather “set the appropriate hearing for development of the record upon which to form a decision.” (Tacoma Steel Reply 2, AB 1239 (Sub-No. 3X); Tacoma Steel Reply 2, AB 1328X.) While the Board’s regulations do not generally permit “replies to replies,” 49 C.F.R. § 1104.13(c), and because Tacoma Steel has not sufficiently supported its arguments as to why the Board should reject the City’s surreply, the Board will accept the City’s surreply in the interest of having a more complete record. *See, e.g., City of Alexandria, Va.—Pet. for Declaratory Ord.*, FD 35157, slip op. at 2 (STB served Nov. 6, 2008).

petitions seek discontinuance authority as opposed to abandonment authority, and thus do not contemplate elimination of the railroad corridor. (Id. at 4.) Accordingly, the City argues, the prospect of using the Line in the future for commuter rail service, however remote, remains a possibility. (Id.)

Employee Protection. The City asserts that the appropriate level of employee protection to be imposed on the discontinuance exemptions here is that established in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979). (TMBL Pet. 5; TRMW Pet. 6.) The City states that it does not anticipate any adverse impact on employment levels as a result of the proposed discontinuances. (TMBL Pet. 5; TRMW Pet. 6.)

## DISCUSSION AND CONCLUSIONS

Exemption from 49 U.S.C. § 10903. Under § 10903, a rail carrier may not discontinue operations without the prior approval of the Board. Under § 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 RTP of 49 U.S.C. § 10101; and (2) either (a) the transaction is of limited scope, or (b) regulation is not needed to protect shippers from an abuse of market power. The Board finds the proposed discontinuances meet the applicable exemption standards.

Detailed scrutiny of the proposed discontinuances under § 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 over operation of the Line, reduce regulatory barriers to exit for the City, and expedite the process of allowing the City to be relieved of its common carrier obligations over the Line. See 49 U.S.C. §§ 10101(2), (7), and (15). Tacoma Steel does not argue that the proposed discontinuances would contravene the RTP, and the Board finds that other aspects of the RTP would not be adversely affected by the use of the exemption process here.

Regulation of the proposed discontinuances under § 10903 is also not needed to protect shippers from the abuse of market power, and Tacoma Steel makes no such assertion. There has been no local traffic on the Line in over two years, and the City asserts that there currently is no overhead traffic on the Line, and if there were, it could be handled over other through routes. Tacoma Steel's arguments about past traffic are not relevant given how few cars have been handled in recent years, and its assertion that the Tacoma Steel Supply facility or commuter rail service could use the Line in the future is speculation upon which the Board will not rely. Moreover, Tacoma Steel's assertion that its property value may suffer from the Line's discontinuance is also not relevant to the Board's analysis under § 10502.

Because regulation is not necessary to protect shippers from the abuse of market power, the Board need not determine whether the transactions are of limited scope. See 49 U.S.C. § 10502(a)(2). However, the Board notes the Line is only approximately 3.5 miles long, has served no local traffic in over two years, and currently handles no overhead traffic, and Tacoma Steel has also made no specific assertions about the scope of the transactions. Further, this proceeding involves discontinuance authorization only, rather than abandonment.

Discontinuance does not entail track salvage or disposition of railroad rights-of-way. The City does not contemplate the elimination of the railroad corridor and retains the option to reinstitute rail service, if warranted, however unlikely that may be. (Joint Surreply 4.)

The Board finds that the record is sufficient to determine whether to grant the City's petitions and that the petitions meet the requirements of § 10502. The Board also finds that development of a larger record is unnecessary and would be inconsistent with the RTP. See § 10101(2), (7), and (15).

Employee Protection. Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting these exemptions, the Board will impose upon the City the employee protective conditions set forth in Oregon Short Line, 360 I.C.C. 91.

Offers of Financial Assistance, Interim Trail Use/Rail Banking, Public Use, 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 April 7, 2023 deadline in Docket No. AB 1239 (Sub-No. 3X) or the April 13, 2023 deadline in Docket No. AB 1328X, the Board will not consider subsidy OFAs for the Line. See 49 C.F.R. § 1152.27(c)(1)(i). And, because the City is seeking authority to discontinue service, not to abandon the Line, 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. All filings made to the service date of this decision are accepted into the record.
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 over the Line by Tacoma Rail in Docket No. AB 1239 (Sub-No. 3X), and by Tacoma Rail Mountain Division in Docket No. AB 1328X, as described above, subject to 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).
3. These exemptions will be effective July 26, 2023.
4. Petitions to reopen and petitions to stay the effectiveness of the exemptions must be filed by July 11, 2023.

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