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May 20, 2008

VIA ELECTRONIC FILING

Ms. Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

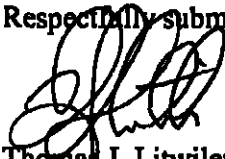
Re: **Finance Docket No. 35116**
R.J. Corman Railroad Company/Pennsylvania Lines Inc. –
Construction and Operation Exemption – Clearfield County, PA

Dear Secretary Quinlan.

Attached for filing in the above-captioned proceeding are an original and ten copies of the **Motion of R.J. Corman Railroad Company/Pennsylvania Lines Inc. to Partially Dismiss Petition for Exemption**, dated May 20, 2008.

Should any questions arise regarding this filing, please feel free to contact me. Thank you for your assistance on this matter. Kind regards.

Respectfully submitted,



Thomas J. Litwiler
Attorney for R.J. Corman Railroad Company/
Pennsylvania Lines Inc.

TJL:tl

Attachment

cc: Parties on Certificate of Service

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35116

R.J. CORMAN RAILROAD COMPANY/PENNSYLVANIA LINES INC.
-- CONSTRUCTION AND OPERATION EXEMPTION --
CLEARFIELD COUNTY, PENNSYLVANIA

**MOTION OF R.J. CORMAN RAILROAD COMPANY/
PENNSYLVANIA LINES INC. TO PARTIALLY
DISMISS PETITION FOR EXEMPTION**

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**ATTORNEYS FOR R.J. CORMAN RAILROAD
COMPANY/PENNSYLVANIA LINES INC.**

Dated: May 20, 2008

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO 35116

R.J CORMAN RAILROAD COMPANY/PENNSYLVANIA LINES INC.
-- CONSTRUCTION AND OPERATION EXEMPTION --
CLEARFIELD COUNTY, PENNSYLVANIA

**MOTION OF R.J. CORMAN RAILROAD COMPANY/
PENNSYLVANIA LINES INC. TO PARTIALLY
DISMISS PETITION FOR EXEMPTION**

Petitioner R.J. Corman Railroad Company/Pennsylvania Lines Inc. ("RJCP") hereby requests that the Board dismiss that portion of RJCP's concurrently-filed Petition for Exemption in this proceeding that relates to the reactivation of a line of railroad between Winburne and Gorton, Pennsylvania (the "Eastern Segment") currently rail-banked under a Certificate of Interim Trail Use or Abandonment ("CITU"). The contents of RJCP's petition are hereby incorporated by reference. Subjecting the reconstruction and reactivation of the Eastern Segment to Board review and approval under 49 U.S.C. § 10901 is neither warranted nor appropriate.

BACKGROUND

In 1990, Consolidated Rail Corporation ("Conrail") received authority from the Interstate Commerce Commission ("ICC") to abandon Conrail's "Snow Shoe Industrial Track," extending from milepost 64.5 near Winburne through Gorton to the end of track at milepost 45.5 near Gillintown in central Pennsylvania. *Conrail Abandonment of the Snow Shoe Industrial Track in Centre and Clearfield Counties, PA*, Docket No. AB-167 (Sub-No. 1004N) (ICC served February 15, 1990). Pursuant to the National Trails System Act, 16 U.S.C. § 1247(d) (the "Trails

Act”) and the regulations at 49 C.F.R. § 1129, the ICC subsequently issued a CITU for the Snow Shoe Industrial Track. *Conrail Abandonment of the Snow Shoe Industrial Track in Centre and Clearfield Counties, PA*, Docket No. AB-167 (Sub-No. 1004N) (ICC served November 5, 1993). Conrail entered into a trails agreement with the Headwaters Charitable Trust (“HCT”), and today HCT maintains and operates a 19-mile trail on the Snow Shoe Industrial Track.

In 1995, Conrail abandoned its connecting line extending from milepost 22.5/64.5¹ at Winburne to milepost 11.7 at Wallaceton Junction, Pennsylvania. *Consolidated Rail Corporation -- Abandonment Exemption -- In Clearfield and Centre Counties, PA*, Docket No. AB-167 (Sub-No.1146X) (ICC served September 8, 1995). No notice of interim trail use or abandonment (“NITU”) was issued for the abandoned Wallaceton Junction-Winburne line. At the end of 1995, RCJP purchased Conrail’s remaining rail lines in the area, including the active Conrail line extending through Wallaceton Junction. *R.J. Corman Railroad Company/ Pennsylvania Lines, Inc. -- Acquisition and Operation Exemption -- Lines of Consolidated Rail Corporation*, ICC Finance Docket No. 32838 (STB served January 26, 1996).

As described in more detail in the Petition for Exemption filed concurrently herewith, RJCP now proposes to reconstruct and reinstitute rail service over the abandoned Wallaceton Junction-Winburne line (the “Western Segment”) and over the Winburne-Gorton segment of the railbanked Snow Shoe Industrial Track (the “Eastern Segment”). Because the Western Segment has been fully abandoned, RCJP is seeking construction and operation exemption pursuant to 49 U.S.C. §§ 10901 and 10502 for its reactivation of that segment.

¹ Between 1990 and 1995, Conrail had apparently changed the milepost designations on this trackage, so that what was milepost 64.5 at Winburne (ascending westward from Jersey Shore, Pennsylvania) in the 1990 abandonment had become milepost 22.5 (ascending eastward from Clearfield, Pennsylvania) at the time of the 1995 abandonment.

With respect to the Eastern Segment, RCJP is concurrently filing herewith a notice of exemption pursuant to 49 U.S.C. § 10902 and 49 C.F.R. § 1150.41 to acquire the residual common carrier obligation and right to resume rail service on the Snow Shoe Industrial Track held by Norfolk Southern Railway Company ("NS"), Conrail's successor-in-interest, under the existing CITU.² See Finance Docket No. 35143, *R.J. Corman Railroad Company/Pennsylvania Lines Inc. -- Acquisition and Operation Exemption -- Line of Norfolk Southern Railway Company*. RCJP also is filing a petition in Docket No. AB-167 (Sub-No. 1004N), *supra*, to vacate the CITU as it applies to the Eastern Segment. No further Board authority is required to resume common carrier operations over the Eastern Segment, and RCJP's Section 10901 construction petition in this docket should be dismissed as to that segment.

DISCUSSION

The Trails Act is "the culmination of congressional efforts to preserve shrinking rail trackage by converting unused rights-of-way to recreational trails." *Preseault v. ICC*, 494 U.S. 1, 5 (1990). When a line is railbanked under the Trails Act pursuant to a CITU or NITU, the line is not abandoned and the railroad retains a residual common carrier obligation encompassing the right to reinstitute rail service. *N&W -- Aban. -- St. Marys & Minster in Auglaize County, OH*, 9 I.C.C.2d 1015, 1018 (1993) ("*N&W/Minster*"). Interim trail use is subject to "being cut off at any time by the reinstatement of rail service. If and when the railroad wishes to restore rail service on all or part of the property, it has the right to do so, and the trail user must step aside." *Georgia Great Southern -- Abandon. & Discontin. of Service -- GA*, 6

² On August 27, 2004, NS obtained, inter alia, all of Conrail's rights with respect to the Snow Shoe Industrial Track. See *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company -- Control and Operating Leases/Agreements -- Conrail Inc and Consolidated Rail Corporation*, Finance Docket No. 33388 (Sub-No.94) (STB served November 7, 2003).

S.T.B. 902, 906 (2003) (“*Georgia Great Southern*”). See also, e.g., *Birt v. STB*, 90 F.3d 580, 583 (D.C. Cir. 1996) (railroad “retains the right to reassert control over the easement at some point in the future if it decides to revive rail service.”); *N&W/Minster*, 9 I.C.C.2d at 1018 (agreement to interim trail use “may be withdrawn at any time the abandoning carrier wishes to reinstitute rail operations over the right-of-way.”).

Consistent with the principles and purpose of the Trails Act, this agency has repeatedly ruled that reactivation of a line railbanked under a CITU/NITU by the rail carrier holding the residual common carrier obligation and right to resume rail service on the line does not trigger or require further construction authority under 49 U.S.C. § 10901:

[N]o § 10901 authority would be required where the abandoning railroad is the one who decides to restore active service on all or part of a right-of-way subject to an NITU (or CITU). Interim trail use authority, like discontinuance authority, allows a railroad to cease operating a line for an indefinite period while preserving the possibility of renewed rail service in the future. If there is interim trail use, there is no abandonment of the right-of-way for railroad purposes. Rather, the ICC will “hold in abeyance its authorization to abandon the right-of-way,” and the route will remain intact and available for future active rail service. [Citation omitted.] In short, so long as the abandoning carrier could have performed the operations without seeking regulatory approval prior to the interim trail use, there is no reason why the resumption of service by the same carrier should trigger § 10901

Iowa Power -- Const. Exempt. -- Council Bluffs, IA, 8 I.C.C.2d 858, 866 n.12 (1990).

Later decisions confirm the logical necessity that this holding applies to properly-authorized successors of the “abandoning carrier” as well:

[I]n this case, GSWR is the *successor in interest* to the rail carrier that originally sought to abandon this rail line. That carrier [] no longer has any interest in the line. . . . No authority under 49 U.S.C. 10901 is required to reactivate rail service where, as here, the carrier who would have been the abandoning railroad had there not been rail banking and interim trail use, or *its successor*, is the one who decides to restore active rail service. See *Iowa Power*.

Because it could have performed the operations without seeking any additional regulator approval prior to the interim trail use, the resumption of service by the same carrier or *its successor* does not trigger the licensing requirement of section 10901, or require that *its successor in interest* seek concurrence from any other carrier.

Georgia Great Southern 6 S.T.B. at 906 (emphasis added); *see also Blue Mountain Railroad, Inc. – Abandonment Exemption – In Whitman County, WA and Latah County, ID*, Docket No. AB-485X (STB served May 16, 2005) at 2.³

Once it acquires NS's residual common carrier interests in the Snow Shoe Industrial Track pursuant to its concurrently-filed notice of exemption in Finance Docket No. 35143, RCJP will plainly be the successor-in-interest to the "abandoning carrier" of the Eastern Segment. Indeed, it will occupy a position no different than that occupied by NS, which was itself the successor-in-interest to Conrail, the original abandoning carrier of the Eastern Segment. Like NS and Conrail before it, RCJP is entitled to reinstitute service on the line, subject only to the Board vacating the relevant portion of the existing CITU.

Requiring RCJP to obtain construction authority or exemption for the Eastern Segment in these circumstances would lead to absurd results. NS/Conrail plainly can reconstruct the Eastern Segment today without Section 10901 authority, and could transfer the reactivated line to RCJP under a notice of exemption comparable to that being filed by RCJP in Finance Docket No. 35143. It makes no legal or logical sense that simply reversing the order of the two transactions would change the need to obtain Section 10901 authority

Indeed, such a finding would undermine the Trails Act itself. Subjecting the reactivation of a railbanked line to Board review under Section 10901 would give the Board discretion to *deny*, for environmental or any other reasons, the construction petition and thus

³ Like the present case, these cases often involved the reconstruction of trackage that had previously been removed.

effectively *prohibit* use of the right-of-way for rail service. Compare *Construction and Operation – Indiana & Ohio Ry. Co.*, 9 I.C.C.2d 783 (1993). Yet the Board’s role under the Trails Act is purely ministerial,⁴ and it should be wary of the consequences of inventing authority to prevent the reactivation of railbanked lines.⁵ As discussed above, where a CITU or NITU is issued and an agreement under the Trails Act is completed, the rail line is not abandoned, and the railroad retains residual common carrier rights and obligations on the line, including the right to reestablish service. See *Georgia Great Southern*, 6 S.T.B. at 908 (“[T]he statute gives the railroad the right to restore rail service at any time.”). That is the very premise of the Trails Act, and its ability to preserve rights-of-way intact against reversionary interests. And it is a premise that presumably would be open to question were the Board to assert the discretion to deny what the statute guarantees. It is unclear why the Board would want to invite such questions, particularly in the face of unanimous precedent holding that Section 10901 authority is not required in such cases.

⁴ E.g., *Iowa Southern R. Co. – Exemption – Abandonment*, 5 I.C.C.2d 496, 503-504 (1989), *aff’d sub nom. Goos v. ICC*, 911 F.2d 1283 (8th Cir. 1990); *Citizens Against Rails to Trails v STB*, 267 F.3d 1144 (D.C. Cir. 2001); *Georgia Great Southern*, 6 S.T.B. at 907 (noting Board’s “limited role and lack of discretion under the Trails Act.”). While most of these decisions relate to the issuance of a CITU/NITU, they also clearly apply to vacation of a CITU/NITU – the only Board action implicated by a reactivation of rail service on a railbanked line by the abandoning carrier. *Georgia Great Southern*, 6 S.T.B. at 908 (“[T]he statute gives the railroad the right to restore rail service at any time.”).

⁵ Whether the Board would use such authority to actually prevent the reactivation of lines held under an NITU/CITU is wholly beside the point. The authority to say “no” has no different legal effect than saying “no.” Cf., e.g., *Borough of Riverdale – Petition for Declaratory Order*, 4 S.T.B. 380, 385 (1999) (state and local permitting or pre-clearance requirements are preempted under ICCTA because “by their nature” they give the state or local body the ability to deny authority); *Auburn & Kent, WA – Pet. for Declar. Order – Stampede Pass Line*, 2 S.T.B. 330, 338 (1997) (“[A] state or local permitting process implies the power to deny authorization” and therefore is preempted by ICCTA.), *aff’d sub nom. City of Auburn v U.S.*, 154 F.3d 1025 (9th Cir. 1998), *cert. denied*, 527 U.S. 1022 (1999).

Once it completes the transaction proposed in Finance Docket No. 35143, RJCP will be the *only* railroad with a common carrier interest in the Eastern Segment. It is plainly the “real party in interest” under *Iowa Power*, 8 I.C.C.2d at 866, and it must have a right to resume service on the Eastern Segment without new entry authority under Section 10901 if the provisions and predicates of the Trails Act are to have any meaning. Indeed, requiring Section 10901 authority for the reconstruction of the Eastern Segment would mean there is no federal regulatory distinction between that line and the Western Segment -- even though the Western Segment was not subject to a CITU/NITU and is fully abandoned. Once again, treating railbanked lines and fully abandoned lines as interchangeable is inconsistent with and perhaps destructive of the governing principles of the Trails Act.

49 C.F.R. § 1152.29(c)(3), which refers to vacating a CITU after construction of a rail line is authorized under 49 U.S.C. § 10901, does not alter the analysis. That regulation applies where an applicant *other* than the abandoning rail carrier (or its successor) seeks to construct a new rail line on a railbanked right-of-way. This was the case in *Iowa Power*, where the ICC went on to require that the abandoning carrier, as the unrelated and real “party in interest,” concur in the proposal. 8 I.C.C.2d at 867. Here, RCJP *is* the real party in interest as a result of its acquisition of NS’s residual common carrier interests in the Eastern Segment,⁶ and it is entitled to reconstruct and reactivate that line immediately upon the Board’s ministerial act of vacating the applicable CITU.

The finding required by statute and precedent necessarily means that no direct environmental review of the reconstruction of the Eastern Segment would take place. But the Board and its predecessor have had no difficulty in the past recognizing that certain significant

⁶ Obviously, NS’s participation in that transaction with RCJP indicates its concurrence in and support of RJCP’s Beech Creek Branch Line project.

line construction projects simply are not subject to the Board's authority or to environmental review. In *Union Pacific R. Co -- Petition -- Rehabilitation of MO-KS-TX RR*, 3 S.T.B. 646 (1998), the railroad proposed to reconstruct 16.7 miles of previously-abandoned main line several miles from the railroad's existing main line. The Board found it had no jurisdiction over the construction under Section 10901, explaining that "[t]he extent of, or intensity of debate over, a project's environmental and safety issues, however, does not, by itself, confer jurisdiction on the Board." 3 S.T.B. at 653. See also *City of Detroit v. Canadian National Ry. Co*, 9 I.C.C.2d 1208 (1993), *aff'd sub nom. Detroit/Wayne County Port Auth. v. ICC*, 59 F.3d 1314 (D.C. Cir. 1995) No different approach is required or warranted here.

It may be the case the Board's Section of Environmental Analysis will review certain "downstream" operational (but not construction) impacts on the Eastern Segment that arise from the Section 10901 construction approval for the Western Segment in this proceeding. *Dakota, MN & Eastern R. -- Construction -- Powder River Basin*, 3 S.T.B. 847, 862 (1998); *City of Auburn v. U.S*, 154 F.3d 1025, 1033 (9th Cir. 1998), *cert. denied*, 527 U.S. 1022 (1999). We note, however, that even that limited review would not and could not address asserted impacts on the existing trails use of the Eastern Segment, since such use is *always* subject to restoration of rail service. "In short, an interim trail use arrangement is subject to being cut off at any time by the reinstatement of rail service. If and when the railroad wishes to restore rail service on all or any part of the property, it has the right to do so, and the trail user must step aside." *Georgia Great Southern*, 6 S.T.B. at 906. See also, e.g., *Citizens Against Rails-to-Trails v. STB*, 267 F.3d 1144, 1149 (D.C. Cir. 2001) (trail sponsor "agrees to return the right-of-way should there ever be a proposal to reactivate the line for rail service ") Indeed, in such circumstances the burden is on the *trail user* to "take whatever corrective actions are necessary to permit the reinstatement of

freight service.” *The Baltimore and Ohio Railroad Company, et al. -- Abandonment and Discontinuance of Service -- In Montgomery County, MD and the District of Columbia*, Docket No. AB-19 (Sub-No. 112) (ICC served March 2, 1990) at 2-3. Using an environmental review process to “mitigate” the impacts of rail service restoration on trail use would turn these established principles on their head, and is not permissible

WHEREFORE, RJCP respectfully requests that its petition for exemption concurrently filed in this proceeding be dismissed as to the Eastern Segment.

Respectfully submitted

By: 

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**ATTORNEYS FOR R.J. CORMAN RAILROAD
COMPANY/PENNSYLVANIA LINES INC.**

Dated: May 20, 2008

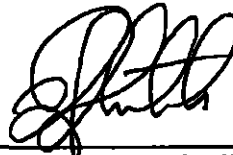
CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of May, 2008, a copy of the foregoing **Motion of R.J. Corman Railroad Company/Pennsylvania Lines Inc. to Partially Dismiss Petition for Exemption** was served by first class mail, postage prepaid, upon:

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