

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-480X

K & E RAILWAY COMPANY--ABANDONMENT EXEMPTION--IN ALFALFA,
GARFIELD, AND GRANT COUNTIES, OK, AND BARBER COUNTY, KS

Decided: December 23, 1996

By petition filed October 14, 1996, K & E Railway Company (K&E) seeks to be exempted under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon its entire 57.69-mile rail line between milepost 0.60, at or near Kiowa, in Barber County, KS, and milepost 56.98, at or near Blanton, in Garfield County, OK, and between milepost 299.88 and milepost 301.19, near the city of Cherokee, in Alfalfa County, OK. With respect to two segments of the line, K&E also seeks to be exempted from the offer of financial assistance requirements (OFA) of 49 U.S.C. 10904 and the public use requirements of 49 U.S.C. 10905. The petition was accompanied by letters supporting the proposed abandonment and urging expedition from the City Manager, the Mayor, and a Councilman of the City of Cherokee. Based on the evidence of record, we will grant the requested exemptions subject to historic preservation and environmental conditions.

BACKGROUND

K&E acquired the line from The Atchison, Topeka and Santa Fe Railway Company earlier this year. See K & E Railway Company--Acquisition and Operation Exemption--The Atchison, Topeka and Santa Fe Railway Company, STB Finance Docket No. 32972 (STB served June 13, 1996).¹ Historically, the line was used for grain gathering, but no traffic had moved over it for at least 5 years prior to the acquisition by K&E, and K&E has subsequently moved no traffic.² The line is K&E's only rail asset.

According to K&E, the track primarily consists of 90-lb. rail installed between 1914 and 1921. The track is described as generally in fair to poor condition, requiring replacement of approximately 14% of the rail, 7% of the bars, and 46% of the ties to resume service. In addition, several wash-outs and four bridges are said to require repairs. K&E estimates that necessary rehabilitation and maintenance would require an initial expenditure of \$318,000 and subsequent annual expenditures of \$296,000 for each of the next 4 years.

K&E states that the line's traffic potential is limited to five former shippers, all Oklahoma grain elevators, identified

¹ Notice was simultaneously published in the Federal Register at 61 FR 30109.

² K&E states that it also was not aware of any overhead traffic that had moved over the line for at least 5 years. Thus, the proposed abandonment would have qualified for the 2-year out-of-service class exemption, 49 CFR 1152.50, but for the recent change in ownership.

as: Burlington Co-op.; Farmers Grain (at Kremlin); Farmers Grain (at Nash); Farmers Co-op. Exchange; and Farmers Co-op. Each shipper is located on or near a state highway in a rural area that is crisscrossed by a network of roadways and state highways capable of handling any truck traffic the shippers might generate. Because traffic volumes are relatively small and the distances fairly short (the grain primarily moves to nearby Enid, OK), K&E observes that truck service is a highly competitive alternative to rail service.

K&E states that it met individually with each of the former shippers to assess the feasibility of redirecting their traffic back to rail. From these meetings, it concluded that the shippers are satisfied with existing private or for-hire truck service and have no interest in reactivating rail service except at extremely low freight rates. K&E believes that the rates shippers are willing to pay would not allow the line, even at its maximum traffic potential, to cover its rehabilitation costs and generate an operating profit.

Additionally, in an effort to reactivate rail service, K&E met with local and state government officials but allegedly was informed that there is no interest in subsidizing or otherwise assisting K&E's reactivation of rail service.

DISCUSSION AND CONCLUSIONS

Abandonment exemption. Under 49 U.S.C. 10903, a rail line may not be abandoned without our prior approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy 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.

Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. Exempting the proposed transaction will minimize the need for Federal regulatory control over rail transportation, and, by eliminating the administrative time and expense of processing an abandonment application, an exemption will expedite regulatory decisions and reduce regulatory barriers to exit [49 U.S.C. 10101(2) and (7)]. An exemption will eliminate the need for K&E to expend significant sums to rehabilitate, maintain, and operate a line that has no potential for profitable operation and has lain dormant for more than 5 years. Thus, an exemption will foster sound economic conditions and encourage efficient management [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be affected adversely. Under the proposed exemption, K&E will be able to consummate the proposed abandonment more expeditiously and transfer 5.69 miles of the right-of-way to Cherokee for flood control use.

Regulation is not necessary to protect shippers from an abuse of market power. There has been no interest in, or demand for, rail service for more than 5 years, and the traffic that formerly moved by rail has long since shifted to trucks or has ceased to move. Thus, any potential for an abuse of market power is mitigated by existing motor carrier service. Moreover, all potential shippers were contacted, and they expressed neither

opposition to the proposed abandonment nor practical interest in reactivating rail service.³

Although K&E notified all former shippers of the proposed abandonment, to ensure that they are informed of our action, we will require K&E to serve a copy of this decision on each of them within 5 days after the service date and to certify to us that it has done so.

Labor protection. Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. However, we do not normally impose employee protective conditions when a carrier abandons its entire line unless the evidence shows the existence of: (1) a corporate affiliate that will continue substantially similar rail operations; or (2) a corporate parent that will realize substantial financial benefits over and above relief from the burden of deficit operations by its subsidiary railroad. See Wellsville, Addison & Galeton R. Corp.--Abandonment, 354 I.C.C. 744 (1978); and Northampton and Bath R. Co.--Abandonment, 354 I.C.C. 784 (1978) (Northampton). K&E has never reactivated rail service, and now proposes to abandon its entire line and go out of business. It does not appear to have had any rail employees to protect nor any corporate affiliate or parent who could benefit from the proposed abandonment. And no one has even attempted to show that either situation under Northampton exists for imposing labor protection in entire line abandonments. Under the circumstances, we will not impose labor protective conditions in this case.

Environmental conditions. K&E submitted an environmental report with its petition and notified the appropriate Federal, state, and local agencies of the opportunity to submit information on the energy and environmental impact of the proposed action. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) examined the environmental report, verified its data, analyzed the probable effects of the proposed action on the quality of the human environment, and served an environmental assessment (EA) on November 26, 1996.

In the EA, SEA noted that the right-of-way may be suitable for other public purposes following abandonment and salvage. It also noted that the Kansas State Historical Society (KSHS) and the Oklahoma Historical Society had requested additional information regarding the bridges located along the right-of-way. In response, SEA recommended that a condition be imposed requiring K&E to retain its interest in and take no steps to alter the historic integrity of all bridges on the right-of-way that are 50 years old or older until the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f, is completed. SEA further noted that the National Geodetic Survey (NGS) had identified 14 geodetic markers along the rail line and requested 90-days' notice to relocate any markers that may be disturbed or destroyed. Accordingly, SEA recommended that a condition be imposed requiring K&E to consult with and provide

³ Given our market power finding, we need not determine whether the proposed abandonment of an entire rail line comprising 57.69 miles of track, primarily in a rural area of Kansas and Oklahoma, is limited in scope.

NGS with 90-days' notice prior to disturbing or destroying any geodetic markers.

In response to the EA, K&E submitted correspondence from KSHS in which KSHS determined that the proposed abandonment would not affect any archeological or historic resources. Accordingly, SEA now limits its recommended historic condition to bridges in Oklahoma. Otherwise, SEA's recommendation remains the same. We conclude that the proposed abandonment, if implemented subject to the conditions discussed above, will not significantly affect either the quality of the human environment or the conservation of energy resources.

Other exemptions. K&E states that it was asked by Cherokee, and agreed, to abandon the line and donate 5.69 miles of the right-of-way, in two sections, between milepost 18.82 and milepost 23.20, and between milepost 299.88 and milepost 301.19, to the city for flood control. Cherokee apparently is prone to flooding two or three times a year, and recent flooding covered the downtown and outlying residential areas. With the two segments of the right-of-way, Cherokee will be able to build a channel and retention system that will complete its planned flood control project.

To expedite the post-abandonment transfer of the portions of the right-of-way needed by Cherokee, K&E requests that the abandonment of the two segments also be exempted from the OFA requirements of 49 U.S.C. 10904 and the public use requirements of 49 U.S.C. 10905. Cherokee supports the proposed abandonment and urgently requests that it be consummated before the end of 1996 to permit the right-of-way to be transferred and the flood control project completed before the beginning of the next flood season.

Exemptions from 49 U.S.C. 10904-05 have been granted from time to time, but only when the right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service.⁴ K&E has agreed to donate portions of the right-of-way to a public entity for a pressing public purpose. There is no interest in continuing, and no likelihood of reactivating, rail service. Moreover, the imposition of OFA procedures or a public use condition with respect to the two needed line segments could delay their transfer to Cherokee for a valid, pressing public use and jeopardize the timely completion of the flood control project. Accordingly, to accommodate K&E's request for expedition, we will exempt the proposed abandonment of the two line segments from the OFA and public use requirements of 49 U.S.C. 10904-05.

⁴ See Southern Pacific Transportation Company--Discontinuance of Service Exemption--In Los Angeles County, CA, Docket No. AB-12 (Sub-No. 172X), et al. (ICC served Dec. 23, 1994); Missouri Pacific Railroad Company--Abandonment--In Harris County, TX, Docket No. AB-3 (Sub-No. 105X) (ICC served Dec. 22, 1992); Chicago & North Western Transportation Company--Abandonment Exemption--In Blackhawk County IA, Docket No. AB-1 (Sub-No. 226X) (ICC served July 14, 1989); and Iowa Northern Railway Company--Abandonment--In Blackhawk County, IA, Docket No. AB-284 (Sub-No. 1X) (ICC served Apr. 1, 1988).

The evidence of record establishes that the proposed exemptions from 49 U.S.C. 10904-05 meet the criteria of 49 U.S.C. 10502. Applying the OFA or public use requirements, in this instance, is not necessary to carry out the rail transportation policy. Allowing the abandonment exemption to become effective immediately, without first being subject to these requirements, will minimize the need for Federal regulatory control over the rail system, expedite regulatory decisions, and reduce regulatory barriers to exit [49 U.S.C. 10101(2) and (7)]. We have already determined that regulation is not necessary to protect shippers from an abuse of market power.

Other matters. Having exempted the abandonment of the two line segments, between milepost 18.82 and milepost 23.20 and between milepost 299.88 and milepost 301.19, from 49 U.S.C. 10904 and 10905, we have partially eliminated the need to extend the effective date of the abandonment exemption to consider OFAs under Exempt. of Rail Abandonment--Offers of Finan. Assist., 4 I.C.C.2d 164 (1987), and requests for public use conditions under 49 CFR 1152.28(a)(2). Therefore, as to these two segments, we will make the decision effective on its date of service.

We will not provide an opportunity for interested persons to file trail use/rail banking requests in connection with these two line segments. Under section 8(d) of the National Trail Systems Act, 16 U.S.C. 1247(d), trail use/rail banking is voluntary and can only be implemented if an abandoning railroad agrees to negotiate an agreement. To the extent K&E has already agreed to donate these two segments of the right-of-way to Cherokee for flood control, it can be expected to decline offers to negotiate interim trail use.

With respect to the remainder of the line, between milepost 0.60 and milepost 18.82 and between milepost 23.20 and milepost 56.98, and in the absence of any demonstrated need for expedition,⁵ we will make the decision effective 30 days after publication in the Federal Register.

SEA has indicated that the right-of-way may be suitable for other public uses after abandonment, but no party has requested a public use condition, and none will be imposed. Nevertheless, we will provide a 10-day period after Federal Register publication for interested persons to request a public use condition with respect to the remainder of the line.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt the abandonment of K&E's entire line described above from the prior approval requirements of 49 U.S.C. 10903 and the abandonment of the two line segments described above from the requirements of 49 U.S.C. 10904-05, subject to: (1) the condition requiring K&E to retain its interest in and take no steps to alter the historic integrity of all bridges on the right-of-way in Oklahoma that are 50 years

⁵ K&E had requested expedited consideration to permit the proposed abandonment to become effective before the end of 1996. Apart from the segments to be exempted from 49 U.S.C. 10904-05, for which expedition is based on the needs of the City of Cherokee, no generalized need for expedition has been shown.

old or older until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f; and (2) the condition that K&E consult with and provide NGS 90-days' notice prior to disturbing or destroying any geodetic markers.

2. K&E must serve a copy of this decision on the line's five former shippers within 5 days after the service date of this decision and certify to the Board that it has done so.

3. Notice will be published in the Federal Register on December 31, 1996.

4. With respect to the two line segments exempted from 49 U.S.C. 10904-05, the exemption will be effective on December 31, 1996, and petitions to reopen must be filed by January 27, 1997.

5. With respect to the remainder of the line, provided no formal expression of intent to file an OFA is received, this exemption will be effective on January 30, 1997; formal expressions of intent to file an OFA⁶ under 49 CFR 1152.27(c)(2) and requests for a notice of interim trail use/rail banking under 49 CFR 1152.29 must be filed by January 10, 1997; petitions to stay must be filed by January 10, 1997; requests for public use conditions in conformity with 49 CFR 1152.28(a)(2) must be filed by January 21, 1997; and petitions to reopen must be filed by January 27, 1997.

6. If a formal expression of intent to file an OFA has been timely submitted, an OFA to allow rail service to continue must be received by the railroad and the Board within 30 days after publication, subject to time extensions authorized under 49 CFR 1152.27(c)(2)(ii)(C) and (D). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(2).

7. OFAs 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."**

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams
Secretary

⁶ See Exempt. of Rail Abandonment--Offers of Finan. Assist., 4 I.C.C.2d 164 (1987).