

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 6 (Sub-No. 472X)

BNSF RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN STEARNS  
COUNTY, MINN.

Digest:<sup>1</sup> This decision allows BNSF Railway Company to end its responsibility to provide rail service over a 7.05-mile rail line in Stearns County, Minn. It also requires BNSF to keep certain railroad structures in place and sets a time period for BNSF to negotiate with parties interested in turning the rail line into a recreational trail.

Decided: May 20, 2011

By petition filed on January 31, 2011, BNSF Railway Company (BNSF) seeks an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10903 to abandon a 7.05-mile line of railroad located between milepost 9.16 at Rockville and milepost 16.21 at Cold Spring, in Stearns County, Minn. (the Line). Notice of the exemption was served and published in the Federal Register on February 18, 2011 (76 Fed. Reg. 9,634). On February 24, 2011, the ROCORI Trail Construction Board (RTCB) filed a request for imposition of a public use condition and for issuance of a notice of interim trail use (NITU) to provide time to negotiate interim trail use/rail banking. BNSF responded, indicating that it did not object to issuance of a NITU. On March 14, 2011, the Stearns County Parks (SCP) filed a request for imposition of a public use condition and an expression of support for RTCB's February 24, 2011 interim trail use request.<sup>2</sup> We will grant the petition for exemption, subject to public use, interim trail use, environmental, and standard employee protective conditions, as set forth below.

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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 Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> SCP's public use request was filed late, as such requests were due by March 10, 2011 (20 days after notice of the petition was published in the Federal Register). See 49 C.F.R. § 1152.28(a)(3). That issue is moot, however, because RTCB's public use request was timely. Although in its filing SCP also states that it "requests issuance of a . . . Notice of Interim Trail Use," it appears to do so only by way of supporting RTCB's request, as SCP notes that it "supports the request of [RTCB]," and the filing does not include the elements needed to comprise a trail use request on SCP's own behalf. See 49 C.F.R. § 1152.29(a).

## BACKGROUND

The Line has been owned by BNSF or its predecessors since 1907. It averages 100 feet in width and does not include any federally granted rights-of-way. In recent years, the Line has been operated by Northern Lines Railroad (NLR), which obtained Board authority in 2005 to lease the Line from BNSF and operate it.<sup>3</sup> BNSF states that there are currently no shippers on the Line, there has been no overhead traffic on the Line for many years, and there is no passenger traffic that will be diverted to other modes of transportation as a result of the proposed abandonment. According to BNSF, the last remaining customer on the Line, Wenner Gas Company, Inc. (Wenner), a liquid petroleum gas distributor, has relocated its facility to a new industrial park located in Rockville. BNSF includes in its petition a letter in support from Wenner.<sup>4</sup> BNSF states that, because of the low volume of traffic on the Line, only limited maintenance has been performed on the Line in recent years. BNSF further states that it plans to remove the rails and ties, but that the bridges, railroad right-of-way, ballast and culverts will remain in place.

## DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10903, a rail line may not be abandoned without prior approval from the Board. 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 of BNSF's proposal under 49 U.S.C. § 10903 is not necessary to carry out the rail transportation policy in this case. By minimizing the administrative expense of the abandonment application process, an exemption will expedite regulatory action and reduce regulatory barriers to exit. See 49 U.S.C. §§ 10101(2) and (7). An exemption, therefore, will

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<sup>3</sup> N. Lines Ry.—Lease & Operation Exemption—Burlington N. & Santa Fe Ry., FD 34627 (STB served Jan. 6, 2005). On March 3, 2011, NLR filed a petition for exemption to discontinue service over the Line. N. Lines Ry.—Discontinuance of Service Exemption—In Stearns County, Minn., AB 1011 (Sub-No. 1X) (STB served March 23, 2011). In a separate decision also being served today, the Board is granting that exemption. N. Lines Ry.—Discontinuance of Service Exemption—In Stearns County, Minn., AB 1011 (Sub-No. 1X) (STB served May 20, 2011).

<sup>4</sup> In its letter, dated November 25, 2009, Wenner states that it received an average of 30 carloads of liquid petroleum gas per year from April 2005 through December 31, 2008, and it received 47 carloads for the year 2009 as of October 31 of that year. According to Wenner, it agreed to cease, as of October 1, 2010, using the side track by which it accessed the Line.

foster sound economic conditions and encourage efficient management by allowing BNSF to avoid significant costs associated with retaining the Line. See 49 U.S.C. §§ 10101(5) and (9). Other aspects of the rail transportation policy will not be adversely affected by the use of the exemption process.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power because there are no active shippers on the Line. No party has filed in opposition to the proposed abandonment. Wenner, the last shipper on the Line, relocated its facility to a new industrial park in Rockville and does not oppose BNSF's petition. Nevertheless, to ensure that Wenner is informed of our action, we will require BNSF to serve a copy of this decision and notice on Wenner so that Wenner receives it within 5 days of the service date of this decision and notice, and to certify contemporaneously to the Board that it has done so. Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

Employee 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 affected employees. Accordingly, as a condition to granting the exemption, we will impose the standard 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).

Environmental review. BNSF submitted an environmental and historic report with its petition and notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed abandonment. See 49 C.F.R. § 1105.11. Our Office of Environmental Analysis (OEA) has examined the environmental and historical report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment.

OEA served an Environmental Assessment (EA) in this proceeding on April 1, 2011, recommending that 1 condition be imposed on any decision granting abandonment authority. In the EA, OEA states that the National Geodetic Survey (NGS) identified 17 geodetic station markers that could be disturbed by the proposed abandonment. Therefore, OEA recommends that BNSF be required to consult with NGS at least 90 days before beginning any salvage activities that will disturb or destroy any geodetic station markers.

Pursuant to 36 C.F.R. § 800.2, OEA conducted a search of the Native American Consultation Database to identify federally recognized tribes that may have ancestral connections to the project area. According to OEA, the Database indicated that there are 21 tribes that may have knowledge regarding properties of traditional religious and cultural

significance within the right-of-way for the proposed abandonment.<sup>5</sup> OEA sent a copy of the EA to these tribes for review and comment.

Comments to the EA were due by May 2, 2011. No comments were received. Accordingly, we will impose the environmental condition recommended by OEA in the EA. Based on OEA's recommendation, the Board concludes that the proposed abandonment, if implemented and conditioned as described in this paragraph, will not significantly affect either the quality of the human environment or the conservation of energy resources.

Interim trail use. RTCB, a trail association formed by the cities of Rockville, Cold Spring and Richmond, Minn., wishes to rail bank and purchase the Line to develop a trail to connect with other trail networks in the area. To that end, RTCB filed a request for the issuance of a NITU for the Line under the National Trails System Act, 16 U.S.C. § 1247(d) (Trails Act), and 49 C.F.R. § 1152.29, to negotiate with BNSF for acquisition of the right-of-way for use as a recreational trail and for rail banking. RTCB has submitted a statement of willingness to assume full responsibility for the management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way, as required by 49 C.F.R. § 1152.29. RTCB has acknowledged that the use of the right-of-way for trail purposes is subject to future reconstruction and reactivation of the right-of-way for rail service. In a response filed on March 2, 2011, BNSF states that it does not object to the issuance of a NITU to RTCB.

Because RTCB's request complies with the requirements of 49 C.F.R. § 1152.29, and BNSF is willing to enter into interim trail use negotiations, we will issue a NITU for the subject

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<sup>5</sup> The Database is at: <http://home.nps.gov/nacd/>. The identified tribes are: Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; Bois Forte Band (Nett Lake) of the Minnesota Chippewa Tribe, Minnesota; Flandreau Santee Sioux Tribe of South Dakota; Fond du Lac Band of the Minnesota Chippewa Tribe, Minnesota; Grand Portage Band of the Minnesota Chippewa Tribe, Minnesota; Keweenaw Bay Indian Community, Michigan; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Lac Vieux Desert Band of Lake Superior Chippewa Indians, Michigan; Leech Lake Band of the Minnesota Chippewa Tribe, Minnesota; Lower Sioux Indian Community in the State of Minnesota; Mille Lacs Band of the Minnesota Chippewa Tribe, Minnesota; Minnesota Chippewa Tribe, Minnesota; Prairie Island Indian Community in the State of Minnesota; Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin; Santee Sioux Nation, Nebraska; Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, South Dakota; Sokaogon Chippewa Community, Wisconsin; Spirit Lake Tribe, North Dakota; St. Croix Chippewa Indians of Wisconsin; Upper Sioux Community, Minnesota; White Earth Band of Minnesota Chippewa Tribe, Minnesota.

Line. The parties may negotiate an agreement during the 180-day period prescribed below. If an agreement is executed, no further Board action is necessary. If no agreement is reached within 180 days, BNSF may fully abandon the Line, subject to the conditions imposed below. See 49 C.F.R. § 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to any future use of the property for restoration of railroad operations.

Public use. Both RTCB and SCP have requested imposition of a public use condition under 49 U.S.C. § 10905. They each request that BNSF be prohibited from disposing of the corridor, other than tracks, ties, and signal equipment, except for public use on reasonable terms, and that BNSF be barred from the removal or destruction of potential trail-related structures, such as bridges, trestles, culverts, and tunnels, for a 180-day period from the effective date of the abandonment. RTCB's justification for its request is that the corridor will make an excellent recreational trail and conversion of the property will be in accordance with longstanding local plans. RTCB states that the 180-day period is needed to assemble and review title information, perform an appraisal, and negotiate with BNSF. SCP's justification for its request is that the corridor would provide an excellent transportation and recreation trail, and conversion to a trail would be in accordance with the Stearns County Comprehensive Plan. SCP also states that the corridor provides important wildlife habitat and green space and that its preservation as a transportation and recreational trail is consistent with that goal. SCP states that the 180-day period is needed to review title information and transportation and recreation plans and to negotiate with BNSF. SCP also expressed its support for RTCB's request for the corridor to be preserved for a transportation and recreation trail.

The Board has determined that persons who request a NITU under the Trails Act may also seek a public use condition under 49 U.S.C. § 10905. See Rail Abans.—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986). When the requirements for both conditions are met, it is the Board's policy to impose them concurrently, subject to the execution of a trail use agreement. RTCB and SCP have met the public use criteria prescribed at 49 C.F.R. § 1152.28(a)(2) by specifying: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) the justification for the period of time requested. Accordingly, a 180-day public use condition will be imposed on the Line, commencing from the effective date of this decision and notice, to enable any state or local government agency or other interested person to negotiate the acquisition of the Line for public use. If a trail use agreement is reached on a portion of the right-of-way, BNSF must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, it should be noted that a public use condition is not imposed for the benefit of any one potential purchaser. Rather, it provides an opportunity for any interested person to negotiate to acquire a right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, BNSF is not required to deal exclusively with RTCB or SCP, but may engage in negotiations with other interested persons.

The parties should note that operation of the trail use and public use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. § 10904. As stated in Rail Abandonments, 2 I.C.C.2d at 608, an offer of financial assistance (OFA) to acquire rail lines for continued rail service or to subsidize rail operations takes priority over interim trail use/rail banking and public use. Accordingly, if an OFA is timely filed under 49 C.F.R. § 1152.27(c)(1), the effective date of this decision and notice will be postponed beyond the effective date indicated here. See 49 C.F.R. § 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. See 49 C.F.R. § 1152.27(f). Finally, if the Line is sold under the OFA procedures, the petition for abandonment exemption will be dismissed and trail use and public use precluded. Alternatively, if a sale under the OFA procedures does not occur, the trail use and public use processes may proceed.

It is ordered:

1. Under 49 U.S.C. § 10502, we exempt from the prior approval requirements of 49 U.S.C. § 10903 the abandonment by BNSF of the Line, subject to the employee protective conditions set forth in Oregon Short Line Railroad, 360 I.C.C. 91, and the conditions that BNSF shall: (1) consult with NGS at least 90 days before beginning any salvage activities that will disturb or destroy any geodetic station markers; (2) be prohibited from disposing of the corridor (other than tracks, ties, and signal equipment) and from removing or destroying potential trail-related structures (such as bridges, trestles, culverts, and tunnels) for a 180-day period from the effective date of this decision and notice to enable any state or local government agencies, or other interested person, to negotiate the acquisition of the Line for public use; and (3) comply with the interim trail use/rail banking procedures set forth below.
2. BNSF is directed to serve a copy of this decision and notice on Wenner, its last remaining customer on the Line, so that it is received within 5 days of the service date of this decision and notice, and to certify contemporaneously to the Board that it has done so.
3. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for the management of, any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and the payment of any and all taxes that may be levied or assessed against, the right-of-way.
4. Interim trail use/rail banking is subject to any future use of the property for restoration of railroad operations and to the user's continuing to meet the financial obligations for the right-of-way.
5. If interim trail use is implemented and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

6. If an agreement for interim trail use/rail banking is reached by November 16, 2011, interim trail use may be implemented. If no agreement is reached by that time, BNSF may fully abandon the Line, provided the conditions imposed above are met. See 49 C.F.R. § 1152.29(d)(1). If an interim trail use/rail banking agreement is executed before November 16, 2011, the public use condition will expire to the extent the trail use/rail banking agreement covers the same line.

7. An OFA under 49 C.F.R. § 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by May 27, 2011, subject to time extensions authorized under 49 C.F.R. § 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27(c)(1). Each OFA must be accompanied by the filing fee of \$1,500. See 49 C.F.R. § 1002.2 (f)(25).

8. 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.”**

9. Provided no OFA has been received, this exemption will be effective on June 19, 2011. Petitions to stay must be filed by June 6, 2011. Petitions to reopen must be filed by June 14, 2011.

10. Pursuant to the provisions of 49 C.F.R. § 1152.29(e)(2), BNSF shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the Line. If consummation has not been effected by BNSF’s filing of a notice of consummation by May 20, 2012, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.