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SERVICE DATE – LATE RELEASE DECEMBER 12, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-103 (Sub-No. 21X)

THE KANSAS CITY SOUTHERN RAILWAY COMPANY—ABANDONMENT  
EXEMPTION—LINE IN WARREN COUNTY, MS

STB Docket No. AB-1016X

VICKSBURG SOUTHERN RAILROAD, INC.—DISCONTINUANCE OF SERVICE  
EXEMPTION—LINE IN WARREN COUNTY, MS

Decided: December 12, 2007

By joint petition filed on August 24, 2007, The Kansas City Southern Railway Company (KCSR), a Class I rail carrier, and Vicksburg Southern Railroad, Inc. (VSOR), a Class III rail carrier, seek exemptions under 49 U.S.C. 10502 from the provisions of 49 U.S.C. 10903 for KCSR to abandon and VSOR to discontinue service over approximately 4.25 miles of rail line (the Line) in Vicksburg, Warren County, MS. The Line extends from milepost 225.6 (south of the Line's crossing of Warrenton Road and the intersection with Kemp Bottom Road) to milepost 229.85 (approximately 0.05 miles south of the Line's crossing of Glass Road, just beyond the Vicksburg city limits). Petitioners also seek exemptions from the offer of financial assistance (OFA) provisions of 49 U.S.C. 10904 and the public use provisions of 49 U.S.C. 10905. Pursuant to 49 U.S.C. 10502(b), the Board served and published a notice in the Federal Register on September 13, 2007 (72 FR 52430) instituting an exemption proceeding. A notice of intent to file an OFA was filed by Raymond B. English, the president of Foam Packaging, Inc. (Foam Packaging), the only active shipper on the Line. The Board will grant the exemptions from 49 U.S.C. 10903, subject to an environmental condition and standard employee protective conditions, but will deny the requests for exemptions from 49 U.S.C. 10904 and 49 U.S.C. 10905.

BACKGROUND

KCSR seeks to abandon, and VSOR seeks to discontinue service over, the southernmost 4.25 miles of a 6.85-mile stub-ended branch that extends from milepost 223.0 to milepost 229.85. VSOR, which leases the Line from KCSR, states that it is currently operating the Line at a loss and that the Line is in need of a significant amount of maintenance relative to the revenues earned from operations.

Petitioners also seek exemptions from sections 10904 and 10905 (financial assistance and public use provisions, respectively) because the City of Vicksburg (City) would like to use the

right-of-way for a recreational trail and because there are plans for a casino, golf course, public park facilities, and other commercial facilities to be built to the west of the Line, all of which are part of a collective development plan for 240 acres of land adjacent to the Mississippi River. The City filed a request for the issuance of a notice of interim trail use (NITU) under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and 49 CFR 1152.29, and KCSR has stated that it is willing to negotiate with the City. The intended developer of the casino<sup>1</sup> and the City have filed in support of the abandonment and discontinuance exemptions, as well as the requests for exemption from the financial assistance and public use provisions. The developer asserts that, if the Line remains in service, it is unlikely to proceed with the casino complex project, citing noise, vibration and aesthetic impacts, increased costs, and liability and decreased revenue concerns. The City asserts that the project will result in increased revenues and jobs for the area.

There is one current shipper on the Line, Foam Packaging, which receives about one railcar per week of polystyrene at a portable truck transfer facility<sup>2</sup> at approximately milepost 227.5. Foam Packaging does not oppose the petition for exemptions from section 10903,<sup>3</sup> but opposes petitioners' request for exemption from section 10904 as its president is interested in purchasing the Line via an OFA.

#### PRELIMINARY ISSUE

Mr. English has filed a motion to strike petitioners' October 2, 2007 response to Foam Packaging's September 12, 2007 comments, arguing that it is a reply to a reply prohibited under 49 CFR 1104.13(c). In the interest of having a complete record, however, we will accept and consider petitioners' October 2, 2007 filing.

#### DISCUSSION AND CONCLUSIONS

Petition for exemptions from regulation under section 10903. Under 49 U.S.C. 10903, a rail line may not be abandoned or service discontinued without prior approval from the Board. Under 49 U.S.C. 10502, however, we must exempt a proposed abandonment or discontinuance from regulation under section 10903 when we find that: (1) continued regulation is not necessary to carry out the transportation policy of 49 U.S.C. 10101; and (2) either (a) the

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<sup>1</sup> Both Lakes Entertainment, Inc., and Lakes Gaming–Mississippi, LLC, have made submissions to the Board as the developer of the project. Their corporate relationship is unclear.

<sup>2</sup> Although the materials that Foam Packaging receives by rail are transported by truck less than 1/2 mile from the receiving location to its facility, the Line is adjacent to Foam Packaging's property.

<sup>3</sup> In a filing submitted on October 2, 2007, Mr. English suggests that the Board consider instituting a rulemaking proceeding to amend 49 CFR 1152.60(d) to require a petitioner seeking an abandonment exemption to serve a copy of the petition on all users of the line to be abandoned. Although this is not the proper forum for such a request, if Mr. English wants to pursue the matter he may file a petition to institute a rulemaking proceeding under 49 CFR Part 1110.

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 this transaction under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of an abandonment and discontinuance application, exemptions will expedite regulatory decisions and reduce regulatory barriers to exit [49 U.S.C. 10101(2) and (7)]. Exemptions will also foster sound economic conditions and encourage efficient management by relieving petitioners of the cost of owning, maintaining, and serving the Line [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be affected adversely.

Regulation of the proposed transaction under 49 U.S.C. 10903 is not necessary to protect shippers from an abuse of market power. The sole shipper on the line, Foam Packaging, does not oppose the abandonment and discontinuance exemptions. Moreover, the record indicates that the shipper will have continued rail service in the future either through the purchase of the Line by its president or from KCSR at a nearby location. Given our market power finding, we need not determine whether the proposed abandonment and discontinuance is limited in scope.

Request for exemption from sections 10904 and 10905 and Mr. English's notice of intent to file an OFA. KCSR and VSOR have requested that the abandonment and discontinuance be exempted from the OFA provisions of 49 U.S.C. 10904 and the public use provisions of 49 U.S.C. 10905. In support, petitioners argue that continued rail service or a public use other than that proposed by the City would thwart the City's plan for a trail, casino, golf course and public park facilities. Petitioners also argue that granting these exemptions and allowing this project to go forward would bring numerous jobs to the area, increase city revenues, provide entertainment for Vicksburg residents and visitors, and improve public safety by removing five at-grade crossings. They additionally argue that, because Foam Packaging receives its freight at a portable truck transfer facility, the freight could be redirected to another relatively nearby receiving location at minimal increased costs. The City and the developer have separately filed in support of the exemptions from sections 10904 and 10905.

Mr. English opposes the request for exemption from the OFA provisions, arguing that Congressional intent would disfavor such an exemption where there is opposition and a notice of intent to file an OFA has been filed. Mr. English also argues that retaining the Line will not preclude building the casino complex, as urged by KCSR, VSOR, the City, and the developer, as the Line does not bisect the property upon which the casino complex will be situated, but instead is located wholly to the west of it.

The OFA provisions reflect a Congressional desire to preserve, whenever possible, any prospect for continuing or resuming rail freight service on corridors that would otherwise be abandoned. See Redmond-Issaquah R.R. Pres. Ass'n v. STB, 223 F.3d 1057, 1061-63 (9th Cir. 2000). While exemptions from 49 U.S.C. 10904 have been granted from time to time, they have

been granted when the right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service.<sup>4</sup>

Here, however, we find that Mr. English's notice of intent clearly offers the possibility of preserving an active rail line pursuant to the method prescribed by Congress, and petitioners have not justified exemption from the OFA process. First, it is well established that OFAs to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking.<sup>5</sup> Thus, the desire to establish a trail on the line does not justify an exemption from the OFA process here.

Moreover, we will not allow the possibility of continued rail service to be foreclosed based on the asserted prospect of potential benefits from the casino, golf course and park development project proposed near the line. Even if such a project could be considered to constitute the type of public use that might justify an exemption from the OFA process, we are not convinced that continued rail service would significantly interfere with such proposed development here in any event. Petitioners and the City claim that continued rail service will either pose a safety hazard to patrons of the proposed casino or will render the project prohibitively expensive due to the need to construct grade-separated crossings between the rail line and the road to the casino. The record shows, however, that the traffic amounts to 60 cars a year, barely one car a week. The claim that this level of traffic would burden the proposed development or pose a safety hazard is not credible.

Because we find no reasonable basis to undercut Congress's objective of providing an opportunity for maintaining rail service, petitioners' request for exemption from the OFA provisions at 49 U.S.C. 10904 will be denied and the OFA process will be allowed to proceed.<sup>6</sup> Finally, petitioners' request to be exempt from the public use provisions will be denied as moot because the deadline has passed and we have received no request for a public use condition.

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. Accordingly, as a condition to granting these exemptions, we will impose the employee protective conditions in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

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<sup>4</sup> Norfolk Southern Railway Company—Abandonment Exemption—In Norfolk and Virginia Beach, VA, STB Docket No. AB-290 (Sub-No. 293X), slip op. at 6 (STB served Nov. 6, 2007); see also CSX Transportation, Inc.—Abandonment—In Barbour, Randolph, Pocahontas, and Webster Counties, WV, STB Docket No. AB-55 (Sub-No. 500) (STB served Jan. 9, 1997) and 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).

<sup>5</sup> See Rail Abandonments—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 608.

<sup>6</sup> We note that petitioners have already responded to Mr. English's information request under 49 CFR 1152.27. Letter from petitioners' counsel to Mr. English dated October 18, 2007, and filed at the Board on October 22, 2007.

Trail use. As indicated, the City has submitted a request for issuance of a NITU for the Line under the Trails Act and 49 CFR 1152.29 in order to negotiate with KCSR for rail banking and interim recreational trail use of the right-of-way. The City has submitted a statement of willingness to assume financial responsibility for 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 CFR 1152.29. The City has also acknowledged that use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation for rail service (rail banking). As noted, KCSR has consented to negotiate with the City for interim trail use.

The City has satisfied the requirements for a NITU and, therefore, imposition of a NITU would be appropriate commencing with the effective date of the exemption. However, given our denial of the request for an exemption from the OFA provisions and Mr. English's filing of a notice of intent to file an OFA, it would be inappropriate to issue a NITU before the OFA process has been completed. If there is a sale of the Line under 49 U.S.C. 10904, a trail use condition would be unnecessary and unavailable. If there is no acquisition under the OFA provisions, the Board will address the NITU request at that time.

Environmental conditions. In the event that Mr. English does not acquire the Line through an OFA and there is no interim trail use under the Trails Act, KCSR will need to comply with environmental conditions before it can salvage the Line. KCSR and VSOR have submitted an environmental report with their petition and have served the appropriate Federal, state, and local agencies with a copy of that report as required by the Board's environmental rules. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, analyzed the probable effects of the proposed action on the quality of the human environment, and served an environmental assessment (EA) on October 23, 2007. In the EA, SEA recommended that no conditions be imposed on any decision granting abandonment authority.

Comments to the EA were due by November 23, 2007. A comment was received from Mr. Simon Monroe of the National Geodetic Survey (NGS) stating that approximately 20 geodetic survey markers may be located in the area of the proposed project. Accordingly, SEA recommends that, should abandonment authority be granted, KCSR be required to consult with NGS and notify NGS at least 90 days prior to beginning salvage activities that will disturb or destroy any geodetic station markers. We will impose the condition recommended by SEA. Based on SEA's recommendation, we conclude that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Mr. English's motion to strike is denied.
2. Under 49 U.S.C. 10502, we exempt KCSR and VSOR from the prior approval requirements of 49 U.S.C. 10903 for the abandonment and discontinuance of the above-

described line, subject to the employee protective conditions in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), and subject to the condition that KCSR shall consult with NGS and notify NGS at least 90 days prior to beginning salvage activities that will disturb or destroy any geodetic station markers.

3. Petitioners' request for exemption from the provisions of 49 U.S.C. 10904 is denied.
4. Petitioners' request for exemption from the provisions of 49 U.S.C. 10905 is denied as moot.
5. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by KCSR and the Board by December 21, 2007, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by the filing fee, which currently is set at \$1,300. See 49 CFR 1002.2(f)(25).

6. 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.”**

7. Provided no OFA has been received, this exemption will be effective on January 11, 2008. Petitions to stay must be filed by December 26, 2007, and petitions to reopen must be filed by January 2, 2008.

8. The request for issuance of a NITU is held in abeyance pending completion of the OFA process.

9. Pursuant to the provisions of 49 CFR 1152.29(e)(2), KCSR 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 KCSR's filing of a notice of consummation by December 12, 2008, 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 Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams  
Secretary