

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-290 (Sub-No. 236X)

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY
COMPANY—ABANDONMENT EXEMPTION—IN ROANE COUNTY, TN

Decided: December 1, 2005

By petition filed on August 15, 2005, The Cincinnati, New Orleans and Texas Pacific Railway Company (CNOTP), a wholly owned subsidiary of Norfolk Southern Railway Company, seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon approximately 1.1 miles of railroad, extending from milepost 156.9-H to milepost 158.0-H in Rockwood, Roane County, TN (the line). In addition to an exemption from 49 U.S.C. 10903, CNOTP seeks exemption from the offer of financial assistance (OFA) and public use provisions at 49 U.S.C 10904 and 49 U.S.C. 10905, respectively.

Notice of the filing was served and published in the Federal Register on September 2, 2005 (70 FR 52482-83). The deadline for replies to the petition was September 22, 2005. On October 28, 2005, Horsehead Corp. (HC) filed a petition to intervene and a reply in “conditional opposition” to the petition. On November 17, 2005, CNOTP filed a letter responding to HC’s petition and reply. On November 18, 2005, HC filed a letter responding to CNOTP’s response.

PRELIMINARY MATTER

In its November 17, 2005 filing, CNOTP states that it does not oppose HC’s intervention in this proceeding. Accordingly, and in the interests of a more complete record, we will allow HC’s intervention and accept its pleading into the record. For the same reason, we will accept HC’s November 18, 2005 filing.

BACKGROUND

CNOTP seeks to abandon the line in order to facilitate the sale of the track to Franklin Industries, Inc. (Franklin), for use as part of Franklin’s existing 15.4-mile private industrial track

that serves its facility at Crab Orchard, TN.¹ The line connects Franklin's private industrial track to CNOTP's main line at the Rockwood station.

CNOTP states that, after Franklin acquires the track, CNOTP will continue to use it under an agreement with Franklin to interchange traffic with both Franklin and HC. HC is located off the line at Rockwood. HC has its own locomotive and can provide switching for service to its facility. CNOTP states that an arrangement exists whereby HC will continue to receive rail service in the event Franklin ceases its operation.

There are no other shippers on the line and there is no overhead or other local traffic. According to CNOTP, there is little or no potential, or space, for additional industrial development. Finally, CNOTP submits that abandonment authority is warranted because Franklin's use of the line will be more efficient and economical.

In its reply, HC states that its negotiations with CNOTP and Franklin were conducted by local employees who were unfamiliar with Board procedures. Only after a draft agreement regarding the abandonment proposal reached HC senior management and corporate counsel did HC become aware that the deadline for filing replies had passed. HC states that no formal agreement exists among CNOTP, Franklin, and HC that ensures continued rail service for HC's Rockwood facility. Accordingly, HC states that it opposes the abandonment unless such an agreement is put in place. HC states that it would drop its opposition to the petition if the parties agreed upon suitable contractual provisions to protect it.

In response, CNOTP states that it filed its petition under the belief that an agreement was reached. It now understands HC's position and states that the parties are working toward a formal agreement, but that it would be difficult to produce a finalized contract prior to the December 2, 2005 deadline for Board action on this petition. CNOTP requests that the Board grant its petition conditioned upon CNOTP being precluded from consummating the abandonment and transferring the line to Franklin until an agreement fully protecting HC's interests is agreed to by the parties. HC, by its letter filed on November 18, 2005, concurs with this request.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without our prior approval, based on our finding that the present or future public convenience and necessity require or permit the abandonment. Under 49 U.S.C. 10502, however, we exempt a transaction or service from the otherwise applicable regulatory requirements or procedures when we find that: (1) those requirements or procedures are not necessary to carry out the rail transportation policy of

¹ Franklin acquired its existing track, which was formerly the Crab Orchard Line, from CNOTP after the carrier abandoned the line in 2000. See The Cincinnati, New Orleans and Texas Pacific Railway Company—Abandonment Exemption—in Cumberland and Roane Counties, TN, STB Docket No. AB-290 (Sub-No. 208X) (STB served Nov. 15, 2000).

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.

Petitioner does not attempt to justify its proposal based on its losses incurred operating the line. Rather its case is based on the proposition that there is no need for it to continue operations over the line because no shipper would lose any service it required.

HC has expressed opposition to the abandonment exemption and exemption from the OFA and public use provisions. HC asserts that, contrary to the assertions in CNOTP's petition, the shipper has not reached a final agreement with CNOTP and Franklin regarding continued rail service to HC's Rockwood facility.

CNOTP admits that it has no agreement with HC but that the carrier is attempting to finalize an agreement that would provide for continued service to HC. CNOTP requests that the Board nonetheless grant its petition subject to a condition that CNOTP not consummate abandonment until provision has been made for service to HC.

This proceeding is subject to a deadline established by Congress. The Board has 110 days from the date of filing a petition or application for abandonment to issue a decision on the merits. See Aban. and Discon. of R. Lines and Transp. Under 49 U.S.C. 10903, 1 S.T.B. 894 (1996) and 2 S.T.B. 311, 313 (1997), aff'd, Nat'l Ass'n of Reversionary Prop. Owners v. STB, 158 F.3d 135 (D.C. Cir. 1998); 49 CFR 1152.27(b)(2). Congress has made clear that carriers that believe they are burdened by unprofitable lines should be able to seek their abandonment promptly. The 110-day deadline challenges parties protesting abandonments to prepare and submit their evidence and arguments soon after the petition or application is filed. Equity demands that the same deadlines apply to the carriers. We have rejected attempts by carriers to rehabilitate inadequate presentations and have denied the sought abandonments in those cases, thus requiring the carriers to submit new filings that can be adjudicated in 110 days. See San Pedro Operating Company, LLC—Abandonment Exemption—In Cochise County, AZ, STB Docket No. AB-441 (Sub-No. 4X), slip op. at 5 (STB served Sept. 15, 2005); Boston and Maine Corporation—Abandonment Exemption—In Hartford and New Haven Counties, CT, STB Docket No. AB-32 (Sub-No. 75X) et al., slip op. at 5-6 (STB served Dec. 31, 1996). The carrier controls the presentation of its case and we expect that submissions to be sufficient to permit us to decide the petition or application within 110 days.

CNOTP recited that its petition was unopposed. When HC belied that representation by filing a protest, the petitioner proposed not a solution but rather a new procedure to give it more time to attempt do something it could have and should have accomplished before it filed its petition. We have resisted attempts to circumvent the 110-day deadline in the past and we see no reason to depart from that practice here even though HC has consented to the proposed procedure. Neither Board regulations nor precedent provide for such a conditional abandonment. CNOTP's petition for an abandonment exemption will be denied.

Denial of this petition is without prejudice to CNOTP's refiling an appropriate petition or application. Such a filing must contain all the relevant evidence to make its case and may include a final agreement between CNOTP, Franklin and HC regarding rail service for HC.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. HC's late-tendered reply in opposition is accepted for filing.
2. CNOTP's petition for exemption is denied without prejudice to its filing an application or a properly supported petition for exemption to abandon this line.
3. This decision is effective on the date of service.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary