

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 290 (Sub-No. 286)

NORFOLK SOUTHERN RAILWAY COMPANY—ADVERSE  
ABANDONMENT—ST. JOSEPH COUNTY, IND.

Digest:<sup>1</sup> This decision grants a petition to reopen this proceeding and also grants the underlying application seeking the adverse abandonment of two rail lines, subject to an environmental condition and labor protective conditions.

Decided: April 16, 2012

On September 13, 2011, the City of South Bend, Ind. (the City), the Brothers of Holy Cross, Inc. (the Brothers), the Sisters of the Holy Cross, Inc. (the Sisters), and Holy Cross Village at Notre Dame (the Village) (collectively, Petitioners) filed a joint petition asking the Board to reopen this proceeding and authorize the adverse abandonment of two Norfolk Southern Railway Company (NSR) rail lines in St. Joseph County, Ind. (the Lines). The Board denied the application for adverse abandonment in a decision served on February 14, 2008. The Board also denied a prior petition to reopen in a decision served on August 27, 2008. We now grant the new petition to reopen and also grant the underlying application seeking adverse abandonment of the two NSR rail lines, subject to two conditions.

BACKGROUND

On November 21, 2006, the City, the Brothers, and the Sisters (collectively, Applicants)<sup>2</sup> filed an application for adverse abandonment of the Lines, which total approximately 3.7 miles in length. The Lines are composed of the UV line and the ZO line. The UV line extends 2.8 miles between milepost UV 0.0 and milepost UV 2.8, where it connects with the ZO line. The ZO line extends 0.9 miles to the north from milepost UV 2.8 onto the Sisters' property, where it connects at milepost ZO 9.6 to an industrial spur. The spur extends easterly onto the campus of

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

<sup>2</sup> The Village was not an applicant in the initial application, see Application at 3, but has since joined Applicants in their petition to reopen this proceeding. For that reason, this decision distinguishes between “Petitioners” (the four named parties who filed the petition to reopen) and “Applicants” (the three named parties who filed the underlying application).

the University of Notre Dame (the University), where there is an inactive rail station, and terminates at the University's on-campus, coal-fired power plant. NSR currently delivers coal to a transload facility in the South Bend area for delivery by truck to the University's power plant.

In their application, Applicants stated that there had been no rail service on the Lines since the mid-1990's, that there was no current or future need for rail service, and that the rights-of-way were needed for various public and private purposes. By decision dated February 14, 2008, the Board concluded that the public interest would be best served by denying the application. Considering the record before it at that time, the Board found that there was a railroad, the Chicago, Lake Shore & South Bend Railway Company (CLS&SB), willing to operate the Lines,<sup>3</sup> and at least one shipper, the University, that was capable of receiving coal over the Lines. The Board noted, however, that its decision was "without prejudice to Applicants' seeking to reopen or file a new abandonment application, should the line transfer, rehabilitation, and restoration of operations not occur within a reasonable period of time." Norfolk S. Ry.—Adverse Aban.—St. Joseph Cnty., Ind., AB 290 (Sub-No. 286), slip op. at 7 (STB served Feb. 14, 2008).

Subsequently, on March 28, 2008, the City, the Brothers, and the Sisters filed a petition to reopen the proceeding on the basis of new evidence. Specifically, they submitted a letter addressed to the Board, dated March 26, 2008, from the University's Executive Vice President, reiterating that the University did not have a need for future rail service and stating that the University did not believe that renewed rail service would be in its or the community's best interests. The Board, with one member in dissent, denied the petition to reopen by a decision served on August 27, 2008, finding that the letter did not constitute new evidence under 49 U.S.C. § 722 and that there was still a reasonable potential for future railroad use of the Lines. Norfolk S. Ry.—Adverse Aban.—St. Joseph Cnty., Ind., AB 290 (Sub-No. 286), slip op. at 3, 4 (STB served Aug. 27, 2008).<sup>4</sup> In its decision, however, the Board again stated that, should the transfer, rehabilitation, and restoration of rail operations not occur within a reasonable time period, or should traffic fail to develop, Applicants could again seek to reopen the proceeding or file a new abandonment application.<sup>5</sup>

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<sup>3</sup> On November 20, 2006, CLS&SB filed a verified notice of exemption pursuant to 49 C.F.R. § 1150.31, invoking a class exemption to acquire and operate 3.2 miles of the Lines. The Board stayed the effectiveness of the exemption shortly after the notice was filed, and later lifted the stay on the same day it denied the adverse abandonment application. Chicago, Lake Shore & S. Bend Ry.—Acquis. & Operation Exemption—Norfolk S. Ry., FD 34960, slip op. at 2 (STB served Feb. 14, 2008). Although lifting the stay allowed the exemption to become effective, the authority conferred to CLS&SB was permissive, and CLS&SB never consummated the transaction described in the notice of exemption.

<sup>4</sup> Vice Chairman Mulvey dissented from the majority's decision. Id. at 5-6.

<sup>5</sup> Applicants sought judicial review of the Board's decisions served on February 14, 2008 and August 27, 2008, before the United States Court of Appeals for the District of Columbia Circuit. The court denied the petitions for review in City of South Bend v. STB, 566 F.3d 1166 (D.C. Cir. 2009).

Petitioners have now filed a joint petition to reopen this proceeding. On October 3, 2011, NSR submitted a letter stating that it does not object to the relief now sought by Petitioners in this particular case. CLS&SB did not file a response to the most recent petition to reopen, but on October 4, 2011, Petitioners submitted a letter to the Board representing that CLS&SB has no further interest in the Lines.

## DISCUSSION AND CONCLUSIONS

### Petition to Reopen

Pursuant to 49 C.F.R. § 1115.4, we will grant a petition to reopen upon a showing that the proceeding involves material error, new evidence, or substantially changed circumstances. Petitioners argue that reopening the proceeding is warranted because no evidence of reasonable potential for future rail use has materialized and the Lines have still not been transferred, rehabilitated, or restored to service. More specifically, Petitioners note that: (1) the University still does not intend to utilize the Lines in the future; (2) based on a survey of other businesses on the Lines, there is still no other current or future need for rail service; (3) NSR has no plans to sell or rehabilitate the Lines, or to restore rail service; and (4) CLS&SB has not reinstated service and in fact has no further interest in the Lines.

We agree with Petitioners that reopening is now warranted in this case. A reasonable period of time has passed since the Board's decisions in 2008 without the transfer or rehabilitation of the Lines, or the restoration of operations. More importantly, we have been informed that CLS&SB is no longer interested in the Lines, which amounts to substantially changed circumstances. See, e.g., Fl. Dept. of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35110 (STB served June 22, 2011) (to warrant reopening for changed circumstances, there must be a changed circumstance that could materially affect the prior decision); Pioneer Indus. Ry.—Alternative Rail Serv.—Cent. Ill. R.R., FD 34917 (STB served Jan. 12, 2007) (reopening granted after the only shipper on a rail line changed position and opposed the discontinuance of rail service, which could materially affect the Board's analysis). To address these changed circumstances, we will grant the petition to reopen this proceeding and reconsider the adverse abandonment application.

### Application for Adverse Abandonment

Pursuant to 49 U.S.C. § 10903(d), the standard governing any application for authority to abandon a line of railroad is whether the present or future public convenience and necessity (PC&N) require or permit the proposed abandonment. In applying this standard in an adverse abandonment context, we consider whether there is a present or future public need for rail service over the line and whether that need is outweighed by other interests. See City of Chicago, Ill.—Adverse Aban.—Chicago Terminal R.R. in Chicago, Ill., AB 1036, slip op. at 3 (STB served June 16, 2010). As part of our PC&N analysis, we must also consider whether the proposed abandonment would have a serious, adverse impact on rural and community development. 49 U.S.C. § 10903(d).

We have exclusive and plenary jurisdiction over rail abandonments in order to protect the public from an unnecessary discontinuance, cessation, interruption, or obstruction of available rail service. See Modern Handcraft, Inc.—Aban., 363 I.C.C. 969, 972 (1981). Accordingly, we typically preserve and promote continued rail service where a carrier has expressed a desire to continue operations and has taken reasonable steps to acquire traffic. But we do not allow our jurisdiction to be used to shield a line from the legitimate processes of state law where no overriding federal interest exists. See Minn. Comm. Ry.—Adverse Discontinuance—In Ramsey County, Minn., AB 882, slip op. at 3 (STB served July 16, 2008) (citations omitted). In an adverse abandonment case, if we conclude that the PC&N does not require or permit continued rail operations over a line, our decision removes the shield of our jurisdiction, thus enabling the applicant to pursue other legal remedies to force the carrier off the line. Id.; see also Modern Handcraft, Inc., 363 I.C.C. at 972.

### 1. PC&N Analysis

Applying these principles, we find, after balancing the relevant factors, that the present and future PC&N support the requested adverse abandonment. It is now clear that there are no shippers who desire service on the Lines. NSR, the affected rail carrier, does not object to the adverse abandonment in this case. Furthermore, the record indicates that CLS&SB, a rail carrier who was previously willing to carry traffic over the Lines, no longer has an interest in the Lines.

In sum, there is no present need for rail service on the Lines. Rail service is not currently provided on the Lines, and has not been provided since the mid-1990s. A survey of businesses located to the west and south of the St. Joseph River indicates that all of these businesses disclaim a need for present rail service and support abandonment of the Lines.<sup>6</sup> The University, which is located east of the river, also disclaims a need for present rail service.<sup>7</sup>

Nor is there a need or potential for future renewed rail operations. The aforementioned businesses located on the Lines disclaim a need for future rail service, as does the University, which was previously identified by the Board in its August 2008 decision as a potential shipper that might benefit from the renewal of rail service in the future. The Board’s conclusion in that decision, however, was premised on there being a carrier “eager to restore service” on the Lines, which is now no longer the case. Even in the unlikely event that some demand for freight rail service were to materialize at some point in the future, shippers on the Lines would have sufficient alternative transportation options. The University currently receives its coal shipments from NSR via trucking from the transloading facility, and it attests that these arrangements will continue to satisfy its transportation needs in the future.<sup>8</sup> The other businesses currently located along the Lines to the west and south of the St. Joseph River ship or receive traffic via trucking.<sup>9</sup>

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<sup>6</sup> V.S. Schalliol ¶¶ 2, 6.

<sup>7</sup> V.S. Affleck-Graves ¶¶ 1, 4-6.

<sup>8</sup> Id. ¶ 4.

<sup>9</sup> Joint Pet. to Reopen, Attach. 2.

Further, there are no industries within the city limits east of the river that would require future rail service because that area is zoned residential.<sup>10</sup>

In adverse abandonment cases, we also weigh whether the abandonment would serve the public interest.<sup>11</sup> In its application and supplement to the joint petition to reopen, the City states that it plans to acquire the right-of-way for public use, specifically for a bicycle and pedestrian trail.<sup>12</sup> Acquisition of the Lines would also allow the City to improve safety and to repave all of the streets and sidewalks over which the tracks cross, which would improve the roadways and facilitate snow removal in the winter months.<sup>13</sup> The benefits that these public projects would bring weigh in favor of granting the proposed abandonment under the circumstances presented here.

Under 49 U.S.C § 10903(d), we must also consider whether the abandonment would have a serious, adverse impact on rural and community development. Given that there is no foreseeable demand for freight rail service on the Lines, removing the Lines from the interstate rail system would not adversely impact rural and community development. In fact, the proposed abandonment would help foster community development, by allowing the City to move forward with the public uses identified above and by allowing the Brothers, the Sisters, and the Village to develop and use their property as they see fit.<sup>14</sup>

For these reasons, we conclude upon reconsideration that a balancing of the relevant factors now favors granting the application for adverse abandonment in this case.

## 2. Environmental Matters

The Board is also required to consider the potential environmental impacts of the proposed abandonment. The City submitted a combined environmental and historic report with its application in 2006, and notified the appropriate federal, state, and local agencies of the opportunity to submit information concerning the environmental impacts of the proposed abandonment.<sup>15</sup> See 49 C.F.R. § 1105.11. The Board's Office of Environmental Analysis

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<sup>10</sup> V.S. Schalliol ¶ 3.

<sup>11</sup> See, e.g., Consol. Rail Corp. v. ICC, 29 F.3d 706, 712 (D.C. Cir. 1994) (“the position of [the public agencies] in favor of abandonment was strong evidence that abandonment would serve the public interest because it would permit the possible development of other public projects”); Norfolk & W. Ry.—Aban. Exemption—In Cinn., Hamilton Cnty., Ohio, 3 S.T.B. 110, 118-20 (1998) (“[Board] will allow the displacement of rail service by other public purposes where the public interest justifies that end.”).

<sup>12</sup> Application, Attach. F, V.S. Laurent ¶ 12; Supplement to Joint Petition at 2-3.

<sup>13</sup> Application at 11; Id. Attach. F., V.S. Laurent ¶¶ 9, 11-12.

<sup>14</sup> Joint Pet. to Reopen at 17-22.

<sup>15</sup> Application, Attach. E.

(OEA)<sup>16</sup> examined the environmental and historic report, verified its data, and analyzed the probable effects of the proposed action on the quality of the human environment. OEA served an Environmental Assessment (EA) for this adverse abandonment proceeding on December 22, 2006, for public review and comment. In the final EA, dated February 1, 2007, OEA recommended one environmental condition to address the Section 106 process of the National Historic Preservation Act, 16 U.S.C. § 470f, and concluded that, with that condition, the proposed action would not significantly impact the quality of the human environment. As previously noted, however, after OEA completed the final EA, the Board denied the adverse abandonment application in its decision served on February 14, 2008.

On January 11, 2012, after filing the joint petition to reopen this adverse abandonment proceeding, Petitioners filed a supplement to the joint petition stating that, in their view, the environmental information submitted with the application has not materially changed. Additionally, Petitioners sent a letter dated January 10, 2012, to all of the environmental consulting agencies, providing an update on the status of the proceeding and requesting any additional comments. Additional comments were received from four agencies.

The United States Department of Agriculture, Natural Resources Conservation Service in Indianapolis, Ind., states that the proposed adverse abandonment of the Lines will not cause a conversion of prime farmland.

The Department of the Army Corps of Engineers (Corps) indicates that, based upon a recent field inspection and review of the applicable National Wetland Inventory Maps, the Lines cross wetlands subject to Corps jurisdiction. The Corps has determined, however, that all potential wetlands are located below the raised bed of the Lines and/or are crossed by existing bridges, and that salvage activities restricted within the limits of the existing raised bed would not require Corps authorization.

The South Bend and St. Joseph County Historic Preservation Commission (SBHC) states that, other than a landmarked steel girder railroad bridge crossing the St. Joseph River near Angela Boulevard, there are no historic sites or structures of interest within the area of potential effects. SBHC has determined that the removal of tracks from the bridge would not have an adverse effect on that structure.

Finally, the Indiana Department of Natural Resources, Division of Historic Preservation and Archaeology (SHPO) has identified several buildings and structures within the probable area of potential effects that are on or may meet the criteria of eligibility for inclusion in the National Register of Historic Places (National Register). The SHPO has determined, however, that the proposed abandonment and related salvage activities would not result in any alterations to the characteristics of those properties.

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<sup>16</sup> OEA was formerly the Section of Environmental Analysis (SEA). For convenience, we refer only to OEA in this decision.

With respect to archaeological resources, the SHPO indicates that a prehistoric site is located within the proposed project area and appears potentially eligible for inclusion in the National Register. It does not appear to the SHPO, however, that abandonment or related salvage activities would affect the site. The SHPO recommends that any portions of the site outside or under the Lines be avoided during salvage and not be subjected to further archaeological investigations. Additionally, the SHPO states that, if any archaeological artifacts or human remains are uncovered during salvage activities, state law requires that the discovery be reported to the SHPO within two (2) business days. OEA therefore recommends that the Section 106 condition originally recommended in 2007 be modified and replaced with a new condition to address the SHPO's concerns regarding the archaeological sites and artifacts in the project area.

We will impose the new condition recommended by OEA, which is set forth in ordering paragraph 2 below. Based on the complete environmental record in this proceeding, 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.

### 3. Labor Protection

In approving this application, we must ensure that affected rail employees will be adequately protected. See 49 U.S.C. § 10903(b)(2). Therefore, we will impose the 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).

### 4. Offers of Financial Assistance, Public Use, and Trail Use

Before the application was filed, the Board granted various waivers and exemptions requested by Applicants. Norfolk S. Ry.—Adverse Aban.—St. Joseph Cnty., Ind., AB 290 (Sub-No. 286) (STB served Oct. 26, 2006). Among these were an exemption from 49 U.S.C. § 10904 and waiver of the related regulations at 49 C.F.R. § 1152.27, governing offers of financial assistance (OFA). The Board also granted an exemption from the public use provisions of 49 U.S.C. § 10905 and waiver of the related regulations at 49 C.F.R. § 1152.28.

With respect to Applicants' request for waiver of the trail use provisions of 49 C.F.R. § 1152.29, the Board denied Applicants' petition at that time. Because trail use requests were due by January 5, 2007, see 71 Fed. Reg. 71609 (Dec. 11, 2006), however, and no requests were filed, Applicants' request for a waiver is now moot. Accordingly, we will not entertain OFA, public use, or trail use requests in this proceeding.

#### It is ordered:

1. The petition to reopen this proceeding is granted.
2. The application for adverse abandonment is granted, subject to the employee protective conditions in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979), and

subject to the condition that Applicants shall, prior to conducting any salvage activities, ensure that prehistoric site 12Sj3 is not adversely impacted by abandonment and related salvage activities. In the event that any unanticipated archaeological sites, human remains, funerary items or associated artifacts are discovered during salvage activities, Applicants must immediately cease all work and notify OEA and the SHPO pursuant to 36 C.F.R. § 800.13(b). OEA shall then consult with the SHPO, Applicants, and other consulting parties, if any, to determine whether appropriate mitigation measures are necessary.

3. Applicants are directed to serve a copy of this decision on CLS&SB and NSR within 5 days of the service date of this decision, and certify to the Board that they have done so.

4. This decision will be effective 15 days from its date of service.

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