

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 1074X

LASSEN VALLEY RAILWAY, LLC—ABANDONMENT EXEMPTION—IN WASHOE COUNTY, NEV. AND LASSEN COUNTY, CAL.

Digest:<sup>1</sup> This decision allows Lassen Valley Railway, LLC (LVR) to end its responsibility to provide rail service over a 21.77-mile line of railroad extending from Washoe County, Nev., to Lassen County, Cal. It also requires LVR to keep certain railroad structures in place and sets a time period for LVR to negotiate with parties interested in turning the rail line into a recreational trail.

Decided: August 5, 2011

By petition filed on April 20, 2011, Lassen Valley Railway, LLC (LVR) seeks an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10903 to abandon a 21.77-mile line of railroad extending from milepost 338.33 near Flanigan, Washoe County, Nev., to milepost 360.10 near Wendel, Lassen County, Cal. (the Line). Notice of the filing was served and published in the Federal Register on May 10, 2011 (76 Fed. Reg. 27,173) (May 10, 2011 Notice). The Lassen County Board of Supervisors (Lassen County) requests that the Board deny the petition. American Trails Association, Inc. (ATA) filed a request for issuance of a notice of interim trail use (NITU) to provide time to negotiate trail use/rail banking. We will grant the exemption, subject to interim trail use, an environmental condition, standard employee protective conditions, and a historic preservation condition, as set forth below.

BACKGROUND

The Line was acquired by LVR from Union Pacific Railroad Company (UP) pursuant to a notice of exemption in Lassen Valley Railway—Acquisition and Operation Exemption—Union Pacific Railroad, FD 35306 (STB served Dec. 3, 2009). UP had been authorized to abandon the line pursuant to a decision in Union Pacific Railroad—Abandonment Exemption—in Lassen County, Cal. and Washoe County, Nev., AB 33 (Sub-No. 230X) (STB served Jan. 26, 2007). LVR states that no revenue freight has moved on the Line since 2004.

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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).

LVR became involved with the Line after Lassen County asked UP to defer abandoning the Line so that Lassen County could come up with financing to acquire the Line in order to preserve it as an active line of railroad. LVR states that it advised Lassen County that it would be interested in buying the Line and operating it as an active line of railroad for at least 1 year's time. LVR states that, when it acquired the Line, it had 2 potential shippers, HL Power Company (HL Power) and Mr. Vincent P. Estell, each approximately 2 miles from the Line. LVR states that, since its acquisition of the Line, neither HL Power nor Mr. Estell installed the necessary connecting track for LVR to serve them. According to LVR, neither potential shipper has used LVR's services for in-bound or out-bound traffic, nor has any traffic moved on the Line since LVR was authorized to acquire it in 2009.

LVR states that, in January 2011, it sent a letter to HL Power and Mr. Estell requesting an update on their operations and need for rail service. According to LVR, it did not receive a response from either entity. LVR states that, in February 2011, it sent another letter to HL Power and Mr. Estell and again did not receive a response from either entity.

On April 12, 2011, Lassen County filed a letter requesting that the petition for abandonment exemption be denied. Lassen County states that it expects an industrial use for the Line in the foreseeable future, although it does not offer a timeframe or give any details regarding what type of traffic it expects.

#### DISCUSSION AND CONCLUSIONS

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 here. The 2 potential shippers lack physical access to the Line and, according to LVR, have not expressed a need for rail service. While Lassen County has asked that the line continue to be maintained by LVR, it has not proposed any measures that would facilitate the reinstatement of any active shippers on the line. Lassen County asserts that it is pursuing development of industrial activity in the vicinity of the Line, but we have no indication of when industrial activity may result in a demand for rail service. By allowing LVR to avoid the cost of owning and maintaining a line that has not been used since 2004 and has no apparent prospects of future traffic, an exemption will foster sound economic conditions and encourage efficient management of rail operations, as contemplated under 49 U.S.C. § 10101(5) and (9). By minimizing the administrative expense of the application process, an exemption will also reduce regulatory barriers to exit. 49 U.S.C. § 10101(7). Other aspects of the rail transportation policy will not be affected adversely.

Further, we find that regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power because, as discussed above, there has been no traffic

on the line for the past 7 years and there is no evidence of demand for rail service in the foreseeable future. Thus, no impact on any shippers can be anticipated from the abandonment. Nevertheless, LVR must serve a copy of this decision on HL Power and Mr. Estell within 5 days after the service date of this decision. 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 employees. Accordingly, as a condition to granting the exemption, we will impose the 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. LVR has submitted a combined environmental and historic report with its petition and has 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 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 July 7, 2011, recommending that 2 conditions be imposed on any decision granting abandonment authority. In the EA, OEA states that the National Geodetic Survey (NGS) identified 12 geodetic station markers located in the area of the proposed abandonment. Therefore, OEA recommends LVR be required to consult with NGS at least 90 days before beginning any salvage activities that will disturb or destroy any geodetic station markers.

LVR served the historic report on the California Office of Historic Preservation, Department of Parks and Recreation (California SHPO) and the Nevada Department of Cultural Affairs, State Historic Preservation Office (Nevada SHPO). The California SHPO, in a letter dated April 26, 2011, concluded that there will be no historic properties affected by the proposed abandonment. However, by letter dated March 23, 2011, the Nevada SHPO noted that it had not yet received sufficient information to make such a determination. Therefore, OEA recommends that LVR be required to retain its interest in, and take no steps to alter the historic integrity of all historic properties located in Nevada, including sites, buildings, structures, and objects within the project right-of-way (the Area of Potential Effect) that are eligible for listing or listed in the National Register of Historic Places (National Register), until the Section 106 process of the National Historic Preservation Act, 16 U.S.C. § 470(f) (NHPA), has been completed. OEA recommends that LVR be required to report back to OEA regarding any consultations it has with the Nevada SHPO and the public. LVR may not file its consummation notice or initiate any salvage activities related to abandonment in the Nevada (including removal of tracks and ties) until the Section 106 process has been completed and the Board has removed this condition.

No comments to the EA were filed by the due date (July 18, 2011). Accordingly, we will impose the conditions recommended by OEA in the EA. Based on OEA'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.

Interim trail use. On July 12, 2011, ATA late-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, so that it could negotiate with LVR for acquisition of the right-of-way for trail use and rail banking.<sup>2</sup> ATA has submitted a statement of willingness to assume full financial 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 under 49 C.F.R. § 1152.29. ATA has acknowledged that use of the right-of-way is subject to possible future reconstruction and reactivation of the Line for rail use. By letter dated July 14, 2011, LVR states that it is willing to negotiate with ATA regarding a trail use agreement.

Because ATA's request complies with the requirements of 49 C.F.R. § 1152.29 and LVR is willing to enter into interim trail use negotiations, a NITU will be issued. 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, LVR 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.

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 LVR of the above-described line, subject to the employee protective conditions set forth in Oregon Short Line Railroad, 360 I.C.C. 91 (1979), and subject to the conditions that LVR shall: (1) consult with NGS at least 90 days before beginning any salvage activities that will disturb or destroy any geodetic station markers; (2)(a) retain its interest in, and take no steps to alter the historic integrity of, all historic properties located in Nevada, including sites, buildings, structures, and objects within the project right-of-way that are eligible for listing or are listed in the National Register, until the section 106 process of the NHPA has been completed, (b) report back to OEA regarding any consultations it has with the Nevada SHPO and the public, and (c) not file its consummation notice or initiate any salvage activities related to abandonment in Nevada (including removal of tracks and ties) until the Section 106 process has been completed and the Board has removed this condition; and (3) comply with the interim trail use/rail banking procedures set forth below.

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<sup>2</sup> The May 10, 2011 Notice established May 31, 2011, as the deadline for filing trail use/rail banking requests. ATA's late-filed submission will be accepted because it has not delayed this proceeding, and LVR does not object.

2. LVR is directed to serve a copy of this decision and notice on HL Power and Mr. Estell 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 trail sponsor's continuing to meet the financial obligations for the right-of-way.

5. If interim trail use is implemented and subsequently the trail sponsor 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 February 4, 2012, interim trail use may be implemented. If no agreement is reached by that time, LVR may fully abandon the Line, provided the conditions imposed above are met. See 49 C.F.R. § 1152.29(d)(1).

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 August 18, 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 a \$1,500 filing fee. 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 to subsidize rail service has been received, this exemption will be effective on September 7, 2011. Petitions to stay must be filed by August 23, 2011. Petitions to reopen must be filed by September 2, 2011.

10. Pursuant to the provisions of 49 C.F.R. § 1152.29(e)(2), LVR 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 LVR's filing of a notice of consummation by August 8, 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.