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SERVICE DATE – JANUARY 16, 2009

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-290 (Sub-No. 305X)

NORFOLK SOUTHERN RAILWAY COMPANY—ABANDONMENT EXEMPTION—
IN SOMERSET COUNTY, PA

Decided: January 13, 2009

By petition filed on October 2, 2008, Norfolk Southern Railway Company (NSR) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon an approximately 1.80-mile line of railroad known as the South Fork Industrial Track, extending between milepost QS 14.40 and milepost QS 16.20 in Somerset County, PA. Notice of the filing was served and published in the Federal Register on October 22, 2008 (73 FR 63053). NSR also seeks exemption 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. We will grant the exemption from 49 U.S.C. 10903, subject to standard employee protective conditions, but will deny the request for exemption from 49 U.S.C. 10904 and 49 U.S.C. 10905.

BACKGROUND

NSR states that it recently returned this 1.80-mile line of railroad to service after a period of dormancy of over 6 years. According to NSR, only traffic from Rosebud Mining Company (Rosebud) moves over the line; NSR serves no other customer on the line. Following abandonment, NSR intends to convey the line to Rosebud for use in its operations as a private track. NSR states that incorporating the line into the operations of Rosebud should lead to more efficient and economical operation of the track.

NSR also seeks exemption from sections 10904 and 10905 to facilitate its planned conveyance of the line to Rosebud. Petitioner contends that the line is not suitable for public use and should not be subject to OFAs or public use conditions. Petitioner attaches a letter of support from Rosebud. No one has filed in opposition to the proposed abandonment.

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. By minimizing the administrative expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will also foster sound economic conditions and encourage efficient management by allowing NSR to avoid the cost of owning, maintaining and servicing 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 is not necessary to protect shippers from an abuse of market power. Rosebud, the only active shipper on the line, supports the abandonment proposal and seeks to purchase the line for use as private track. Nevertheless, to ensure that Rosebud is informed of the Board's action, NSR will be required to serve a copy of this decision on Rosebud within 5 days of its service date and certify 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.

Exemption from Section 10904. Exemptions from the OFA process at 49 U.S.C. 10904 have been granted from time to time, when the right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service. See, e.g., Union Pacific R.R. Co.—Abandonment Exemption—In Pima County, AZ, STB Docket No. AB-33 (Sub-No. 141X) (STB served Feb. 16, 2000). Here, NSR has not justified an exemption from the OFA process, as it has not demonstrated that the right-of-way is needed for a valid public purpose rather than simply to facilitate a sale of the line to Rosebud for its private use. Because we find no reasonable basis for departing from Congress's objective of providing an opportunity for maintaining common carrier rail service as part of the abandonment process, NSR's request for an exemption from the OFA provisions at 49 U.S.C. 10904 will be denied and the OFA process will be allowed to proceed. Nevertheless, given the apparent lack of need for this line for any shipper other than Rosebud, any person seeking to file an OFA must provide evidence of how this line will be turned into a viable common carrier line serving shippers other than Rosebud.

Exemption from Section 10905. As noted above, NSR requested exemption from the public use provisions of 49 U.S.C. 10905. Requests for a public use condition were due by November 12, 2008, and none have been filed. Therefore, the request for exemption from section 10905 will be denied as moot.

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 R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

Environmental review. NSR has submitted environmental and historic reports 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 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment.

SEA served an environmental assessment (EA) on December 1, 2008, and requested comments by December 31, 2008. In the EA, SEA recommended that we not impose environmental conditions on any decision granting abandonment authority.

No comments to the EA were filed by the December 31, 2008 due date. Therefore, we will not impose any environmental conditions. Accordingly, based on SEA's recommendation, we conclude that the proposed abandonment will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt NSR from the prior approval requirements of 49 U.S.C. 10903 for the abandonment of the above-described line, subject to the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

2. NSR's request for exemption from the provisions of 49 U.S.C. 10904 is denied.

3. NSR's request for exemption from the provisions of 49 U.S.C. 10905 is denied as moot.

4. NSR is directed to serve a copy of this decision on Rosebud within 5 days after the service date of this decision and to certify to the Board that it has done so.

5. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by January 26, 2009, 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 \$1,500. 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 February 15, 2009. Petitions to stay must be filed by February 2, 2009, and petitions to reopen must be filed by February 10, 2009.

8. Pursuant to the provisions of 49 CFR 1152.29(e)(2), NSR 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 NSR's filing of a notice of consummation by January 16, 2010, 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 Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary