

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-55 (Sub-No. 533X)

CSX TRANSPORTATION, INC.--ABANDONMENT EXEMPTION--
IN HAMILTON COUNTY, OH

Decided: November 25, 1996

CSX Transportation, Inc. (CSXT) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a 1.25-mile portion of its Louisville Division, Cincinnati Terminal Subdivision, between milepost 7.11, near Mitchell Street, and milepost 5.86, at the end of track at Dane Avenue, in Cincinnati, Hamilton County, OH. The United Transportation Union (UTU) requests imposition of labor protective conditions. We will grant the petition, subject to labor protective conditions and a historic preservation condition.

BACKGROUND

The rail line proposed for abandonment is located in a mixed light-industrial/residential area and traverses the Spring Grove Cemetery (the Cemetery).¹ CSXT states that the line is in extremely poor condition and is subject to acts of vandalism. When rail service is required, CSXT must back trains down the line, because there is no trackage which allows a train to be turned. This process necessitates adding a caboose to the end of the train. In addition, CSXT must use a flagman at each of three heavily-traveled crossings to stop traffic when providing service because there are no gates at any of the crossings. CSXT views operations on this line as dangerous both to CSXT and the public, as well as costly to perform.

Only one shipper, Jefferson Smurfit Corporation (Jefferson Smurfit), a recycling facility, has shipped or received freight over the line in recent years. Jefferson Smurfit shipped 56 carloads in 1994, 9 carloads in 1995, and 2 carloads during the first 3 months of 1996. According to CSXT, Jefferson Smurfit currently uses truck transportation for 95% of its outbound shipments and for all of its inbound shipments of scrap paper. Following abandonment, CSXT asserts that Jefferson Smurfit could use truck transportation exclusively; if rail service is preferred, CSXT's team track on Dalton Street or its intermodal facility on Western Avenue in Cincinnati could be used. CSXT indicates that a copy of its petition was served on Jefferson Smurfit. Neither that shipper nor anyone else has protested the proposed abandonment.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without prior approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find

¹ The Cemetery has expressed an interest in acquiring that portion of the right-of-way lying within the cemetery.

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 abandoning this line, an exemption will reduce regulatory barriers to exit and provide for the expeditious handling and resolution of this proceeding [49 U.S.C. 10101(2), (7), and (15)]. By allowing CSXT to avoid maintaining and operating this low-volume line and to apply its assets more productively elsewhere on its system, an exemption will promote safe and efficient rail transportation, foster sound economic conditions, and encourage efficient management [49 U.S.C. 10101(3), (5), and (9)]. Other aspects of the rail transportation policy are not affected adversely. For example, competition and the continuation of a sound rail transportation system are not affected [49 U.S.C. 10101(4)].

Because Jefferson Smurfit is already using motor carriers for most of its transportation needs and has other rail transportation alternatives available via CSXT's team track and intermodal facilities, we find that regulation is not necessary to protect the shipper from an abuse of market power. Nevertheless, to ensure that the shipper is informed of our action, we will require CSXT to serve a copy of this decision on Jefferson Smurfit within 5 days of the service date of this decision and to 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, although the proposed abandonment appears to satisfy that criterion as well.

UTU requests the imposition of labor protective conditions. Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a carrier of a statutory obligation to protect the interests of its employees. Accordingly, we will impose the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979), as a condition to granting this exemption.

CSXT has submitted an environmental 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 action. 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 effect of the proposed action on the quality of the human environment. In the environmental assessment (EA) served on October 7, 1996, SEA preliminarily concluded that a historic preservation condition should be imposed on the abandonment authority requiring CSXT to retain its interest in and take no steps to alter the historic integrity of that portion of the line lying within the Cemetery until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f. Comments on the EA were due by October 21, 1996.

CSXT filed comments on October 18, 1996, stating that the rail line itself is not a historic property, but that only the

Cemetery through which it runs is historic. However, CSXT stated in its previous comments that Bridge No. 64 is potentially eligible for the National Register of Historic Places. CSXT indicates that it does not intend to disturb the underlying roadbed, but only intends to remove the track materials, and possibly transfer ownership of the right-of-way to the Cemetery. The Cemetery filed comments supporting the abandonment and expressing an interest in acquiring the right-of-way. The Ohio Historic Preservation Office comments that there are no known sites listed in the Ohio Archaeological Inventory for the project area, but expresses concern about the effects the abandonment will have on the historic nature of the Cemetery.

Based on the data available, SEA concludes in the post-EA that the rail line itself is not historic and recommends modifying the condition to limit the historic preservation condition to include only Bridge No. 64. SEA expresses the view that, if Bridge No. 64 is potentially eligible for the National Register, CSXT can satisfactorily document the historic nature of the bridge. This will allow CSXT to remove the track materials and negotiate a possible sale of the right-of-way to the Cemetery. Therefore, SEA has modified its previously-recommended historic condition as follows: CSXT shall retain its interest in and take no steps to alter the historic integrity of Bridge No. 64, until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f. Based on SEA's recommendation, which we adopt, we conclude that the proposed abandonment, if implemented subject to the above condition, will not significantly affect either the quality of the human environment or conservation of energy resources.

SEA has indicated that the right-of-way may be suitable for other public use under 49 U.S.C. 10905. We note that no one requested a public use condition, and we will not impose one here. Nevertheless, we will provide a period of 20 days after Federal Register publication for interested persons to request a public use condition.

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 CSXT of the above-described 1.25-mile rail line, subject to: (1) the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979) and (2) a historic preservation condition requiring CSXT to retain its interest in and take no steps to alter the historic integrity of Bridge No. 64, until completion of the section 106 process of the National Historic Preservation Act.

2. Notice will be published in the Federal Register on December 12, 1996.

3. CSXT must serve a copy of this decision on Jefferson Smurfit within 5 days after the service date of this decision and certify to us that it has done so.

4. Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on January 13, 1996.

5. Formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2)² and requests for interim trail use/rail banking under 49 CFR 1152.29 must be filed by December 23, 1996. Petitions to stay must be filed by December 27, 1996. Requests for a public use condition in conformity with 49 CFR 1152.28(a)(2) must be filed by January 2, 1997. Petitions to reopen must be filed by January 6, 1997.

6. If a formal expression of intent to file an OFA has been timely submitted, an OFA to allow rail service to continue must be received by the railroad and the Board within 30 days after publication, subject to time extensions authorized under 49 CFR 1152.27(c)(2)(ii)(C) and (D). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(2).

7. 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."**

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen. Commissioner Owen commented with a separate expression.

Vernon A. Williams
Secretary

Commissioner Owen, commenting: We have here three parties with a legitimate vested interest in the outcome of the case -- a railroad, its employees and a cemetery. The railroad and cemetery have reached a mutually acceptable agreement and the employees have received generous income protection.

This agency's public interest obligation, then, is to expedite closure, which means assisting the railroad in abandoning its unprofitable line and assisting the cemetery in acquiring the property. Indeed, as the cemetery's president made clear, the rail line poses significant operational

² See Exempt. of Rail Abandonment--Offers of Finan. Assist., 4 I.C.C.2d 164 (1987) for current regulations. We note that the ICCTA has made changes and additions to the previous law regarding the processing of abandonments and OFAs. To implement these changes, we have issued a notice of proposed rulemaking in Abandonment and Discontinuance of Rail Lines and Rail Transportation under 49 U.S.C. 10903, STB Ex Parte No. 537 (STB served Mar. 15, 1996). We have received numerous comments from the public on our proposed rules and are in the process of analyzing those comments. Because we have not yet adopted final rules modifying the existing rules, however, the current regulations will apply here if there is an OFA. See Consolidated Rail Corporation--Abandonment Exemption--in Hudson County, NJ, STB Docket No. AB-167 (Sub-No. 1158X) (STB served July 25, 1996).

difficulties for the cemetery and also is a serious safety and security problem.

It is an assault on common sense to suggest, as the Ohio State Preservation Office has, that the ballast, cross ties, track spikes and track running through the cemetery might have historic significance. While I applaud the recommendation of SEA now to remove the limiting condition affecting the line within the confines of the cemetery, I am disturbed that 16 U.S.C. 470f encourages every impediment to rail-line abandonments without resort to common sense.

Each day's delay in a line abandonment imposes real costs upon the applicant -- dollars that could otherwise be used to renew productive assets or otherwise must be collected from shippers with limited transportation alternatives.

Clearly, 16 U.S.C. 470f conflicts with the intent of Congress in 49 U.S.C. 10101 that this agency "reduce regulatory barriers . . . [to] exit . . . encourage . . . efficient management . . . foster sound economic conditions [and] promote . . . [an] efficient rail transportation system."