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SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-792X

RAILROAD SWITCHING SERVICE OF MISSOURI, INC.–ABANDONMENT EXEMPTION–IN ST. LOUIS COUNTY, MO

Decided: May 2, 2005

By petition filed on January 12, 2005, Railroad Switching Service of Missouri, Inc. (RSSM), seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon its entire line of railroad extending 1.89 miles from a point of connection with Norfolk Southern Railway Company (NS) at or near Broad Street (milepost 0) to the end of the line at the publishing facility of the St. Louis Post-Dispatch (the Post-Dispatch) located at 900 North Tucker Boulevard (milepost 1.89), in St. Louis County, MO. Notice of the filing was served and published in the Federal Register on February 1, 2005 (70 FR 5268). On February 25, 2005, the City of St. Louis (the City) filed a request for a public use condition. On April 18, 2005, The Trust for Public Land (TPL) filed a request for issuance of a notice of interim trail use (NITU). On April 20, 2005, RSSM filed a letter opposing the City's request. We will grant the exemption, subject to trail use, public use, and environmental conditions.

BACKGROUND

The line was acquired by the City from a predecessor of NS in 1989. The City immediately leased the line to RSSM. See Railroad Switching Service of Missouri, Inc.–Lease and Operation Exemption–Norfolk and Western Railway Company, Finance Docket No. 31426 (Sub-No. 1) (ICC served June 23, 1989). From 1989 to 1999, RSSM operated the line under the lease, and in 1999, purchased it from the City.

The sole shipper on the line, the Post-Dispatch, used the line to receive inbound movements of newsprint paper from June 2003 to June 2004. According to RSSM, it transported 150 carloads of newsprint paper to the Post-Dispatch during that period. In June 2004, the Post-Dispatch notified RSSM that it would no longer use the rail line, and there has been no traffic over the line since then.

RSSM contends that when it operated the line the revenues were insufficient compared to the cost of operations. RSSM asserts that the line's configuration and its urban setting make it difficult and expensive to operate.[1]

Despite its efforts, RSSM has been unsuccessful in attracting shippers to the line. With the loss of its sole shipper, the Post-Dispatch, and no prospects for future traffic, RSSM seeks authority to abandon the line.

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 RSSM to avoid the costs of owning and maintaining a line that is not in use [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 the abuse of market power because the Post-Dispatch, the sole shipper on the line, has stated that it no longer intends to use the line. Nevertheless, to ensure that the Post-Dispatch is informed of our action, we will require RSSM to serve a copy of this decision on the Post-Dispatch within 5 days of the 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.

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. However, it is well settled that employee protective conditions will not be imposed when a carrier abandons a line that constitutes its entire system, unless the evidence shows the existence of: (1) a corporate affiliate

[1] RSSM indicates that the line is situated on a steel girder bridge over Interstate Highway 70 and on a number of city streets for a distance of approximately 4,400 feet. After exiting the bridge across Highway 70, the line runs down the middle of Hadley Street for several blocks. For approximately 300 feet at its terminus, the line is located underground in a tunnel.

that will continue substantially similar rail operations; or (2) a corporate parent that will realize substantial financial benefits (over and above relief from the burden of deficit operations by its subsidiary railroad). See Wellsville, Addison & Galeton R. Corp.–Abandonment, 354 I.C.C. 744 (1978); and Northampton and Bath R. Co.–Abandonment, 354 I.C.C. 784 (1978) (Northampton). Here, RSSM has a corporate parent, Ironhorse Resources, Inc. (Ironhorse), a noncarrier, but RSSM states that Ironhorse is unlikely to benefit materially from the proposed abandonment. Further, no one has attempted to show that the situation under Northampton for imposing employee protection exists in this case. Under the circumstances, we will not impose labor protective conditions.

RSSM 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 March 11, 2005, and requested comments by April 11, 2005.

In the EA, SEA set forth concerns expressed or reviews not completed by various agencies and recommended that conditions be imposed on any decision granting abandonment authority. First, SEA states that the Missouri Department of Natural Resources, State Historic Preservation Office (SHPO), has completed its evaluation of the potential impact of this project on historic resources and concurs with RSSM that the proposed action that is located adjacent to the Murphy Blair Historic District will have no adverse effect on the National Register of Historic Places (National Register) listed district. However, according to SEA, the SHPO states that a steel girder bridge crossing over Interstate Highway 70 may be eligible for listing on the National Register. Therefore, SEA recommends that a condition be imposed requiring that RSSM retain its interest in and take no steps to alter the historic integrity of all sites and structures on the right-of-way that are 50 years old or older until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f (NHPA). Second, SEA states that the U.S. Fish and Wildlife Service, Great Lakes Office, Big Rivers Region (FWS), has not completed its review of the proposed abandonment. Therefore, SEA recommends that a condition be imposed prohibiting RSSM from salvaging or disposing of the right-of-way until consultation with FWS has been completed. Third, SEA states that the U.S. Army Corps of Engineers, St. Louis District (the Corps), has not completed its review of the proposed abandonment. Therefore, SEA recommends that a condition be imposed prohibiting RSSM from salvaging or disposing of the right-of-way until consultation with the Corps has been completed. Fourth, SEA states that the U.S. Park Service, Midwest Regional Office (Park Service) has not completed its review of the proposed abandonment. Therefore, SEA recommends that a condition be imposed prohibiting RSSM from salvaging or disposing of the right-of-way until consultation with the Park Service has been completed. Fifth, SEA states that the Missouri Department of Natural Resources, Water Protection Program (DNR-WPP), has not completed its

review of the proposed abandonment. Therefore, SEA recommends that a condition be imposed prohibiting RSSM from salvaging or disposing of the right-of-way until consultation with the DNR-WPP has been completed. Sixth, SEA states that the City of St. Louis Planning Department (SL-PD) has not completed its review of the proposed abandonment. Therefore, SEA recommends that a condition be imposed prohibiting RSSM from salvaging or disposing of the right-of-way until consultation with the SL-PD has been completed.

Comments in response to the EA were received and considered by SEA. In response to a letter dated March 24, 2005, from FWS, SEA recommends that the previously recommended condition (No. 2) in the EA, prohibiting RSSM from salvaging or disposing of the right-of-way until consultation with FWS has been completed, not be imposed. SEA also indicates that FWS stated that the Missouri Department of Conservation (MDC) should be contacted if concerns exist for state-listed species. According to SEA, MDC has not completed its review of the proposed abandonment. Therefore, SEA recommends that a new condition be imposed on any decision granting abandonment authority prohibiting RSSM from salvaging or disposing of the right-of-way until consultation with MDC has been completed. Based on telephone conversations on March 18, 2005, with the Corps and with the Park Service, SEA recommends that the previously recommended conditions, requiring consultation with those organizations (Nos. 3 and 4 in the EA) not be imposed. Accordingly, we will impose the new condition recommended by SEA prohibiting RSSM from salvaging or disposing of the right-of-way until consultation with MDC has been completed, and, with the exception of conditions 2, 3, and 4, we will impose the conditions recommended by SEA in the EA. Based on SEA'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.

As previously noted, TPL filed a request for the issuance of a NITU under the National Trails System Act, 16 U.S.C. 1247(d). TPL, a nonprofit California public benefit corporation, has submitted a statement of willingness to assume financial responsibility for the right-of-way and has acknowledged that use of the right-of-way is subject to possible future reconstruction and reactivation of the right-of-way for rail service as required under 49 CFR 1152.29. In a letter filed on April 18, 2005, RSSM stated that it is willing to negotiate with TPL for interim trail use. Because TPL's request complies with the requirements of 49 CFR 1152.29 and RSSM is willing to enter into negotiations, we will issue a NITU for the subject line. 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, RSSM may fully abandon the line, subject to the conditions imposed below. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

SEA has indicated in its EA that the right-of-way may be appropriate for other public use. As noted, the City filed a request for a public use condition under 49 U.S.C. 10905. It states that

the property under and adjacent to the existing rail line is, and will continue to be, central to the City's redevelopment plan. RSSM objects to the imposition of a public use condition stating that, in view of contractual commitments between RSSM and TPL, RSSM is virtually certain that the subject right-of-way will be conveyed to TPL for rail banking and interim trail use. RSSM asserts that conveyance of the right-of-way to TPL would likely occur shortly after the effectiveness of the exemption for abandonment authority. It argues that imposition of a public use condition could materially delay the public benefits associated with conveyance of the right-of-way to TPL for trail use. Therefore, RSSM requests that the City's request be denied.

To justify a public use condition, a party must set forth: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) justification for the period of time requested. Although the City did not specify a period of time or justification of a time period, the Board, under 49 U.S.C. 10905, may prohibit the disposal of rail properties that are proposed for abandonment and are suitable for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment. When the Board decides to impose both trail use and public use, it is our policy to do so concurrently, subject to the execution of a trail use agreement. Under the circumstances here, the Board will give the City an opportunity to negotiate with RSSM for public use of the rail line. Accordingly, a 90-day public use condition will be imposed on the line to be abandoned, commencing from the effective date of this decision and notice, to enable any state or local government agency or other interested person to negotiate the acquisition of the line for public use. If a trail use agreement is reached on a portion of the right-of-way, RSSM must keep the remaining right-of-way intact until the expiration of the public use condition, to permit public use negotiations. Also, we note that a public use condition is not imposed for the benefit of any one potential purchaser. Rather, it provides an opportunity for any interested person to acquire the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, RSSM is not required to deal exclusively with the City, but may engage in negotiations with other interested persons, including TPL.

The parties should note that operation of the trail use and public use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in Rail Abandonments–Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 608 (1986), offers of financial assistance (OFA) to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking and public use. Accordingly, if an OFA is timely filed under 49 CFR 1152.27(c)(1), the effective date of this decision and notice will be postponed beyond the effective date indicated here. See 49 CFR 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. See 49 CFR 1152.27(f). Finally, if the line is sold under the OFA procedures, the petition for abandonment exemption will be dismissed and trail use and public use precluded. Alternatively, if a sale under the OFA procedures does not occur, the trail use and public use processes may proceed.

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 RSSM of the above-described line, subject to the conditions that RSSM: (1) leave intact all of the right-of-way, including bridges, trestles, culverts, and tunnels (except track, ties, and signal equipment) for a period of 90 days from the effective date of this decision and notice, to enable any state or local government agency or any other interested person to negotiate the acquisition of the line for public use; (2) retain its interest in and take no steps to alter the historic integrity of all sites and structures on the right-of-way that are 50 years old or older until completion of the section 106 process of the NHPA; (3) consult with DNR-WPP, SL-DP, and MDC prior to salvaging or disposing of the right-of-way; and (4) comply with the terms and conditions for implementing interim trail use/rail banking as set forth below.

2. RSSM is directed to serve a copy of this decision on the Post-Dispatch within 5 days after the service date of this decision and to certify 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 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 for 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 the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.

5. If interim trail use is implemented and subsequently the user 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 the 180th day after service of this decision and notice, interim trail use may be implemented. If no agreement is reached by that time, RSSM may fully abandon the line, provided the conditions imposed above are met.

7. 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 May 12, 2005, 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 $1,200. See 49 CFR 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 has been received, this exemption will be effective June 1, 2005. Petitions to stay must be filed by May 17, 2005, and petitions to reopen must be filed by May 27, 2005.

10. Pursuant to the provisions of 49 CFR 1152.29(e)(2), RSSM 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 RSSM's filing of a notice of consummation by May 2, 2006, 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 Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams

Secretary