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SERVICE DATE - LATE RELEASE JUNE 16, 1999

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33762

DENVER ROCK ISLAND RAILROAD--ALTERNATIVE RAIL SERVICE--  
LINES OF KANSAS SOUTHWESTERN RAILWAY, L.L.C.

Decided: June 15, 1999

On June 4, 1999, the Denver Rock Island Railroad (DRI) filed a petition pursuant 49 U.S.C. 11123 and 49 CFR parts 1146 and 1147,<sup>1</sup> to authorize interim rail service for 30 days on a 9.6-mile segment of line of the Kansas Southwestern Railway, L.L.C. (KSW) between milepost 639.3 at Hudson, KS, and milepost 629.7 at Stafford, KS (subject line). No rail service is currently being provided on the subject line. DRI seeks expedited consideration of its request. DRI indicates that it will be ready to begin service on June 15, 1999. We will grant DRI's petition.

BACKGROUND

In early 1998, KSW purchased from the Union Pacific Railroad Company (UP) about 288 miles of rail line it had previously leased from UP, including the subject line. Kansas City Southwestern Railway, L.L.C.--Acquisition Exemption--Union Pacific Railroad Company, STB Finance Docket No. 33551 (STB served March 11, 1998). On April 22, 1998, KSW embargoed due to track conditions a number of these lines, including the subject line. Subsequently, KSW filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments to abandon an approximately 64.27-mile line of railroad on the Iuka Branch between milepost 609.97, at Olcott and milepost 630.13 at Iuka, and the portion of its Stafford Branch (including the subject line) between milepost 610.0 at Olcott and milepost 654.11 at Radium (the Olcott North Lines). Notice of the exemption was served and published in the Federal Register on December 28, 1998 (63 FR 71537-38). Kansas City Southwestern Railway, L.L.C.--Abandonment Exemption--In Reno, Pratt and Stafford Counties, KS, STB Docket No. AB-437 (Sub-No. 2X) (KSW Abandonment I).

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<sup>1</sup> These rules were adopted in Expedited Relief for Service Inadequacies, STB Ex Parte No. 628 (STB served Dec. 21, 1998) (Service Inadequacies).

On February 19, 1999, DRI timely filed its offer of financial assistance (OFA),<sup>2</sup> and in a decision served February 24, 1999 (KSW Abandonment III), DRI was found to be financially responsible and the effective date of the exemption was postponed to allow the OFA process to proceed. That decision provided that, if the parties could not agree on a purchase price, either party could request that the Board set terms and conditions of the purchase price by March 22, 1999.

By letter filed March 23, 1999, DRI informed the Board that the parties had agreed to complete the sale of the lines outside of the OFA process, and asked that its OFA be withdrawn. In a decision served June 3, 1999 (KSW Abandonment IV), the Board terminated the OFA process, permitted the abandonment exemption to go into effect, and issued a notice of interim trail use or abandonment (NITU).<sup>3</sup>

#### DRI'S PETITION

In its petition, DRI submits that it has worked diligently to complete an agreement under which DRI or an affiliate would purchase and operate the Olcott North lines. It states that the parties expect to close on the transaction sometime in August 1999.

According to DRI, Stafford County Flour Mills Company (Stafford Mills), the operator of a flour mill in Hudson, KS, "has urgently requested DRI to begin providing rail service to its facility on the [s]ubject [l]ine prior to August." DRI states that the Hudson mill is currently operating at 55-65% of its capacity and wishes to make use of production capacity or "run time" during June and July. DRI claims that the ability of Stafford Mills to market its product and provide work for its employees during a traditionally slower period would be significantly enhanced by having rail service during those months. In particular, DRI indicates that the mill wants to respond to requests for bids issued by the Department of Agriculture, and to market its product line during these months in the large regional markets of Texas, southern California, and the Chicago area. According to DRI, the relief sought would allow Stafford Mills to establish a position in these markets prior to the

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<sup>2</sup> The exemption was scheduled to become effective on January 27, 1999, but a formal expression of intent to file an OFA to purchase the entire line filed by DRI effectively stayed the effective date of the exemption for 10 days until February 6, 1999. See 49 CFR 1152.27(c)(2)(i). By decision served January 29, 1999 (KSW Abandonment II), the time period for DRI to file an OFA was tolled until February 19, 1999, and the effective date of the exemption was further postponed until March 1, 1999.

Also, the January 29, 1999 decision provided that the request by the Iowa Trails Council (ITC) for issuance of a notice of interim trail use under the National Trails System Act, and for a public use condition under 49 U.S.C. 10905, would be held in abeyance pending completion of the OFA process.

<sup>3</sup> By letter filed May 17, 1999, ITC had withdrawn its request for a public use condition, but its request for a NITU had remained pending.

late summer surge in demand for flour.<sup>4</sup> Rail access from the Hudson mill would be provided via joint-line service with The Burlington Northern and Santa Fe Railway Company (BNSF) with the interchange at Stafford.<sup>5</sup>

On June 11, 1999, KSW submitted a letter advising the Board that it has entered into a written agreement with DRI, and that the agreement sets forth the terms, including the terms of compensation and liability, for DRI's use of KSW's line between Hudson and Stafford under a temporary order of the Board. KSW indicates that the agreement would run for 60 days after the effective date of the Board's order or until September 1, 1999, whichever date is earlier. KSW states that, during this period, the parties would continue to negotiate for DRI's purchase of significant portions of KSW's Olcott North lines, which include the line between Hudson and Stafford.

#### DISCUSSION AND CONCLUSION

We will grant DRI relief for 30 days under 49 U.S.C. 11123 and 49 CFR 1146.<sup>6</sup> Section 1146 is intended to "handl[e] requests for localized immediate service relief," Service Inadequacies at 6 n.11, and DRI has shown "a substantial inadequacy in rail service provided by the incumbent carrier or other demonstrated inadequacy in rail service provided by the incumbent carrier." 49 CFR 1146.1(a) (emphasis supplied).<sup>7</sup>

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<sup>4</sup> On June 11, 1999, DRI submitted a letter of support from Stafford Mills.

<sup>5</sup> DRI also argues that beginning rail service before the purchase would greatly facilitate getting local participation in financing the purchase.

<sup>6</sup> DRI also requested relief under 49 CFR 1147. This rule is based not on section 11123, which DRI cited, but on 49 U.S.C. 10705 and 11102. Unlike section 1146, relief under section 1147 is not limited to a specific duration and is intended "to alleviate service problems on a fuller, less hastily developed record." Service Inadequacies at 6. Here, the limited record thus far developed and the limited duration of the authority sought are consistent with section 1146.

<sup>7</sup> Under 49 CFR 1146.1(c), there is a rebuttable presumption that the transportation emergency will continue for more than 30 days, which can be rebutted by the incumbent carrier. While a further Board order is needed at the end of the 30-day period, the presumption "is designed to simplify and expedite the 30-day reexamination by avoiding a rehashing of the original inquiry into whether relief is appropriate and limiting the evidentiary presentations and our analysis to the issue of whether the emergency is over so that the relief is no longer needed." Service Inadequacies at 17. Here, there would appear to be a need for the alternative service until the expected purchase consummation in August 1999. Under 49 U.S.C. 11123, relief is limited to a maximum of 270 days.

Here, there has been no service on the line for more than two years and, in fact, although service is expected to be reinstated, the abandonment exemption is currently effective.<sup>8</sup> Under the circumstances presented here, DRI, with a statement of support from Stafford Mills, has shown a need for relief, and while the incumbent carrier, KSW, does not object to DRI's service proposal, it does not, according to DRI, want to incur the expense of temporarily restoring operations pending the disposition of the subject line.

DRI has complied with the other requirements of section 1146. It indicates that it has negotiated with KSW on the use of the subject line, including the terms of compensation and liability.<sup>9</sup> Because KSW is not operating, DRI's operations will not conflict with KSW's. The service should also not interfere with the other operations of KSW.

DRI submits that it has an agreement with BNSF to interchange traffic at Stafford, and DRI has established rate and service terms for the traffic. DRI has acquired a locomotive to provide service on the subject line, and BNSF has agreed to provide cars for shipments originating on that line. Under these conditions, there should be no degradation of service to DRI's existing customers.

DRI states that the subject line was inspected by a qualified track inspector in May 1999, and DRI certifies that the track on the subject line meets Federal Railroad Administration (FRA) Class I track standards. It plans to do minor brushcutting and maintenance work on the line and expects to be ready to begin service by June 15, 1999. DRI states that its operations will be performed according to all applicable FRA regulations, and that a copy of the petition was delivered to FRA.<sup>10</sup> DRI submits that, during the interim period, it will offer employment on a priority basis to KSW employees or former employees who worked on the line before the embargo. If these employees decline employment or cannot be found, DRI states that it will hire qualified individuals to perform operations.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

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<sup>8</sup> According to DRI, KSW has agreed not to consummate the abandonment pending the timely purchase of the line. As far as trails use is concerned, we do not know if the trail negotiations are dependent on this part of the Olcott North Line. In any event, the sale of the subject line for continued rail use would appear to be consistent with the purpose of rail banking under the Trails Act under 16 U.S.C. 1247(d). Finally, the Trails Act is voluntary and KSW will ultimately have to decide whether it wishes to enter an agreement with DRI or ITC.

<sup>9</sup> As noted above, KSW has subsequently reported that the parties have reached an agreement on terms that would apply during DRI's temporary operations.

<sup>10</sup> The petition was also served on KSW, Stafford Mills, and the Kansas Corporation Commission, Transportation Division.

It is ordered:

1. DRI's petition is granted, and it is authorized to perform service on the line for 30 days.
2. DRI is authorized to perform service on the line until 11:59 p.m. on July 15, 1999.
3. This decision is effective on its date of service.

By the Board, Chairman Morgan, Vice Chairman Clyburn and Commissioner Burkes.

Vernon A. Williams  
Secretary