

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-290 (Sub-No. 252X)

NORFOLK SOUTHERN RAILWAY COMPANY—ABANDONMENT EXEMPTION—
IN NOTTOWAY, PRINCE EDWARD, CUMBERLAND, AND APPOMATTOX
COUNTIES, VA

Decided: January 18, 2005

By petition filed on September 30, 2004, 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 33.8-mile line of railroad between milepost N-134.10 near Burkeville and milepost 167.90 near Pamplin City, in Nottoway, Prince Edward, Cumberland, and Appomattox Counties, VA (the line). Notice of the filing was served and published in the Federal Register on October 20, 2004 (69 FR 61703), setting November 9, 2004, as the due date for replies to the petition for exemption. On that date, SMI Rebar (SMI) replied in opposition to the exemption, and, on November 16, 2004, NSR filed a letter in response to SMI's reply, with a request that the Board accept the letter into the record in this proceeding. A request for issuance of a notice of interim trail use (NITU) and imposition of a public use condition was filed on October 22, 2004, by the Commonwealth of Virginia, Department of Conservation and Recreation (VADCR). NSR responded to the trail use request in its November 16, 2004 letter. The exemption will be granted, subject to environmental, public use, trail use, and standard employee protective conditions.

PRELIMINARY MATTER

On December 6, 2004, SMI filed a pleading seeking the rejection of NSR's November 16, 2004 letter, as a prohibited reply to a reply under 49 CFR 1104.13(c). Alternatively, should we not reject the letter, SMI responded to it. In a letter filed December 10, 2004, NSR replied that its November 16, 2004 letter contained a sufficient request and support for its acceptance by the Board. NSR also states that it does not oppose SMI's alternative request that we accept SMI's further response of December 6, 2004, to the extent that the filing is a response and does not introduce new evidence or argument. Because the parties have each responded to the other's filing, no party will be prejudiced. Accordingly, we will accept the filings discussed above into the record in this proceeding, and accord them the weight they are due.

BACKGROUND

The line begins at Burkeville in Nottoway County and runs west primarily through Northern Prince Edward County with a small segment in Cumberland County. It ends at Pamplin City in Appomattox County. NSR asserts that the line is a surplus parallel line located between the same end points (Burkeville and Pamplin City) as an NSR main line that will remain in service. Thus, upon a grant of this exemption, rail service will remain at Burkeville and Pamplin City, but will no longer be available at Rice, Farmville and Prospect, points located between the end points of the line. According to NSR, it has improved the main line and has already rerouted overhead traffic that previously moved over the line. The only local traffic on the line involves service to SMI and Farmers Co-operative/Southern States Co-operative, Inc. (Farmers) both located in Farmville.

NSR states that, in the base year (April 1, 2003-March 31, 2004), it transported 158 carloads of freight over the line for the two customers at Farmville. The traffic consisted of 135 shipments of (steel) bars, iron, and 1 carload of sheet steel for SMI and 10 carloads of diammonium fertilizer, 8 carloads of PTSM chloride, 2 carloads of soybean oil meal, 1 carload of soybean hulls, and 1 carload of urea for Farmers.

According to NSR, it cannot maintain or operate profitably over the line, nor can it justify any future rehabilitation of or reinvestment in the line. It contends that the revenue from the traffic of the two customers on the line, is insufficient to cover its avoidable costs, much less a return on value, opportunity costs or rehabilitation costs, and no reasonably forecast increase in their traffic could cover the wide deficit. Despite modest recent increases in SMI traffic in the current period of high demand for steel or scrap, NSR submits that it has no guaranteed level of traffic on the line, and that no application of rate increases (that would not divert traffic) could provide it with sufficient increased revenue and traffic to cover its costs of maintaining and operating the line and opportunity and rehabilitation costs. The area traversed by the line is sparsely populated and, according to NSR, there is little prospect for any significant industrial development that would provide increased railroad business.

The local train that provides service over the line to and from Farmville originates and terminates at Crewe, VA (approximately 5 miles east of Burkeville at milepost N-129.0). It is operated by a two-person crew, on average, three times per week. NSR states that most of the traffic on the line (almost all of SMI's traffic) consists of traffic which passes through Crewe after being interchanged with CSX Transportation, Inc. (CSXT) at Petersburg, VA,¹

¹ In the base year, only 23 shipments originated or terminated on NSR; 6 shipments
(continued...)

approximately 40 miles east of Crewe. Accordingly, NSR contends that it does not have a long haul for most of the Farmville traffic and has limited ability to increase revenues on the line by significantly raising rates on that traffic. NSR submits that it has operated this local train service over the entire line and over both segments of the line—Pamplin City to Farmville and Burkeville to Farmville—but that service cannot be performed at a profit under any scenario.

NSR has provided revenue, cost, avoidable loss, net liquidation value and opportunity cost information relating to the line, and to the Burkeville-Farmville and Farmville-Pamplin City segments individually, as follows:

	Scenario 1 Entire Line	Scenario 2 Burkeville-Farmville	Scenario 3 Farmville-Pamplin
	Base Yr/Forecast Yr	Base Yr/Forecast Yr	Base Yr/Forecast Yr
Revenues Attributable to Line	\$166,373 / \$172,698	\$166,373 / \$172,698	\$166,373 / \$172,698
Total Avoidable Costs	\$390,232 / \$401,209	\$304,721 / \$312,582	\$256,420 / \$262,177
Total Return on Value	\$276,917 / \$144,453	\$122,649 / \$64,253	\$153,892 / \$80,226
Avoidable Loss from Operations	\$223,859 / \$228,511	\$138,348 / \$139,884	\$90,047 / \$89,479
Avoidable Loss including Return on Value	\$500,776 / \$372,964	\$260,997 / \$204,137	\$243,939 / \$169,705
Net Liquidation Value	\$2,925,665 / \$3,071,948	\$1,290,144 / \$1,354,651	\$1,626,890 / \$1,708,235
Opportunity Cost	\$290,519	\$128,111	\$161,550

Maintenance costs for a 2,418-foot High Bridge at milepost N-144.87 contribute to increased normalized maintenance costs for the Burkeville-Farmville segment. According to NSR, the High Bridge, built in 1912-14, has been rapidly deteriorating and would require an

¹(...continued)

originated or terminated on Canadian National Railway Company or Canadian Pacific Railway Company; and the remaining 129 carloads were interchanged with CSXT at Petersburg.

estimated cost of \$871,200 for 1 year or \$217,800 for each of 4 years to rehabilitate. Although these estimates are not included in the forecast year costs for Scenarios 1 and 2, NSR contends that rehabilitation of the High Bridge is required and would be a cost to be considered for continued operation of the entire line or the Burkeville-Farmville segment, as well as the main element of any subsidization cost for the line as a whole or the Burkeville-Farmville segment of the Line for the forecast year.

Because of its size and remote location (not visible from the highway), and the historic interest in the adjacent site, the High Bridge has presented NSR with liability concerns and there have been some incidents for which claims against NSR have been made. According to NSR, the costs of these claims cannot be factored into the above losses but nonetheless are costs that it must consider.

NSR states that it has made efforts to cut costs and to work with the shippers on rate increases or shipping arrangements to improve the prospects for keeping the line in service. NSR submits that these efforts have not been able to overcome the large avoidable costs and account for the significant opportunity costs in view of the small volume of traffic on the line and the number of miles of line that must be maintained to handle that traffic.

NSR avers that upon abandonment of the line, the remaining shippers' traffic on the line can move by: (1) a transload service through facilities on NSR at Petersburg or similar CSXT facilities near Petersburg; (2) a possible transload operation with the Buckingham Branch Railroad Company (BBRR) at Dillwyn, VA; or (3) straight truck or intermodal service. NSR contends that the alternative most likely to be cost effective would be SMI's use of transload operations that could be established by BBRR at Dillwyn, about 20 miles from Farmville.

NSR asserts that SMI has used truck transportation on occasion as a substitute or supplement to rail transportation so transload or truck transportation is a transportation option for that shipper. Thus, trucking companies that operate in the area could provide SMI with either transload or direct motor carrier service.

SMI opposes the use of the exemption process for this abandonment proposal. As a matter of procedural due process, it contends that NSR should be required to file an abandonment application where the merits of the abandonment can be thoroughly analyzed. Regarding NSR's presentation, SMI contends that the revenue and cost calculations provided by NSR are either unsupported or unreasonable. Specifically, it challenges the condition of the High Bridge, the "unusually high" figure for off-branch costs, the "substantial" cost for ditching as well as the cost figures for other normalized maintenance costs. Also, SMI argues that there is no support for unit costs for rail, off-track maintenance, turnouts or crossties, equipment depreciation or return on value.

SMI, without providing specific data to contradict the evidence provided by NSR, contends, that, if abandonment were authorized, it would experience a substantial increase in freight charges on the traffic that it currently receives by rail, which would be very harmful to its overall financial condition. SMI states that this harm would be far more serious than the harm to NSR from continued operation of the line. SMI asserts that it and other shippers at Farmville “may be willing” to accept less frequent service and to take more traffic from NSR origins if it would increase rail line profitability, and result in continued operation of 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, the Board must exempt a transaction or service from regulation when it finds 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. SMI’s arguments to the contrary are without merit. Although asserting that NSR’s revenue and cost calculations are unsupported or unreasonable, SMI provides no concrete evidence or calculations of its own to refute NSR’s figures. NSR has provided, in notes and narrative, the methods and assumptions used to calculate the various data and has disclosed the input sources used (Uniform System of Accounts and Railroad Annual Report R-1). Also, data computations are referenced to specific sections of 49 CFR 1152. Although we cannot properly evaluate the reasonableness of rehabilitation for the High Bridge, NSR did not include that figure in its cost analysis. Additionally, NSR has shown that shippers have the availability of alternative transportation, by nearby transload operations or truck, and that overhead traffic can continue to be served over its parallel main line. Finally, SMI’s contentions of increased transportation costs if the abandonment is approved are without any support in the record, and, even if they do occur, they are not a basis, alone, to deny the abandonment.

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 relieving NSR of the expense of maintaining a line no longer generating sufficient traffic and revenue and by allowing NSR to apply its assets more productively elsewhere on its system [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be adversely affected.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power because both shippers apparently have adequate access to alternative transportation sources, either by transload operations over other rail lines or by available truck

service, and there are no prospects of new shippers requiring service on the line. Nevertheless, to ensure that the shippers are informed of our action, NSR will be required to serve a copy of this decision on the shippers within 5 days of the service date and certify to the Board that it has done so. In light of the market power finding, it is not necessary to determine whether the proposed abandonment 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. Accordingly, as a condition of granting this exemption, we will impose the employee protective conditions set forth in Oregon Short Line R. Co.–Abandonment–Goshen, 360 I.C.C. 91 (1979).

NSR 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 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 November 29, 2004, and requested comments by December 29, 2004.

In the EA, SEA notes that the Virginia Department of Transportation, Surveys and Photogrammetry (DOT-SP) has identified 66 station markers on the right-of-way that may be affected by the proposed abandonment. Therefore, SEA recommends that NSR consult with and provide the National Geodetic Survey (NGS) and DOT-SP with at least 90 days' notice prior to initiation of any activities that may destroy or disturb any geodetic station markers located on the line. SEA also notes that the U.S. Fish and Wildlife Service, Region 5 (FWS) and the Virginia Department of Natural Heritage Resources (DNHR) have not completed their review with regard to endangered species. Therefore, SEA recommends that a condition be placed on any decision granting abandonment authority prohibiting NSR from salvaging or disposing of the entire right-of-way until consultations with FWS and DNHR have been completed. SEA also notes that the U.S. Environmental Protection Agency, Region 3 (EPA), the U.S. Army Corps of Engineers, Norfolk District (COE), the Virginia Department of Environmental Quality, Water Division (DEQ-WD) and the Virginia Department of Environmental Quality, Waste Management Division (DEQ-WM) have not completed their reviews. Therefore, SEA recommends that a condition be placed on any decision granting abandonment authority prohibiting NSR from salvaging or disposing of the entire right-of-way until consultation with those agencies has been completed. Finally, SEA notes that the U.S. Department of Interior, National Park Service Northeast Region (NPS) has identified the Appomattox Court House National Park and the historic High Bridge as areas of concern. Therefore, SEA recommends that a condition be placed on any decision granting abandonment authority prohibiting NSR from salvaging or disposing of the entire right-of-way until consultation with NPS has been completed.

A comment in response to the EA was received and considered by SEA. Based on the information provided by NGS, an additional station marker was identified. The proposed condition will be amended accordingly. Therefore, the conditions recommended by SEA in the EA, as amended, will be imposed. The proposed abandonment, as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

On October 22, 2004, VADCR filed a request for interim trail use/rail banking under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act). VADCR submitted a statement of willingness to assume financial responsibility for the management of, and for any legal liability arising out of the transfer or use of the transferred right-of-way to the full extent permitted by the Virginia Tort Claims Act. VADCR acknowledged that the use of the right-of-way for trail purposes is subject to the user's continuing to meet its responsibilities and is subject to possible future reconstruction and reactivation for rail service, as required at 49 CFR 1152.29. NSR has stated that it is willing to negotiate for interim trail use. Because VADCR's request complies with the requirements of 49 CFR 1152.29, and NSR is willing to enter into negotiations, a NITU will be issued as requested. 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, NSR 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 suitable for other public use following abandonment. As noted above, VADCR has also requested that a 180-day public use condition be imposed, precluding NSR from: (1) disposing of the corridor, other than the tracks, ties, and signal equipment, except for public use on reasonable terms; and (2) removing or destroying potential trail-related structures such as bridges, trestles, and culverts. VADCR submits that this corridor would make an excellent recreational trail and a commuter route for persons traveling to work or school in Farmville. VADCR states that the 180-day period is needed to complete a master plan for the trail and review title information, conduct a survey and complete an engineering study of bridges, trestles and drainage structures.

We have determined that persons who file under the Trails Act may also file for public use under 49 U.S.C. 10905. See Rail Abandonments—Use of Rights-of Way as Trails, 2 I.C.C.2d 591, 609 (1986) (Trails). When the need for both conditions is established, it is our policy to impose them concurrently, subject to the execution of a trail use agreement. VADCR has met the public use criteria prescribed at 49 CFR 1152.28(a)(2) by specifying: (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. Accordingly, a 180-day public use condition will be imposed, commencing from the effective date of this decision and notice, to enable any State or local government 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, NSR must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, 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, NSR is not required to deal exclusively with VADCR, but may engage in negotiations with other interested persons.

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 Trails, 2 I.C.C.2d at 608, an offer of financial assistance (OFA) to acquire a rail line for continued rail service or to subsidize rail operations takes 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. SMI's request to reject NSR's November 16, 2004 letter is denied; SMI's December 6, 2004 and NSR's December 10, 2004 responses are accepted for filing.
2. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903 the abandonment of the above-described line, subject to the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979), and the conditions that NSR shall: (1) leave intact all of the right-of-way, including bridges, trestles, and culverts (except track, ties, and signal equipment) for a period of 180 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) comply with the interim trail use/rail banking procedures set forth below; (3) consult with and provide NGS and the DOT-SP with at least 90 days' notice prior to initiation of any salvage operations so that plans can be made for relocation of any of the 67 station markers; and (3) consult with FWS, DNHR, EPA, COE, DEQ-WD, DEQ-WM, and NPS prior to salvaging or disposing of the entire right-of-way.
3. NSR is directed to serve a copy of this decision and notice on all shippers within 5 days after the service date of this decision and notice and certify to the Board that it has done so.

4. 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 for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

5. 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.

6. 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.

7. 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, NSR may fully abandon the line, provided the conditions imposed above are met.

8. 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 28, 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).

9. 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."**

10. Provided no OFA has been received, this exemption will be effective on February 17, 2005. Petitions to stay must be filed by February 2, 2005, and petitions to reopen must be filed by February 14, 2005.

11. 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 18, 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 not later than 60 days after satisfaction, expiration or removal of the legal or regulatory barrier.

By the Board, Chairman Nober, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A. Williams
Secretary