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SERVICE DATE - LATE RELEASE AUGUST 3, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-541X

PORTLAND & WESTERN RAILROAD, INC.--ABANDONMENT
EXEMPTION--IN WASHINGTON COUNTY, OR

Decided: August 28, 1998

By petition filed April 15, 1998, Portland & Western Railroad, Inc. (PNWR) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon: (1) a line of railroad extending from milepost 20.05 to milepost 21.09, a distance of 1.04 miles (the Subject Line); and (2) if required, two additional segments: (a) from milepost 21.09 to milepost 21.26, a distance of 0.17 mile and (b) from milepost 21.50 to milepost 22.00, a distance of 0.5 mile, (the Additional Segments), all located at or near Hillsboro, in Washington County, OR.¹ Notice of the institution of an exemption proceeding was published in the Federal Register at 63 FR 24841 on May 5, 1998. We will grant the petition, subject to labor protective conditions.

BACKGROUND AND PRELIMINARY MATTER

PNWR is a common carrier by railroad that currently owns approximately 154 miles of rail lines in Oregon. In September of 1995, PNWR entered into an agreement with Burlington Northern Railroad Company (BN)² to lease five separate lines of the BN in PNWR's service area.³ During

¹ Abandonment authority for the segments from milepost 21.09 to milepost 21.26 (0.17 mile) and from milepost 21.50 to milepost 22.09 (0.5 mile) was previously granted to Burlington Northern Railroad Company (BN) in Burlington Northern Railroad Company--Abandonment Exemption--In Washington County, OR, Docket No. AB-6 (Sub-No. 363X) (ICC served Dec. 5, 1994). Thereafter, PNWR filed a notice of exemption to acquire and operate all three segments in Portland & Western Railroad, Inc.--Acquisition and Operation Exemption--The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 33502 (STB served Nov. 24, 1997). In that proceeding, PNWR acquired the rail, track materials, and other personal property necessary for rail service and an exclusive rail easement over the underlying property; BN retained the real property with the intent to donate the property to the State of Oregon. PNWR questions the need to seek abandonment authority for the two Additional Segments previously abandoned by BN because PNWR states that it never exercised its authority due to the absence of traffic.

² On December 31, 1996, The Atchison, Topeka and Santa Fe Railway Company merged with
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the pendency of the lease proceeding, BN agreed to sell to PNWR the lines under lease, as well as some additional properties in the region. PNWR purchased these lines in November 1997.⁴ After acquiring the Additional Segments, PNWR learned that BN had previously abandoned these segments in AB-6 (Sub-No. 363X), see n. 1.

In any event, PNWR now seeks to abandon the Subject Line and, if required, the Additional Segments (collectively, the Lines). PNWR questions the need to seek abandonment authority for the Additional Segments because PNWR says it has never exercised its authority to operate the lines due to the absence of traffic.

PNWR filed its notice of exemption under 49 CFR 1150.40, and then purchased the Additional Segments, thereby consummating the transaction. And, when PNWR subsequently held itself out to provide service, it assumed a common carrier obligation for those segments. This is true regardless of whether it was successful in its attempts to generate traffic on the Additional Segments.

PNWR says that it has not provided any service on the lines since they were purchased from BN in November 1997. Assertedly, the last service provided on the lines was prior to December 1994 by BN. According to PNWR, if not for the recent change in ownership, the Lines would have been eligible for the class exemption for out-of-service rail lines under 49 CFR 1152.50. PNWR states that the Lines are not part of any through routes and that there are currently no active on-line shippers. Moreover, the petitioner says, there are no prospects for future service.

Due to the absence of traffic, PNWR maintains that there is no justification for PNWR to continue to incur the costs necessary to maintain the Lines. Abandonment will allow PNWR to facilitate a road widening project by the Oregon Department of Transportation through the removal of a bridge located at milepost 20.1. PNWR plans to re-use a portion of the bridge in the reconstruction of its Cornelius Pass line.

²(...continued)

and into the BN. The name of the surviving corporation is The Burlington Northern and Santa Fe Railway Company (BNSF).

³ See Portland & Western Railroad, Inc.--Lease and Operation Exemption--Burlington Northern Railroad Company, Finance Docket No. 32766 (ICC served Jan. 5, 1996).

⁴ See Portland & Western Railroad, Inc.--Acquisition and Operation Exemption--The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 33502 (STB served Nov. 24, 1997).

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 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 time and expense of the abandonment process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will allow PNWR to use its assets elsewhere on its rail system, thereby promoting safe and efficient rail transportation, fostering sound economic conditions, and encouraging efficient management [49 U.S.C. 10101(3), (5), and (9)]. Other aspects of the rail transportation policy are not affected adversely.

Regulation is not needed to protect shippers from an abuse of market power. No shippers will lose service because there are no shippers located on or currently using the line. 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 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.

PNWR 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 abandonment. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified its data, and analyzed the probable effect of the proposed action on the quality of the human environment. SEA served an environmental assessment (EA) on June 17, 1998, recommending that no environmental or historic conditions be imposed on the abandonment. No comments were filed in response to the EA. Based on SEA's recommendation, we conclude that the proposed abandonment, if implemented, will not significantly affect either the quality of the human environment or conservation of energy resources. Although SEA has indicated that the right-of-way may be suitable for public use under 49 U.S.C. 10905, no one has sought a public use condition, and none will be imposed.⁵

⁵ Public use requests were due no later than 20 days after publication of the notice of the petition
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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 PNWR of the above-described segments of rail line, subject to the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979).

2. An OFA under 49 CFR 1152.27(c)(1)⁶ to allow rail service to continue must be received by the railroad and the Board by August 13, 1998, 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 a \$1,000 filing fee. See 49 CFR 1002.2(f)(25).

3. 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.**"

4. Provided no OFA has been received, this exemption will be effective on September 2, 1998. Petitions to stay must be filed by August 13, 1998. Petitions to reopen must be filed by August 24, 1998.

5. Pursuant to the provisions of 49 CFR 1152.29(e)(2), PNWR 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 PNWR's filing of a notice of consummation by August 3, 1999, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If any 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 Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

⁵(...continued)
for exemption in the Federal Register, or by May 26, 1998.

⁶ See Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903, STB Ex Parte No. 537 (STB served Dec. 24, 1996, and June 27, 1997).