

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-290 (Sub-No. 280X)

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY—
ABANDONMENT EXEMPTION—IN ROANE COUNTY, TN

Decided: February 22, 2007

By petition filed on November 6, 2006, The Cincinnati, New Orleans and Texas Pacific Railway Company (CNOTP), a wholly owned subsidiary of 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 for CNOTP to abandon an approximately 1.10-mile line of railroad extending from milepost 156.9-H to milepost 158.0-H in Rockwood, Roane County, TN (the Line). Notice of the filing was served and published in the Federal Register on November 24, 2006 (71 FR 67956) (November 24 Notice). CNOTP also seeks exemption from the offer of financial assistance (OFA) requirements of 49 U.S.C. 10904 and the public use provisions of 49 U.S.C. 10905. We will grant the exemptions, subject to an environmental condition and standard employee protective conditions.

BACKGROUND

On August 15, 2005, CNOTP filed a petition for exemption to abandon this same line based solely on the proposition that there was no need for continued operations over the line because no shipper would lose any service it required. CNOTP did not attempt to justify the petition based on operating losses. However, when a shipper on the line, Horsehead Corp. (Horsehead), opposed the abandonment, the Board denied the petition without prejudice to the subsequent filing of an application or a properly supported petition for exemption to abandon the line. See The Cincinnati, New Orleans and Texas Pacific Railway Company—Abandonment Exemption—In Roane County, TN, STB Docket No. AB-290 (Sub-No. 236X), slip op. at 3 (STB served Dec. 2, 2005).

CNOTP states that it intends to sell the line to Franklin Industries, Inc. (Franklin), for continued operation as a private rail line.¹ Also, CNOTP intends to continue to use the line,

¹ Franklin previously acquired a 15.4-mile line of railroad (known as the Crab Orchard Line) from CNOTP. See The Cincinnati, New Orleans and Texas Pacific Railway Company—Abandonment Exemption—in Cumberland and Roane Counties, TN, STB Docket No. AB-290 (Sub-No. 208X) (STB served Nov. 15, 2000).

under an agreement with Franklin, as an interchange track to interchange freight traffic with both Franklin and Horsehead.²

Franklin and Horsehead are the only shippers on the line. In its petition, CNOTP attached letters from Franklin and Horsehead stating that the parties have reached an agreement regarding mutual continued use of the line and that they have reached an agreement with NSR for a continuing exchange of rail cars on the said track. With these agreements in place, Franklin and Horsehead state that they do not object to the petition for exemption. CNOTP states that the line is a dead-end branch line and asserts that there is little or no potential for future industrial development along the line due to the small populations of Rockwood and Roane County.

DISCUSSION AND CONCLUSIONS

Abandonment Exemption. 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 CNOTP to avoid the cost of owning and maintaining a line that a shipper is willing to buy, maintain, and operate [49 U.S.C. 10101(5) and (9)] and to protect the interest of the only other shipper on the line. Other aspects of the rail transportation policy will not be affected adversely.

Regulation of the proposed transaction is not necessary to protect shippers from an abuse of market power because Franklin and Horsehead, the only shippers on the line, will continue to receive rail service through the connection of the private track with CNOTP's active rail line. Also, the Line carries no overhead traffic that needs to be rerouted. Nevertheless, to ensure that Franklin and Horsehead are informed of the Board's action, CNOTP will be required to serve a copy of this decision on Franklin and Horsehead within 5 days of its 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.

Other Exemptions. As previously noted, to expedite the sale of the right-of-way to Franklin, CNOTP has requested that the proposed abandonment be exempted from the OFA requirements of 49 U.S.C. 10904 and the public use requirements of 49 U.S.C. 10905. Exemptions from 49 U.S.C. 10904 and 10905 have been granted from time to time, but only when the right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service. See, e.g., Missouri Pacific Railroad Company—Abandonment and

² In this filing, CNOTP states that Horsehead's name is Horsehead Resource Development, Inc.

Discontinuance of Operations Exemption—in Houston, Harris County, TX, STB Docket No. AB-3 (Sub-No. 139X), et al. (STB served Dec. 31, 1996). The right-of-way is critical to Franklin's plans to use the line as a private track, no interested party has objected to the proposed exemptions,³ and the only other shipper on the line has made arrangements with Franklin for continued service. Indeed, the line is a dead-end branch line and has little to no potential for industrial development that would require rail service. On the other hand, the imposition of OFA procedures or a public use condition could delay the transfer of the needed portion of the right-of-way to Franklin for a valid use and ultimately jeopardize the timely completion of its acquisition of the line. Accordingly, we will exempt the proposed abandonment from the OFA and public use requirements of 49 U.S.C. 10904-05.

The evidence of record establishes that the proposed exemptions from 49 U.S.C. 10904 and 49 U.S.C. 10905 meet the criteria of 49 U.S.C. 10502. Applying OFA requirements and public use provisions in this instance is not necessary to carry out the rail transportation policy. Allowing the abandonment exemption to become effective expeditiously, without first being subject to these requirements, would minimize the need for Federal regulatory control over the rail transportation system, expedite the regulatory decision, and reduce regulatory barriers to exit [49 U.S.C. 10101(2) and (7)]. It has already been determined that regulation is not necessary to protect shippers from an abuse of market power.

Labor Protection. 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 to granting the exemption, we will impose the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

Environmental Matters. CNOTP 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 January 5, 2007, and requested comments by February 5, 2007.

In the EA, SEA notes that the U.S. Department of Commerce, National Geodetic Survey (NGS), has identified five geodetic station markers that may be affected by the proposed abandonment. Therefore, SEA recommends a condition requiring that CNOTP provide NGS with at least 90 days' notice prior to initiating any salvage operations that may disturb or destroy any markers so that NGS may plan for their possible relocation.

No comments to the EA were filed by the due date. Accordingly, the condition recommended³ by SEA in the EA will be imposed. Based on SEA's recommendation, we

³ As stated in the November 24 Notice, requests for public use conditions were due by December 14, 2006. No requests were filed.

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.

Other matters. We will not provide an opportunity for interested persons to file trail use/rail banking requests. Under Section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d), trail use/rail banking is voluntary and can only be implemented if an abandoning railroad agrees to negotiate an agreement. Here, CNOTP has stated that it will not entertain trail use requests.

It is ordered:

1. Under 49 U.S.C. 10502, an exemption from the prior approval requirements of 49 U.S.C. 10903-05 for the abandonment by CNOTP of the above-described line is granted, subject to the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), and subject to the condition that CNOTP shall provide NGS with at least 90 days' notice prior to initiation of any salvage operations that may disturb or destroy any geodetic station markers so that plans can be made for their relocation.
2. CNOTP is directed to serve a copy of this decision on Franklin and Horsehead within 5 days after the service date of this decision and certify to the Board that it has done so.
3. This exemption will be effective on March 25, 2007. Petitions to stay must be filed by March 12, 2007, and petitions to reopen must be filed by March 20, 2007.
4. Pursuant to the provisions of 49 CFR 1152.29(e)(2), CNOTP 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 CNOTP's filing of a notice of consummation by February 23, 2008, 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 Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary