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SERVICE DATE - MAY 6, 1999

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-558X

DONIPHAN, KENSETT AND SEARCY RAILWAY--ABANDONMENT EXEMPTION--  
IN SEARCY, WHITE COUNTY, AR

Decided: May 5, 1999

By petition filed January 27, 1999,<sup>1</sup> Doniphan, Kensett and Searcy Railway (DK&S) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a 1.28-mile portion of its line of railroad, known as the DK&S Branch, extending from milepost 299.12 to the end of the line at milepost 300.40, in Searcy, in White County, AR. DK&S also seeks an exemption from the offer of financial assistance (OFA) requirements of 49 U.S.C. 10904 and the public use requirements of 49 U.S.C. 10905. We will grant the exemption from 49 U.S.C. 10903-05, subject to environmental and standard employee protective conditions.

BACKGROUND

DK&S is the owner and operator of 5.5 miles of rail line in the State of Arkansas.<sup>2</sup> It states that it seeks to discontinue operations and abandon the portion of the line in question because service to the three shippers on the line is no longer required and the right-of-way is needed for other public purposes.

According to DK&S, the shippers, Arkansas Wholesale Lumber Co. (AWL), Frostyaire Frozen Foods (FFF), and Thompson Recycling Company, Inc. (TRC), have already discontinued using the line and, therefore, will not be adversely affected by the abandonment. AWL has relocated its facility, FFF is using truck service, and TRC no longer receives shipments into its facility at Searcy. Letters from the shippers in support of the exemption request are included in the petition. In addition to the current lack of need for rail service, DK&S does not foresee a future need for rail service on the line. Overhead traffic does not exist because this is an end portion of track.

DK&S submits that the right-of-way is required for other public purposes by Harding University (Harding) of Searcy, as supported by a letter from David B. Burks, President of Harding. A bypass road recently constructed for the purpose of redirecting vehicular traffic from downtown

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<sup>1</sup> Notice of the filing was served and published in the Federal Register on February 16, 1999 (64 FR 7688-89).

<sup>2</sup> The 5.5-mile DK&S Branch is the only line of railroad owned and operated by DK&S, which is wholly owned by Union Pacific Railroad Company.

Searcy necessitated the relocation of the principal entrance to Harding's campus. However, the line crosses the new entrance, requiring the installation of new grade crossings and signalization unless the abandonment is approved. Also, Harding has experienced recent growth in its enrollment and must expand its campus housing as soon as possible. The most efficient location for additional dormitory space is on property that is presently occupied by the line, but construction cannot commence until abandonment of the line is authorized. Accordingly, expedited review of the abandonment proposal is requested so that construction can begin as soon as exemption authority is granted.<sup>3</sup>

DK&S states that, because it wants to promptly convey the underlying right-of-way to Harding, it will not negotiate with any party for the transfer of the line for trail use.

#### 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 relieving DK&S from the cost 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 transaction is not necessary to protect shippers from the abuse of market power because the shippers on the line do not object to the proposed transaction. The shippers have either relocated their facilities, no longer use rail transportation or no longer receive shipments at Searcy, and alternative transportation is available.<sup>4</sup>

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

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<sup>3</sup> The Searcy Industrial Development Commission, the Mayor of the City of Searcy (the Mayor), White County Judge Bob Parish, and Searcy Chamber of Commerce strongly support the abandonment petition and urge expedited action.

<sup>4</sup> Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

granting this exemption, we will impose the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979).

DK&S 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 effects of the proposed action on the quality of the human environment. SEA served an environmental assessment (EA) on March 26, 1999.

In the EA, SEA indicated that the Arkansas Soil and Water Conservation Commission (ASWCC) has informed SEA that during salvage operations appropriate erosion practices must be taken and the site revegetated upon completion of work. Therefore, SEA recommends that a condition be imposed requiring DK&S to consult with ASWCC prior to salvage operations. SEA also notes that the National Geodetic Survey (NGS) has identified one geodetic station marker (M 164) that may be affected by the proposed abandonment. Accordingly, SEA recommends that a condition be imposed requiring DK&S to consult with NGS at least 90 days prior to salvage activities in order to plan for its relocation if the marker will be disturbed or destroyed by abandonment activities.

No comments to the EA were filed by the April 26, 1999 due date. We will impose the conditions recommended by SEA. Based on SEA's recommendations, 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, to expedite the post-abandonment transfer of the right-of-way needed by Harding, DK&S has requested that the 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. 10904-05 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.<sup>5</sup> Here DK&S has agreed to transfer the subject right-of-way to Harding for a

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<sup>5</sup> See Union Pacific Railroad Company--Abandonment Exemption--In Salt Lake County, UT, STB Docket No. AB-33 (Sub-No. 116X) (STB served Sept. 30, 1998); K&E Railway Company--Abandonment Exemption--In Alfalfa, Garfield, and Grant Counties, OK and Barber County, KS, STB Docket No. AB-480X (STB served Dec. 31, 1996), slip op. at 4, citing Southern Pacific Transportation Company--Discontinuance of Service Exemption--In Los Angeles County, CA, Docket No. AB-12 (Sub-No. 172X), et al. (ICC served Dec. 23, 1994); Missouri Pacific Railroad Company--Abandonment--In Harris County, TX, Docket No. AB-3 (Sub-No. 105X) (ICC (continued...))

valid public purpose and the shippers on the line do not need continued rail service. On the other hand, imposition of OFA procedures could delay transfer of the line to Harding and jeopardize the timely completion of its construction project. Additionally, as a public use for the right-of-way here has already been established by agreement between DK&S and Harding, there is no need for a public use condition under these circumstances. Accordingly, we will grant an exemption 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. 10904-05 meet the criteria of 49 U.S.C. 10502. Applying OFA or public use requirements, 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)]. We have already determined that regulation is not necessary to protect shippers from an abuse of market power.

We will also not provide any further opportunity for interested persons to file trail use/rail banking requests. Trail use/rail banking is voluntary and can only be implemented if an abandoning railroad agrees to negotiate an agreement. See section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d). Here DK&S has made it clear that it will not entertain trail use requests.

Finally, to accommodate the request for expedited action, we will make the subject exemption effective 5 days after the service date of this decision. The record supports a need for such expedition.

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

It is ordered:

1. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903-05 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 subject to the conditions that DK&S shall: (1) consult with ASWCC prior to salvage operations; and (2) consult with NGS at least 90 days prior to salvage activities in order to plan for relocation of the geodetic station marker if the marker will be disturbed or destroyed by abandonment activities.

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<sup>5</sup>(...continued)  
served Dec. 22, 1992); Chicago & North Western Transportation Company--Abandonment Exemption--In Blackhawk County, IA, Docket No. AB-1 (Sub-No. 226X), et al. (ICC served July 14, 1989); and Iowa Northern Railway Company--Abandonment--In Blackhawk County, IA, Docket No. AB-284 (Sub-No. 1X) (ICC served Apr. 1, 1988).

2. This exemption will be effective on May 11, 1999.

3. Pursuant to the provisions of 49 CFR 1152.29(e)(2), DK&S 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 DK&S's filing of a notice of consummation by May 5, 2000, 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 Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams  
Secretary