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SERVICE DATE - JULY 2, 1998

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-493 (Sub-No. 7X)

TRACK TECH, INC.--ABANDONMENT EXEMPTION--IN ADAIR AND  
UNION COUNTIES, IA

Decided: June 29, 1998

By petition filed March 17, 1998, Track Tech, Inc. (Track Tech), seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a line of railroad between milepost 1.45 near Creston, and milepost 21.15 at the end of the line in or near Greenfield, a distance of 19.70 miles, in Adair and Union Counties, IA. Pursuant to 49 U.S.C. 10502(b), a notice was published in the Federal Register (63 FR 16859) on April 6, 1998, instituting an exemption proceeding. A request for issuance of a notice of interim trail use (NITU) and imposition of a public use condition was filed by the Iowa Trails Council, Inc. (ITC).<sup>1</sup> A comment in opposition to the petition was filed by Archer T. Elliott and Darline D. Elliott. We will grant the exemption, subject to public use, trail use, environmental, and standard employee protective conditions.

BACKGROUND

The line proposed for abandonment was formerly owned by The Burlington Northern and Santa Fe Railway Company (BNSF). According to Track Tech, BNSF had limited operations on the line and, at the end of February 1997, BNSF took the line out of service and embargoed it. BNSF sold the line to Track Tech on or about June 11, 1997,<sup>2</sup> but, because of unsafe and poor track conditions, Track Tech has never operated trains over it.<sup>3</sup>

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<sup>1</sup> The April 6 notice provided that any request for a public use condition under 49 CFR 1152.28 or for trail use/rail banking under 49 CFR 1152.29 had to be filed no later than April 27, 1998. ITC's request was filed on May 4, 1998. However, in 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), we stated that we would retain our policy of accepting filings after the due date when good cause is shown. Because ITC's late-filed request has not delayed the proceeding and will not prejudice any party, we will accept ITC's submission.

<sup>2</sup> See Track Tech, Inc.--Acquisition and Operation Exemption--The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 33434 (STB served Sept. 12, 1997).

<sup>3</sup> Track Tech also acquired six other lines from BNSF in 1996. It filed petitions for  
(continued...)

Track Tech submits that there are three shippers on the line—Green Valley Chemical (Green Valley), Rolling Hills Farm Service, and Farmers Cooperative Company (Farmers Cooperative). According to Track Tech, in 1996, the last full year of operation by BNSF, shipper use was sporadic and minimal. A total of 82 cars moved over the line; 27 cars of fertilizer were received inbound at Orient and Greenfield and 55 cars of grain and anhydrous ammonia were transported outbound from Creston, Orient, and Greenfield. There is no overhead traffic on the line because it ends at Greenfield.

Track Tech states that alternative transportation service is available through other rail<sup>4</sup> and motor carriers that operate in the area.

Archer and Darline Elliott are landowners whose farm property is adjacent to the railroad right-of-way proposed for abandonment. They now live in Lakewood, CO, and their farm is managed by Farmers National Company of Omaha, NE. The only access to their farm is from Cherry Street Road, which is on the west side of the farm. An access lane crosses a small portion of their land and then crosses the railroad track, via an access right-of-way, to a larger portion of their land. The Elliotts state that without this access, which they have had for years, the farm would be inaccessible. They state that their south property line separates them from Green Valley's fertilizer plant. They attach a newspaper article which indicates that the Crestland Cooperative (Crestland)<sup>5</sup> has purchased the segment of the line from its plant in Creston to Townline Road, which is the north border of Creston. They also state that Green Valley is seeking to buy 4 miles of the line from Townline Road to a point where it now crosses Cherry Street Road. According to the Elliotts, Crestland and Green Valley want to use the entire length of the line that crosses their property from their south property line up to Cherry Street Road and they protest the sale of the portion of the line that extends across their property.

#### 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

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<sup>3</sup>(...continued)  
exemption to abandon these lines in STB Docket No. AB-493 (Sub-Nos. 1X, 2X, 3X, 4X, 5X, and 6X). The exemptions in Sub-Nos. 1X, 2X, and 5X were granted by decisions served on January 12, 1998. The exemptions in Sub-Nos. 3X, 4X, and 6X were granted by decisions served on February 24, 1998.

<sup>4</sup> BNSF's east-west main line is located 4 miles south of Green Valley's facility at Creston and Iowa Interstate Railroad Company's east-west main line is located approximately 13 miles north of Greenfield.

<sup>5</sup> The article, which appeared in the Creston News Advertiser on December 12, 1997, indicates that Crestland was formerly Farmers Cooperative.

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 Track Tech of the costs of owning and maintaining the line [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 alternative transportation is available from other rail and motor carriers in the area. Nevertheless, to ensure that the shippers are informed of our action, we will require Track Tech to serve a copy of this decision and notice on them within 5 days of the service date of this decision and notice and certify to us that it has done so. Given our market power finding, we need not determine whether the proposed abandonment is limited in scope.

It does not appear that the Elliotts' comments have been served on Track Tech, as required by our rules. In any event, the concerns raised by the Elliotts are land use matters that must be resolved locally with the owners of the rail line and in accordance with the terms of the easement that permits the line to cross the property and the Elliotts' access right-of-way.

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

Track Tech 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 the data it contains, analyzed the probable effects of the proposed action on the quality of the human environment, and served an environmental assessment (EA) on May 27, 1998. In the EA, SEA indicated that the National Geodetic Survey (NGS) has identified nine geodetic station markers along the rail line and requests 90 days' notice to plan relocation of any markers that may be disturbed or destroyed by the proposed abandonment. Therefore, SEA recommends that a condition be imposed on any grant of abandonment authority requiring Track Tech to consult with NGS and provide it with 90 days' notice prior to disturbing or destroying any geodetic markers so that plans can be made for their relocation.

SEA received a letter from the Elliotts on June 23, 1998, in which the Elliotts object to the proposed sale of a segment of the line to be abandoned by Track Tech to Green Valley. The

segment in question crosses the Elliotts' farm property. The Elliotts argue that the proposed sale should be restricted to the boundary of Green Valley's property and should not include the line segment which crosses the Elliotts' property. Green Valley has indicated to the Elliotts that they need the additional trackage to switch cars. The Elliotts maintain that Green Valley should restrict its activities to its own property. These concerns go to activities of Green Valley over which we have no jurisdiction. Our jurisdiction concerns the abandonment and discontinuance of service with respect to rail operations and does not cover the subsequent reuse of a segment of the line by Green Valley following abandonment. However, we have noted the Elliotts' concern and entered their letter in the environmental docket.

We will impose the condition recommended by SEA. 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 the conservation of energy resources.

ITC requests that interim trail use/rail banking be imposed under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and has submitted a statement of willingness to assume financial responsibility for the right-of-way and acknowledged that use of the right-of-way is subject to possible reactivation of the right-of-way for rail service as required under 49 CFR 1152.29. By letter filed June 16, 1998, Track Tech states that it is willing to negotiate with ITC for interim trail use. ITC's request complies with the requirements of 49 CFR 1152.29 and Track Tech is willing to enter into negotiations. Therefore, we will issue a NITU for the described line. 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, Track Tech 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.

The parties should note that operation of the trail use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in Rail Abandonments--Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 608 (1986) (Trails), offers of financial assistance (OFA) to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking and public use. Accordingly, if an OFA is timely filed under 49 U.S.C. 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 precluded. Alternatively, if a sale under the OFA procedures does not occur, trail use may proceed.

SEA has indicated in its EA that the right-of-way may be suitable for other public use after abandonment. As noted above, ITC has also requested that a 180-day public use condition be imposed. ITC requests that Track Tech be precluded from: (1) disposing of the rail corridor, other than the tracks, ties and signal equipment; and (2) removing or destroying potential trail-related structures such as bridges, trestles, culverts and tunnels. ITC is an Iowa corporation organized in

1984 for the purpose of preserving appropriate railroad rights-of-way for possible reactivation of rail service with the interim use of these former railroad corridors as conservation/recreation trails designed for public use. ITC states that keeping this right-of-way intact is consistent with state policies. It indicates that the 180-day time period is needed to negotiate with the carrier and raise funds for acquisition and development.

We have determined that persons who file under the Trails Act may also file for public use under 49 U.S.C. 10905. See Trails, 2 I.C.C.2d at 609. 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. ITC 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 of the period of time requested. Accordingly, a 180-day public use condition also will be imposed, commencing with the effective date of this decision and notice. If a trail use agreement is reached on a portion of the right-of-way, Track Tech must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, we note that 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 a right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, Track Tech is not required to deal exclusively with ITC, but may engage in negotiations with other interested persons.

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 of the above-described line, subject to employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979), and the conditions that: (1) Track Tech shall leave intact all of the right-of-way, including bridges, trestles, culverts and tunnels (but not track or track materials), 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) Track Tech shall comply with the interim trail use/rail banking procedures set forth below; and (3) Track Tech shall consult with NGS and provide it with 90 days' notice prior to disturbing or destroying any geodetic markers so that plans can be made for their relocation.

2. The late-filed request for a NITU under 49 U.S.C. 1247(d) and a public use condition under 49 U.S.C. 10905 is accepted.

3. 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 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.

4. 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.

5. 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.

6. 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, Track Tech may fully abandon the line, provided the conditions imposed above are met.

7. Track Tech must serve a copy of this decision and notice on the shippers on the line within 5 days after the service date of this decision and notice and certify to the Board that it has done so.

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 July 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 the filing fee, which currently is set at \$1,000. 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 August 1, 1998. Petitions to stay must be filed by July 17, 1998, and petitions to reopen must be filed July 27, 1998.

11. Pursuant to the provisions of 49 CFR 1152.29(e)(2), Track Tech shall file 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 Track Tech's filing of a notice of consummation by July 2, 1999, 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 Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary