

40523
EB

SERVICE DATE – LATE RELEASE APRIL 5, 2010

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-290 (Sub-No. 311X)

NORFOLK SOUTHERN RAILWAY COMPANY—PETITION FOR EXEMPTION—IN
BALTIMORE CITY AND BALTIMORE COUNTY, MD

Decided: April 5, 2010

Norfolk Southern Railway Company (NSR) has filed a petition with the Surface Transportation Board under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903. In its petition, NSR seeks to abandon a 13.26-mile dead-end segment (“Line”) of a line of railroad commonly known as the Cockeysville Industrial Track (“CIT”). NSR also seeks exemption from the offer of financial assistance (OFA) provisions of 49 U.S.C. 10904 and the public use condition provisions of 49 U.S.C. 10905. The Maryland Transit Administration (MTA), seeking to remove any potential for conflicts between its commuter passenger rail operations on the Line and any potential freight traffic, supports NSR’s requests. James Riffin opposes the request for an OFA exemption, contending that there is a significant potential demand for renewed freight rail operations on the Line.

As explained below, we are granting NSR’s petition for an exemption to abandon freight rail service on the above-described line, subject to standard employee protective conditions, and for an exemption from the OFA process. We are denying, as moot, NSR’s request for an exemption from the public use condition process.

BACKGROUND

The Line is located between railroad milepost UU-1.00 (located just north of Wyman Park Drive, formerly Cedar Avenue) and the end of the CIT line south of the bridge at railroad milepost UU-15.44 in the City of Baltimore and in Baltimore County, MD. In 1990, Consolidated Rail Corporation (Conrail) sold the Line to MTA for use as part of its light rail commuter passenger system, which began operations over the Line in 1993. Conrail retained the sole, exclusive and perpetual right to provide freight rail service over the Line. In 1999, NSR acquired Conrail’s freight operating rights over the Line.

By 2005, as commuter passenger service on the Line increased, demand for freight rail service over the Line reached the point where the Line was, at best, only marginally profitable. At that point, NSR sought to abandon freight rail service on the Line. The Board denied NSR’s petition without prejudice to refiling, due to procedural deficiencies noted by Riffin. Norfolk Southern Railway Company—Abandonment Exemption—In Baltimore County, MD, STB Docket No. AB-290 (Sub-No. 237X) (STB served Apr. 3, 2006).

In its current petition for exemption, filed on December 16, 2009, NSR states that there has been no freight traffic over the Line since April 2005, and that future freight traffic would not generate sufficient revenue to cover the cost of resuming rail freight operations over the Line. NSR further asserts that the Line is now extensively used for public commuter rail transportation, and that after the abandonment of freight rail service, the Line will continue to be used for a public purpose as MTA's passenger rail transit line of railroad. NSR includes a letter from Baltimore County Executive James Smith expressing the county's support for the proposed abandonment of any freight service obligation "because removal of the potential for any freight rail service on that corridor would be entirely consistent with the County's . . . long term objectives for preservation of the integrity and safety of the operation of the MTA's light rail passenger service."

According to NSR, in April 2005, MTA arranged for alternative transportation service for the three shippers that had been using the Line: E.C.C.A. Calcium Products, Inc. d/b/a IMERYYS Pigments and Additives Group (IMERYYS); Baltimore Gas and Electric Company (BGE); and Fleischmann's Vinegar Company (Fleischmann). NSR states that IMERYYS, BGE and Fleischmann have agreed with MTA to continue using such alternative services and not to protest NSR's abandonment proposal. NSR notes that no railroad customer who has received service over the Line has filed a formal complaint concerning lack of service on the Line, and that there has been no reasonable request for rail freight service over the Line by or on behalf of a railroad customer located along the Line in the now 5-year period since April 2005.

Notice of NSR's petition for exemption was published in the Federal Register on January 5, 2010. On January 5, 2010, Riffin, Zandra Rudo, Carl Delmont, Lois Lowe, and Eric Strohmeyer jointly filed a notice of intent to participate as parties of record and a notice of intent to file an OFA pertaining to the Line. On the same date, Riffin, on behalf of himself and the other named individuals, filed comments and opposition to NSR's request for exemption from the OFA procedures, as well as a motion for a protective order to protect what he claimed was highly confidential marketing data and business information filed under seal. By a decision served on January 29, 2010, the Board stated that Riffin may only represent himself, as he is neither a licensed attorney nor practitioner approved to practice before the Board. By a decision served on March 22, 2010, the Board granted in part a motion to strike filed by NSR, striking certain filings and certain sections and phrases of filings submitted by Riffin pertaining to his representation of others. Eric Strohmeyer filed a proper notice of intent to participate on March 4, 2010, and became a party to this proceeding on that date. On March 26, 2010, Rudo, Delmont, and Lowe each filed a motion to amend the January 5, 2010 notice of intent to participate as a party of record and a second notice of intent to file an offer of financial assistance. On the same date, Rudo, Delmont, and Lowe also each filed a motion for a protective order to protect certain documents and information submitted to the Board under seal. Rudo, Delmont, and Lowe all provided sufficient information to become parties to this proceeding on March 26, 2010.

In its reply to NSR's petition for exemption on January 25, 2010, MTA states that it supports NSR's petition for exemption for the proposed abandonment of freight service and exemption from the OFA and public use processes. MTA asserts that the abandonment and

associated exemptions are critical to ensure the future safety and success of the light rail transit system it operates over the Line. MTA states that there has been no freight traffic on the Line, or any reasonable request for freight rail service, since April 2005, and that there is no credible or reasonable prospect of future demand for such service. MTA further states that the three former shippers have all secured permanent transportation alternatives to freight rail service and fully support NSR's petition for exemption.¹ In addition, MTA asserts that, as demand for freight rail services has decreased over the Line, demand for passenger light rail service on the Line has increased, thus compelling MTA to double-track the entire Line while working to reduce actual and potential conflicts with freight traffic. In support of this assertion, MTA claims that, in 2008, the light rail line carried a weekday average of 25,754 passengers for regularly scheduled service. MTA asks the Board to grant NSR's petition for exemption, based on the lack of demand for freight rail service and the valid and compelling public purpose the Line is serving.

Riffin states that he does not object to NSR's relinquishment of its operating rights over the Line, as long as he is permitted to acquire the operating rights and provide freight rail service on the Line.² Riffin disputes NSR's claim that future freight traffic would not generate sufficient revenue to cover the costs of resuming freight service on the Line. Riffin also claims that the reason there has been no freight rail traffic over the Line since 2005 is because MTA removed most of the track infrastructure and effectively took the Line out of service in April 2005 in order to facilitate its double-tracking project. Riffin argues that his acquisition of NSR's freight operating rights would not interfere with MTA's current or planned transit services. Riffin contends that he has made reasonable requests for freight service, but that NSR improperly denied them as unreasonable.

Riffin further asserts that, in April 2005, MTA convinced the three former shippers over the Line to utilize alternate transportation for their goods by signing a subsidy agreement with each shipper by which MTA paid over \$200,000 per year to subsidize the extra cost to shippers of trucking their products. Riffin claims that these subsidy agreements will end in April 2010, and that plant managers at Fleischmann and IMERYYS disclosed to him that there have been extensive discussions about the transportation of their goods after April 2010. Riffin further asserts that the former shippers are prohibited by these subsidy agreements from filing comments with the Board at the risk of losing the subsidy agreement payments. Riffin also states that a number of other shippers desire freight rail service in Cockeysville. In support of his claims, Riffin submits as confidential information a listing of what he describes as potential shippers and their projected need for freight rail service in Cockeysville, in addition to other information.

Riffin also claims that providing freight rail service over the Line would greatly assist in the transportation of municipal solid waste (MSW) generated in Baltimore County to a proposed 1,500-ton incinerator on the property of Edgewood Arsenal, located in Harford County, MD. Riffin states that, without freight rail service on the Line, the proposed incinerator will result in

¹ Letters of support for the NSR petition for exemption from two former shippers, Fleischmann and BGE, are attached to the MTA reply as Exhibits 1 and 2, respectively.

² Otherwise, Riffin opposes the proposed abandonment exemption.

the transport by motor carrier of 365,000 tons of MSW to Harford County, thus doubling the number of trucks on Route 152 to 27,000 per year. Riffin further claims to have submitted a proposal for the transportation of an average of 13 rail cars per day of MSW from Cockeysville to the Harford County incinerator over the Line, between the hours of midnight and 5 AM.

DISCUSSION AND CONCLUSIONS

Exemption from Section 10903. Under 49 U.S.C. 10903, a rail line may not be abandoned nor rail service over a line discontinued 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.

When abandonment authorization is sought, whether by application or exemption petition, the railroad must demonstrate either that there is no longer any need for service on the line or that the line in question has become a burden on interstate commerce. Here, the record evidence does not show any current need, or any credible, nonspeculative future need, for freight service on the line. Thus, detailed scrutiny of NSR's proposal under 49 U.S.C. 10903 is not necessary to protect shippers from an abuse of market power. There are no current freight railroad customers using the Line.³ The three former shippers on the Line have shifted their traffic to alternate transportation services. Indeed, two of them have submitted letters expressing their support for NSR's proposal.

Riffin's forecasts for potential freight rail traffic on the CIT are too speculative to be given any significant weight. In Union Pacific Railroad Company—Discontinuance—in Utah County, Utah, STB Docket No. AB-33 (Sub-No. 209), slip op. at 2-3 (STB served Jan. 2, 2008) (Utah County), the Board declined to consider a potential shipper's traffic projections because that party had not taken the basic step of contacting the carrier about rates and terms of service, nor had it provided contracts or otherwise demonstrated that the traffic would be likely in the coming year. Here, Riffin's showing is even weaker: he has failed to submit any verified statements or other evidence from shippers requesting freight rail service or demonstrating a need for such service in the future. Rather, Riffin's only evidence of potential traffic consists of his unsubstantiated statements. We find this evidence to be insufficient.⁴

³ The Board previously has assessed Riffin's claim that NSR failed to serve him and has determined that Riffin is not a shipper on the CIT. Maryland Transit Administration – Petition for Declaratory Order, STB Finance Docket No. 34975 (STB served Sept. 19, 2008). Riffin's restatement of the same allegations here does not warrant revisiting that determination.

⁴ Cf. Norfolk Southern Railway Company—Abandonment Exemption—In Norfolk and Virginia Beach, VA, STB Docket No. AB-290 (Sub-No. 293X) (STB served Dec. 6, 2007) (rejecting opposition to OFA exemption where evidence consisted of Riffin's unsupported assertions about purported conversations with potential shippers).

Riffin's attempt to explain the absence of shipper support for his position is unpersuasive. Riffin suggests that BGE, IMERYYS, and Fleischmann have not expressed to us a desire to use rail service on the CIT because, if they did, MTA would exercise its rights under their agreements to require them to repay over \$1 million each. Riffin claims to have a copy of one of these contracts, but he has declined to submit it here, stating that he fears that MTA would cancel that shipper's contract. We find none of this persuasive.

First, Riffin's asserted desire to protect the shipper against the cancellation of its contract makes little sense given that, according to Riffin, all of these contracts expire this month. Second, assuming that the contracts would entitle MTA to repayment from any former shipper who objected to the proposed abandonment or OFA exemption request, we believe this reflects a business judgment by the former shippers about their need for rail service over the Line. Indeed, MTA contends that its arrangements with the shippers were intended to assist those shippers in finding a permanent alternative to shipping over the Line. We find MTA's claim credible, as a temporary alternative would not resolve MTA's safety concerns arising from increased commuter passenger use of the Line. Moreover, if MTA's payments were intended merely as subsidies for the shippers' use of a temporary alternative to the Line, it seems unlikely that BGE and Fleischmann would have provided letters supporting the abandonment proposal. In short, as was the case in Utah County, there simply is no evidence before us in this case of any commitment or affirmative acts by actual or potential shippers to secure rail service over the Line. As a result, we find that the potential future traffic claimed by Riffin is too speculative to be entitled to much weight.

Also speculative is Riffin's claim that Baltimore County would use freight rail service to transport MSW to a proposed incinerator in Harford County. The record contains no evidence that the proposed incinerator has even been approved for construction.⁵ The website of the Harford County government does not indicate a timeline for the construction of the proposed incinerator, if it has been approved, or whether it would accommodate freight rail service.⁶ Moreover, Riffin has not submitted a letter or any other evidence from officials in Baltimore County indicating a commercial need for freight rail service over the Line, but rather has submitted newspaper articles regarding the proposed incinerator. In contrast, NSR has submitted a letter from Baltimore County Executive James Smith stating unequivocally the county's desire to see "the removal of the potential for any freight rail service" on the Line to promote the integrity and safety of MTA's light rail operations.

To ensure that the three former shippers on the Line are informed of our action, we will require NSR to serve a copy of this decision on BGE, Fleischmann, and IMERYYS, so that it is received by the shippers within 5 days of the service date of this decision, and to certify

⁵ See Utah County, slip op. at 6 (rejecting traffic projections as too speculative where potential shipper had not started to build the plant that would receive the proposed chemical shipments).

⁶ Harford County Government – Resource Recovery Facility, <http://www.harfordcountymd.gov/dpw/envaffairs/rescrecovery.html>.

contemporaneously to us that it has done so. Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

Detailed scrutiny of NSR's proposal 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 expedite regulatory decisions and reduce regulatory barriers to exit, as specified in 49 U.S.C. 10101(2) and 10101(7). An exemption will also foster sound economic conditions and encourage efficient management by allowing NSR to terminate its common carrier obligation over a line without traffic and apply any personnel and assets currently devoted to the line more productively elsewhere on its rail system, consistent with 49 U.S.C. 10101(5) and (9). Other aspects of the rail transportation policy will not be affected adversely. Thus, we find that the proposed exemption from Section 10903 meets the criteria of 49 U.S.C. 10502.

Exemption from Section 10904. Under 49 U.S.C. 10904, a financially responsible person may offer to purchase, or subsidize continued rail operations over, a rail line sought to be abandoned. Occasionally, the Board has granted exemptions from the OFA provisions of 49 U.S.C. 10904, when the right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service.⁷ Here, NSR has established that the Line is currently used for a valid public purpose by MTA, as a passenger rail transit line. MTA has asserted on this record that the abandonment of freight rail service is critical to ensuring the future safety and success of the light rail transit system MTA operates over the Line, and that it fully supports NSR's request for exemption from the OFA process for that reason. MTA explains that it has worked to reduce actual and potential conflicts with freight traffic to ensure that the increased demand for light rail service on the Line is safely met. The Board has received no request from a former shipper or potential shipper indicating a commercial need for freight rail service over the Line. Because the Line is currently in use for a valid public purpose, and there is no indication of an overriding public need for continued rail service, we will exempt the proposed abandonment from the OFA requirements of 49 U.S.C. 10904.⁸

Riffin suggests that freight rail service to the potential new incinerator in Harford County would meet a public need. However, given the short distances involved, the fact that the MSW movements necessarily originate on trucks, and the fact that a rail interchange would be needed to complete the delivery of the MSW to the potential incinerator, which, if located on a rail line, would be on a different rail line, we have serious questions about the feasibility of an operation

⁷ See, e.g., Norfolk Southern Railway Company—Abandonment Exemption—In Norfolk and Virginia Beach, VA, STB Docket No. AB-290 (Sub-No. 293X) (STB served Nov. 6, 2007) (Virginia Beach), petition for review dismissed sub nom. Riffin v. STB, No. 07-1483 (D.C. Cir. Apr. 22, 2009).

⁸ See Los Angeles County Metropolitan Transportation Authority—Abandonment Exemption—In Los Angeles County, CA, STB Docket No. AB-409 (Sub-No. 5X), slip op. at 5-6 (STB served July 17, 2008) (LACMTA) (explaining that an OFA exemption would be appropriate to facilitate existing mass transit service where traffic on the line to be abandoned had been nonexistent for years and any plans to restore freight rail service were speculative).

transloading the MSW from trucks to rail here. Presumably, that explains why neither NSR nor any of the public bodies involved with developing the new incinerator has sought to promote a rail option for the facility. Indeed, as previously noted, Baltimore County supports NSR's petition for exemption.

Section 10502 provides that the Board, to the maximum extent consistent with this part, shall exempt a person, class of persons or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part is not necessary to carry out the rail transportation policy and is not needed to protect shippers from the abuse of market power. Section 10904 provides a vehicle by which the Board may compel the sale of a rail line to a person for continued rail service. Given the testimony of MTA and Baltimore County, we require a stronger showing than Riffin has made that rail service to the proposed incinerator would serve a real public need and that such service would not compromise the safety of the continued use of the tracks for public transit, an important consideration here. See 49 U.S.C. 10101(8).

In opposing NSR's OFA exemption request, Riffin cites the Board's decision in Norfolk Southern Railway Company – Adverse Abandonment – St. Joseph County, IN, STB Docket No. AB-290 (Sub-No. 286) (STB served Feb. 14, 2008), petition to reopen denied (STB served Aug. 27, 2008), aff'd sub nom. City of South Bend v. United States, 566 F.3d 1166 (D.C. Cir. 2009) (South Bend), apparently to support the proposition that he has submitted sufficient evidence to establish the future need for rail service over the Line. That case is distinguishable. It involved a third-party, or "adverse," abandonment. Unlike carrier-initiated abandonments, in adverse abandonments a third party—not the carrier that owns the line—seeks to compel the removal of the line from the national rail system and from our jurisdiction, often against the will, or at least without the acquiescence of, the incumbent carrier. More importantly, in that case the Board was persuaded that there was a real potential for rail service: Notre Dame University, a former shipper of coal on the line, continued to receive 80,000 tons of coal annually by motor carrier and was expected to increase its use to 100,000 tons annually in the near future; coal is a commodity that can be moved more efficiently by rail than by truck; and although Notre Dame had withdrawn its initial support for a plan to reactivate the line, it later indicated that it might consider resuming using rail service for its coal deliveries. The record here reveals no similar evidence of a potential demand for the renewal of freight rail service. In any event, the weighing of evidence and balancing of interests intrinsic to abandonment cases is highly case-specific, based on the nature, weight, and credibility of the facts and evidence presented in each case.

Riffin also quotes a lengthy passage from Norfolk Southern Railway Company—Abandonment Exemption—In Orange County, NY, STB Docket No. AB-290 (Sub-No. 283X) (STB served May 2, 2007) (Orange County) to suggest that his mere expression of interest in providing rail service on the Line suffices to prevent the Board from granting an OFA exemption. In quoting Orange County, Riffin omits the Board's finding that, in that case, "the petition for abandonment is not tied to a public project."⁹ Here, in contrast, NSR's petition is

⁹ Orange County, slip op. at 3.

tied to a public project, MTA's light rail commuter passenger system, a type of public project that this agency regards as both valid and important.¹⁰

The record here establishes that the proposed exemption from section 10904 meets the criteria of 49 U.S.C. 10502. Applying OFA 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 provisions, will 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)]. Regulation is not necessary to protect shippers from an abuse of market power, because there are no current shippers on the Line and no potential shippers have objected to the exemption from the OFA process.¹¹

Exemption from Section 10905. NSR has also requested an exemption from the public use condition provision of 49 U.S.C. 10905. Requests for a public use condition were due by January 25, 2010, and none has been filed. Therefore, the request for exemption from section 10905 will be denied as moot.

Employee 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 affected employees. Accordingly, as a condition to granting this exemption, we will impose the standard employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

Environmental review. NSR has submitted a combined environmental and historic 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 action. See 49 CFR 1105.11. The Board's Section of Environmental Analysis (SEA) has examined the report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment. SEA issued an Environmental Assessment (EA) for public review and comment on February 16, 2010. Comments to the EA were due by March 15, 2010. In the EA, SEA recommended that we not impose any environmental conditions on any decision if we grant the abandonment exemption.

¹⁰ LACTMA, slip op. at 5.

¹¹ On April 2, 2010, Strohmeyer filed a motion for a protective order, a notice of intent to file an OFA, and a request to toll the time period for filing an OFA. Given our decision to grant an exemption from the OFA process, we will deny as moot Strohmeyer's motion for a protective order and request to toll the time period for filing an OFA.

Comments on the EA were received from Riffin on March 10, 2010.¹² In his comments, Riffin challenges as unsupported the statement in the EA that there is little prospect of attracting other rail traffic commitments sufficient to support a profitable rail freight operation. Riffin asserts that the potential number of rail cars disclosed in his confidential information submitted to the Board was not noted by the EA, and that the record in this proceeding had not been sufficiently developed to reach the conclusion that the CIT could not support a profitable rail operation. Riffin further states that the issue of whether there is sufficient traffic to support a profitable freight rail operation on the CIT must be decided by the Board.¹³ Riffin also claims that the lack of freight rail service on the CIT negatively affects air quality and the human environment due to the quantities of recyclable commodities currently transported via trucks by shippers located adjacent to the CIT.

On March 18, 2010, SEA issued a Post EA addressing Riffin's comments. SEA explained that the traffic information submitted by Riffin pertains to the merits of the case, but that it does not change SEA's environmental analysis. SEA states that, because no freight rail traffic has moved over the CIT since April 2005, the proposed abandonment of freight rail service would not result in any further diversion of freight traffic to other transportation systems or modes. Accordingly, SEA continued to recommend that no environmental conditions be imposed.

We agree with SEA's analysis. Based on that analysis, we find that the proposed abandonment of freight rail service will not significantly affect either the quality of the human environment or the conservation of energy resources. Accordingly, we will grant NSR's petition for exemption.

This action 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 requirements of 49 U.S.C. 10903 the abandonment of freight rail service on the above-described line by NSR, subject to the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).
2. NSR's request for an exemption from the provisions of 49 U.S.C. 10904 is granted.

¹² Strohmeyer, Rudo, Delmont, and Lowe, have joined Riffin in making environmental comments. Because the environmental commenting process is an informal process, the comments will be accepted on behalf of all of these individuals. But, for convenience, we will refer to them as Riffin's comments.

¹³ This issue has been addressed on the merits, above.

3. NSR's request for an exemption from the provisions of 49 U.S.C. 10905 is denied as moot.

4. Strohmeier's motion for a protective order and request to toll the time period for filing an OFA are denied as moot.

5. NSR is directed to serve a copy of this decision on BGE, Fleischmann, and IMERYYS so that they receive a copy within 5 days of the service date of this decision and to certify to the Board contemporaneously that it has done so.

6. The exemptions will be effective on May 5, 2010. Petitions to stay must be filed by April 20, 2010, and petitions to reopen must be filed by April 30, 2010.

7. 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 April 5, 2011, 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 Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.