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SERVICE DATE – MARCH 25, 2011

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 384 (Sub-No. 3X)

DELTA SOUTHERN RAILROAD, INC.–ABANDONMENT EXEMPTION–IN DESHA AND
CHICOT COUNTIES, ARK.

Decided: March 23, 2011

Digest:¹ This decision allows Delta Southern Railroad, Inc., to end its obligation to provide rail service over a 24.1-mile line of railroad in Desha and Chicot Counties, Ark., and to eliminate the line.

By petition filed on December 6, 2010, Delta Southern Railroad, Inc. (DSR), seeks an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10903 to abandon a 24.1-mile line of railroad (the Line) between milepost 408.9 at or near McGehee and milepost 433.0 at or near Lake Village, in Desha and Chicot Counties, Ark. Notice of the filing was served and published in the Federal Register on December 23, 2010 (75 Fed. Reg. 80,894). The deadline for replies to the petition was January 12, 2011, and no replies were filed. We will grant the exemption, subject to environmental and standard employee protective conditions.

BACKGROUND

The Line extends between a point of connection with Union Pacific Railroad Company (UP) at or near McGehee at milepost 408.9 and a point of connection with a former line of railroad now owned by Southeast Arkansas Economic Development District (SAEDD) at or near Lake Village at milepost 433.0.²

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² By letter dated January 5, 2011, DSR clarifies that SAEDD did not acquire the former line from it pursuant to Board processes and states that SAEDD did not become a rail carrier by virtue of its acquisition of the former rail line. See Delta S. R.R.–Aban. Exemption–between Lake Vill., Ark. and Shelburn, La., AB 384 (Sub-No. 1X)(STB served Apr. 7, 2005).

According to DSR, the Line was constructed between 1907 and 1915 by UP predecessor Missouri Pacific Railroad Company (MP). DSR acquired the Line as part of a purchase of rail lines from UP/MP in 1989.

DSR states that the only shipper that has used the Line in the past 10 years is Epstein Gin (Epstein). Epstein has shipped cottonseed from its facility located at Lake Village at milepost 431.3, about 2.7 miles north of the southern terminus of the proposed abandonment.

DSR states that Epstein's use of the Line has declined in recent years. According to DSR, Epstein shipped 451 carloads in 2008, but only 81 carloads in 2009. DSR asserts that Epstein's rail shipments remained low in 2010, with only 20 carloads during the first ten months.

The Line was embargoed on November 2, 2010, due to unsafe track conditions.³ According to DSR, Epstein has stated that if it were not for the embargo, it would have shipped an additional 40 carloads, which would have brought its total carloads to 60 for 2010. DSR states that this traffic level reflects a decline of 26% from Epstein's already reduced traffic level in 2009 and a decline of 87% from Epstein's 2008 rail traffic. DSR has estimated that Epstein's use of the Line in forecast year 2011 would be 60 carloads, based on Epstein's likely rail traffic volume in 2010 had the Line not been embargoed. DSR contends that Epstein's future use of the Line would not be anywhere near its use of the Line in 2008, noting that any projection of forecast year traffic in excess of 60 carloads would be unduly speculative. DSR adds that the area surrounding the Line is rural, making it highly unlikely that a rail-served industry would locate on the Line in the future.

DSR contends that it would incur a substantial operating loss in the forecast year at a 60-car traffic level. DSR asserts that it currently derives \$341.59 in revenue per car for transporting Epstein's traffic, and assuming a 3%-percent increase in per-car revenue in 2011, DSR would derive \$351.84 per car for the transportation of 60 carloads for Epstein in the forecast year. At that revenue level, DSR calculates that there would be total revenue of \$21,110 from Epstein in the forecast year. DSR estimates that its costs to maintain the track and bridges on the Line alone would amount to approximately \$144,600 in the forecast year, based on an average maintenance cost of \$6,000 per mile per year ($\$6,000 \times 24.1 \text{ miles} = \$144,600$). Considering only its estimated maintenance costs, DSR calculates that it would suffer a forecast year operating loss of \$123,490. DSR also estimates that it would cost more than \$4 million to rehabilitate the track and bridges on the Line to comply with Federal Railroad Administration Class I safety standards.⁴ With the decline in traffic on the Line, DSR concludes that its continued operation would not generate enough revenue to justify the costs to rehabilitate and maintain the Line. DSR adds that its continued operation also would result in opportunity costs

³ DSR has attached to its petition a copy of its embargo permit as Appendix 3 and a series of photographs of track and bridge conditions on the Line, with milepost locations noted adjacent to the photographs, as Appendix 4.

⁴ This figure consists of \$1,957,800 to replace crossties, \$648,386 for ballast rock, \$96,000 to replace rails, and \$1,368,779 to replace bridges.

of \$81,228 in the forecast year from foregoing a more profitable alternative use of the Line's assets.

According to DSR, Epstein and other local interests have feasible transportation alternatives. DSR states that there are facilities specifically designed for truck-to-rail transloading of cottonseed at Jerome and Portland, Ark., both located near Epstein's facility at Lake Village. According to DSR, Jerome is only 25 highway miles from Lake Village, and Portland is only 22 highway miles from Lake Village. DSR notes that there is excellent highway access between those points. DSR states that both Jerome and Portland are rail served by UP on UP's main line between Little Rock, Ark., and New Orleans, La., and that Epstein has used both facilities for shipping cottonseed. As noted, there has been no opposition to DSR's petition.⁵

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 expedite regulatory action and reduce regulatory barriers to exit, in accordance with 49 U.S.C. §§ 10101(2) and (7). An exemption will also foster sound economic conditions and encourage efficient management by allowing DSR to save the expenses of maintaining and operating a line that is minimally used and unprofitable. See 49 U.S.C. §§ 10101(5) and (9). Other aspects of the rail transportation policy will not be adversely affected by use of the exemption process.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. Epstein, the only shipper using the Line, appears to have alternative transportation available and has not filed in opposition to the proposed abandonment. Nevertheless, to ensure that Epstein is informed of our action, we will require DSR to serve a copy of this decision on Epstein so that it is received by the shipper within 5 days of the service date of this decision and to certify 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.

Under 49 U.S.C. § 10502(g), the Board may not use its 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 set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979).

⁵ DSR has served a copy of its exemption petition on Epstein.

DSR 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 C.F.R. § 1105.11. Our Office of Environmental Analysis (OEA) has examined the report, verified the data it contains, analyzed the probable effects of the proposed action on the quality of the human environment, and issued an Environmental Assessment (EA) for public comment. The EA was served on February 4, 2011.

In the EA, OEA states that the U.S. Fish and Wildlife Service (USFWS) has indicated that the federally endangered Interior Least Tern (*Sterna antillarum athalassos*) is known to occur in both counties, where it nests on sand and gravel islands. The USFWS also has indicated that the species breeds between May 15 and August 1. The USFWS recommends that, if observations reveal breeding activity within one-half mile of the proposed abandonment, no action should proceed prior to consultation with USFWS. Accordingly, OEA recommends that prior to commencement of any salvage activities, DSR be required to consult with the USFWS (501-513-4489) regarding potential impacts from salvaging activities to the breeding activities of that federally listed endangered species that may occur near the Line; and that DSR be required to report the results of these consultations in writing to OEA prior to the onset of salvage operations.

Comments to the EA were due by March 7, 2011. No comments were received. Accordingly, we will impose the environmental condition recommended by OEA in the EA. Based on OEA's recommendation, 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.

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 DSR of the above-described line, subject to the employee protective conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979), and subject to the condition that DSR shall consult with the USFWS (501-513-4489) regarding potential impacts from salvaging activities to the breeding activities of the federally listed endangered Interior Least Tern (*Sterna antillarum athalassos*) that may occur near the Line and report the results of these consultations in writing to OEA prior to the onset of salvage operations.

2. DSR is directed to serve a copy of this decision on Epstein so that it is received by Epstein within 5 days after the service date of this decision and to certify contemporaneously to the Board that it has done so.

3. An OFA under 49 C.F.R. § 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by April 4, 2011, subject to time extensions authorized under 49 C.F.R. § 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. § 10904 and

49 C.F.R. § 1152.27(c)(1). Each OFA must be accompanied by the filing fee, which currently is set at \$1,500. See 49 C.F.R. § 1002.2(f)(25).

4. 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.”**

5. Provided no OFA has been received, this exemption will be effective on April 24, 2011. Petitions to stay must be filed by April 11, 2011, and petitions to reopen must be filed by April 19, 2011.

6. Pursuant to the provisions of 49 C.F.R. § 1152.29(e)(2), DSR 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 DSR’s filing of a notice of consummation by March 25, 2012, 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 Nottingham, and Commissioner Mulvey.