

29566  
DO

SERVICE DATE - SEPTEMBER 2, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-290 (Sub-No. 194X)

NORFOLK AND WESTERN RAILWAY COMPANY  
--ABANDONMENT EXEMPTION--  
BETWEEN SOUTH BEND AND DILLON JUNCTION  
IN ST. JOSEPH AND LAPORTE COUNTIES, IN

IN THE MATTER OF AN OFFER OF FINANCIAL ASSISTANCE

Decided: August 31, 1998

Norfolk and Western Railway Company (NW), a wholly owned subsidiary of Norfolk Southern Railway Company (NS), filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments to abandon the South Bend to Dillon Junction branchline extending from milepost SK-2.5, near South Bend, to milepost SK-24.0, near Dillon Junction, a distance of approximately 21.5 miles in St. Joseph and LaPorte Counties, IN. The notice of exemption was filed on June 23, 1997, in conjunction with the railroad control application docketed as STB Finance Docket No. 33388. In CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company--Control and Operating Leases/Agreements--Conrail Inc. and Consolidated Rail Corporation, STB Finance Docket No. 33388, Decision No. 12 (STB served July 23, 1997) (CSX/NS/CR No. 12), slip op. at 12, which was published in the Federal Register on July 23, 1997, at 62 FR 39577, the Board accepted for consideration the primary application and related filings, and the related abandonment proposals.

In Decision No. 89, served on July 23, 1998, in the STB Finance Docket No. 33388 proceeding (CSX/NS/CR No. 89), the Board authorized the exemption in STB Docket No. AB-290 (Sub-No. 194X), granted the request for a public use condition,<sup>1</sup> and provided that: (1) a formal expression of intent to file an offer of financial assistance (OFA) under 49 CFR 1152.27(c)(2), to allow rail service to continue must be received by NS and the Board by July 31, 1998; (2) the OFA must be received by NS and the Board by August 21, 1998,<sup>2</sup> subject to time

---

<sup>1</sup> With respect to the South Bend-Dillon Junction abandonment, the St. Joseph Parks and Recreation Department requested a 180-day public use condition and also filed a statement under the National Trails System Act Amendments of 1983, 16 U.S.C. 1247(d) (Trails Act). See CSX/NS/CR No. 89, slip op. at 46 n.67.

<sup>2</sup> The Board also noted that, because OFAs take precedence over public use, if an OFA is filed by August 21, 1998, public use negotiations will have to await the completion of the OFA

(continued...)

extensions authorized under 49 CFR 1152.27(c)(2)(ii)(C); (3) the offeror must comply with 49 U.S.C. 10904 and must also comply with 49 CFR 1152.27(c)(2); (4) each OFA must be accompanied by a \$1,000 filing fee; and (5) provided no OFA has been received, the exemption in STB Docket No. AB-290 (Sub-No. 194X) will be effective on Day One<sup>3</sup> (unless stayed pending reconsideration).<sup>4</sup>

On August 21, 1998, American Electric Power Service Corporation (AEP) submitted an OFA under 49 U.S.C. 10904 and 49 CFR 1152.27(c) to subsidize rail operations over the line operated by NW. AEP states that it was an active participant in the proceedings, seeking to maintain necessary rail service at one of its electric generating stations. AEP further states that the reason it did not file the requisite notice of intent by July 31, 1998, is because its management responsible for railroad transportation matters and its counsel were unaware until now of AEP's interest in maintaining rail operations over the line in question. AEP states that its timely filed OFA should moot its failure to have filed a notice of intent to submit an OFA by July 31, 1998. AEP also indicates, as further discussed below, that NS has agreed to waive this notice requirement.

In its OFA, AEP did not submit an actual dollar amount, but states that NS is willing to negotiate with AEP over a mutually agreeable amount to permit it to continue rail operations over the line, and that AEP is willing to enter into negotiations with NS as soon as possible. AEP states that its counsel promptly notified the lead counsel for NS on August 21, 1998, of AEP's willingness to enter into good faith negotiations with NS to provide the level of financial assistance to NS necessary to maintain rail operations on the line. AEP states that, since it only expressed interest in making an OFA to NS on August 21, these representations should satisfy the requirements of 49 CFR 1152.27(c)(ii)(C), inasmuch as NS has not had an opportunity to provide AEP with the estimate required under 49 CFR 1152.27(a)(1) of the necessary subsidy. AEP indicates that, in consideration of AEP's representations, NS has agreed to waive the requirement that AEP should have filed a notice of intent to make an OFA by July 31, 1998. If NS and AEP are unable to arrive at a mutually agreeable dollar amount, either party may request the Board to establish terms and conditions.

An OFA to acquire a line for continued rail service need not be detailed, but an offeror must show that it is financially responsible and that the offer is reasonable. See Conrail Abandonments Under NERSA, 365 I.C.C. 472 (1981).

---

<sup>2</sup>(...continued)

process. If an OFA results in the continuation of rail service, the public use condition will have no effect. See CSX/NS/CR No. 89, slip op. at 182 n.266.

<sup>3</sup> Day One (also known as the Closing Date) is the date on which CSX and NS will effect the division of the operation and use of Conrail's assets. See CSX/NS/CR No. 89, slip op. at 17 n.27.

<sup>4</sup> The Board has not received any petitions to stay the exemption.

AEP states that it is a large, multi-State electric utility with very substantial assets, that it currently ships substantial quantities of coal over several of the nation's railroads, including NS, and that its financial responsibility is well known to NS, as well as other railroads, and presumably to the Board.

AEP requests the Board to (a) waive the obligation to have filed a notice of intent to submit an OFA by July 31, 1998; (b) accept its OFA filed August 21, 1998, as satisfying the prerequisites of the applicable regulations; and (c) postpone the effectiveness of the condition as to public use negotiations until such time as AEP and NS are able to engage in good faith negotiations to determine a mutually agreeable amount of financial assistance necessary to permit rail operations to continue on the line. AEP's requests are reasonable and will be granted.

Because AEP, a financially responsible entity, has offered financial assistance, the effective date of the exemption authorizing abandonment of the line will be postponed, pending completion of the OFA process.

Any person filing a request to set terms and conditions must pay the requisite filing fee, set forth at 49 CFR 1002.2(f)(26), which currently is \$14,600. An original and 10 copies of the request should be submitted along with the fee, in an envelope bearing the docket number of the proceeding,<sup>5</sup> along with the words "Attention: Application Unit, Request to Set Terms and Conditions" in the lower left hand corner.

Appeals to this decision are governed by 49 CFR 1011.2(a)(7). Any appeal must be filed within 10 days of the service date of this decision and will be heard by the entire Board.

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

---

<sup>5</sup> The docket number of this proceeding is STB Docket No. AB-290 (Sub-No. 194X).

It is ordered:

1. The obligation of AEP to have filed a notice of intent to submit an OFA by July 31, 1998, is waived.
2. The effective date of the decision authorizing abandonment of the line, see CSX/NS/CR No. 89, slip op. at 182 (ordering ¶75), is postponed in order to permit the OFA process under 49 U.S.C. 10904 and 49 CFR 1152.27 to proceed.
3. The effectiveness of the condition providing an opportunity for public use negotiations, see CSX/NS/CR No. 89, slip op. at 182 (ordering ¶74), is postponed in order to permit the OFA process under 49 U.S.C. 10904 and 49 CFR 1152.27 to proceed.
4. If NS and AEP cannot agree on terms and conditions, either party may request the Board to establish the terms and conditions on or before September 21, 1998. If no agreement is reached and no request is submitted by that date, the Board will serve a decision vacating this decision and reinstating effective dates for the decision authorizing abandonment of the line and the condition as to public use negotiations.
5. This decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams  
Secretary