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SERVICE DATE - NOVEMBER 30, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-472 (Sub-No. 1X)

DAKOTA RAIL, INC.—ABANDONMENT EXEMPTION—IN McLEOD, CARVER, AND
HENNEPIN COUNTIES, MN

Decided: November 29, 2001

By petition filed on August 13, 2001,¹ Dakota Rail, Inc. (Dakota Rail) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903² to abandon its entire rail line from milepost 24.6, near Wayzata, to the end of the line at milepost 68.5, in Hutchinson, a distance of approximately 43.9 miles, in McLeod, Carver, and Hennepin Counties, MN. Protests and comments were filed by Carver County Regional Rail Authority, Hennepin County Regional Railroad Authority (HCRRA), the City of Hutchinson, MN, the Institute of Scrap Recycling Industries, Inc. (ISRI), Lake Minnetonka Parks and Trails, Inc., Minnesota Department of Transportation (MN/DOT), the City of Minnetonka Beach, MN, the City of Mound, MN, Norwesco, Inc. (Norwesco), the City of Orono, MN, Suburban Hennepin Regional Park District, MN, the City of Spring Park, MN, and the City of Wayzata, MN. The City of Minnetrista, MN (Minnetrista), requests issuance of a notice of interim trail use (NITU)

¹ Notice of the filing was served and published in the Federal Register on August 31, 2001 (66 FR 46063).

² In its petition, Dakota Rail also sought exemption from the requirements of 49 U.S.C. 10904 [offer of financial assistance (OFA) procedures] and 49 U.S.C. 10905 [public use conditions]. In its response to comments in opposition, filed on October 12, 2001, Dakota Rail withdrew its requests for exemptions from the OFA and public use provisions. According to Dakota Rail, it originally sought the exemptions from 49 U.S.C. 10904 and 10905 because it believed that would expedite the abandonment process and any subsequent sale of the line. With regard to a possible sale of the line, on August 1, 2001, Prairie Holding Corp., a subsidiary of RailAmerica, Inc. (RailAmerica), and the parent of Dakota Rail, entered into a Letter of Intent to sell its stock in Dakota Rail to McKnight Rail Road, L.L.C. (McKnight). McKnight is a to-be-formed Illinois Limited Liability Corporation that is the acquisition vehicle for MidAmerica Development & Management Corporation and ELM Investments, L.L.C. On August 23, 2001, the Board granted Dakota Rail's request for a protective order with respect to the Letter of Intent. Dakota Rail has agreed to provide the Letter of Intent and other relevant documents to parties considering submission of an OFA.

under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act). Dakota Rail replied.³ In addition, U.S. Representatives James L. Oberstar, Martin Olav Sabo, and Mark R. Kennedy jointly filed a letter urging us to give full and fair consideration to offers from local governments to preserve the rail corridor. We will grant the exemption, subject to public use, environmental, and historic conditions.

BACKGROUND

The line was previously abandoned by the former Burlington Northern Railroad Company (BN).⁴ Subsequently, Dakota Rail acquired the right to operate the line, as well as an option to acquire the real estate.⁵ Dakota Rail provided service on an as-needed basis, transporting on average approximately 420 carloads annually. Dakota Rail states that it was informed by MN/DOT that the volume was insufficient for eligibility for receipt of public funding for track repairs and rehabilitation.⁶ Then, on February 2, 2000, an embargo on the line was published, limited to all hazardous materials and dangerous commodities. An embargo of all stations, limiting traffic to a “permit-only basis” for safety reasons, followed on May 16, 2000. This embargo was lifted on November 8, 2000, for non-hazardous materials and non-dangerous commodities for all stations except Hutchinson, but due to line conditions, traffic remains on a

³ In addition to the October 12 reply, Dakota Rail filed an earlier response, on September 24, 2001, to the comments of HCRRA and those of McLeod County Regional Railroad Authority (MCRRA), which addressed petitioner’s environmental report.

⁴ See Burlington Northern Railroad Company—Abandonment in Hennepin, Carver, and McLeod Counties, MN, ICC Docket No. AB-6 (Sub-No. 247) (ICC served Aug. 12, 1985).

⁵ Dakota Rail did not exercise the real estate option, instead entering a Contract for Deed and Operating Agreement (Contract for Deed) between Dakota Rail, as buyer, and MCRRA, as seller. The Contract for Deed consisted of the assumption of a mortgage between MCRRA, as mortgagor, and the State of Minnesota, acting through MN/DOT, and a United States Government lien. Dakota Rail maintains that MCRRA has no authority over the sale of the property under the Contract for Deed, as the Contract for Deed is silent as to the sale of Dakota Rail stock and confers no rights upon MCRRA regarding the stock. MCRRA requests that MCRRA be recognized as the fee owner of the property at issue, further noting that its purpose for the land, as stated in the Contract for Deed, was the maintenance of a corridor for public use through 2008. We make no finding as to the ownership of the right-of-way because it is not germane to our decision in this abandonment proceeding.

⁶ MN/DOT states that Dakota Rail has an outstanding track rehabilitation loan and that Dakota Rail’s assertion that it is ineligible to receive public funding is simply incorrect. Dakota Rail states that, at the time of the sale of stock to McKnight, or earlier, the loan from MN/DOT will be repaid through MCRRA.

permit-only basis. A \$700 per car surcharge was imposed on December 4, 2000. No traffic has moved over the line since May 16, 2000. Since then, Dakota Rail's customers have used motor carriage, or rail/motor service involving transloading freight from other railroads to trucks for final deliveries. The area surrounding the line is accessible by Minnesota Routes 7 and 12 and Hennepin County Route 15.

Dakota Rail seeks to abandon the line asserting that the revenues anticipated from traffic on the line are outweighed by the projected costs of line rehabilitation and maintenance, and opportunity costs. It provides data illustrating the steady decline in traffic on the line and the decline in customer demand.⁷ It anticipates that these trends will continue and that, after rehabilitation, the line will generate no more than 470 carloads of traffic per year, resulting in \$366,325 in gross revenue. It estimates that the cost for rehabilitating the line to Federal Railroad Administration (FRA) Class 1 condition would exceed \$11,000,000, but that, by making minor and limited repairs to the bridges and rail, along with spot resurfacing, the line could be restored to service for \$506,488. Dakota Rail calculates maintenance costs for a completely rehabilitated line to be \$130,980 annually, or about \$3,000 per mile, which it states is conservative compared to the line's historic average. It estimates annual post-rehabilitation operating costs to be \$271,470, and opportunity costs to be \$587,405, resulting in an economic loss of \$492,550 a year.

Comments and Protests. Several entities have filed requests that Dakota Rail's petition be denied based on the volume of protests and on the need for more time to review the abandonment proposal. They seek preservation of the rail corridor for transportation or other public uses. ISRI urges denial of the petition alleging a continuing need to use the rail line for shipping purposes. ISRI alleges that there is at least one (unidentified) scrap recycling business on the line that Dakota Rail has refused to serve, but admits that it has other service available, albeit less convenient and more costly. ISRI also asserts that the line was and remains viable, ignoring the prior abandonment by BN. ISRI does not submit any evidence challenging petitioner's data.⁸ Other commenters have requested imposition of a public use condition and a NITU, or simply urge that the right-of-way be left intact for transportation purposes. Some have stated an intent to participate in the Board's OFA process. None of the commenters submitted any evidence challenging petitioner's economic data.

⁷ According to Dakota Rail, traffic on the line has shown an overall decline, as follows: 965 carloads in 1995; 724 carloads in 1996; 615 carloads in 1997; 720 carloads in 1998; 435 carloads in 1999; and 176 carloads prior to the embargo in 2000.

⁸ Another shipper, Norwesco, merely opposed petitioner's request for exemption from the OFA provisions of 49 U.S.C. 10904 with respect to a 12.4-mile segment of the line. Because petitioner has withdrawn its request for exemption from section 10904, Norwesco's interest has been satisfied. Dakota Rail served a copy of the petition on six other shippers, but none filed comments.

DISCUSSION AND CONCLUSIONS

Dakota Rail's petition for exemption fully comports with our regulations and, when viewed in the light of the comments that have been filed, provides a sufficient basis for us to determine whether a need for service over the line exists. Thus, the petition will not be denied on the basis that Dakota Rail should be required to file an application for abandonment authority. Neither will the petition be denied on the grounds that the timeline for a petition for exemption is insufficient for those parties working towards a plan to pursue alternative uses for the rail corridor. By statute, we have no more than 110 days from the date of filing of either a petition for exemption or an application for abandonment authority to issue a decision on the merits. See Aban. and Discon. of R. Lines and Transp. Under 49 U.S.C. 10903, 1 S.T.B. 894 (1996) and 2 S.T.B. 311 (1997). In any event, our regulations governing OFAs (49 CFR 1152.27), public use conditions (49 CFR 1152.28), and trail use/rail banking (49 CFR 1152.29) provide additional time after the 110-day time period to permit consideration of alternative uses for the line.

Under 49 U.S.C. 10903, a rail line may not be abandoned or service 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.

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 Dakota Rail of the cost of maintaining the line segment [49 U.S.C. 10101(5) and (9)]. Although the line might be marginally profitable at the projected traffic level of 470 carloads, the costs associated with its rehabilitation and maintenance do not justify continuing service on the line. When opportunity costs are factored in, the burden on Dakota Rail from continuing rail service outweighs the potential benefits to shippers, particularly here, where alternative means of transportation are available and where the line's shippers have not shown specific harm. Other aspects of the rail transportation policy will not be affected adversely.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. No shippers have been served by the line since May 2000 and none has shown specific harm that would result from the abandonment proposal. Alternative transportation service, including motor carrier service and motor/rail service, is presently being used to meet area shipping needs. Nevertheless, to ensure that the shippers served by the line are informed of our decision, we will require Dakota Rail to serve a copy of this decision on them within 5 days of the service date and certify to us that they have 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), we may not use our exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. However, we do not normally impose employee protective conditions when a carrier abandons its entire line unless the evidence shows the existence of: (1) a corporate affiliate that will continue substantially similar rail operations; or (2) a corporate parent that will realize substantial financial benefits over and above relief from the burden of deficit operations by its subsidiary railroad. See Wellsville, Addison & Galeton R. Corp.—Abandonment, 354 I.C.C. 744 (1978); and Northampton and Bath R. Co.—Abandonment, 354 I.C.C. 784 (1978) (Northampton). Dakota Rail proposes to abandon its entire line. If the abandonment exemption is granted, Prairie Holding Corp., a subsidiary of RailAmerica, intends to sell Dakota Rail's stock to McKnight, which will abandon the line and develop the real estate. No Dakota Rail affiliate will continue these or similar rail operations. Thus, Dakota Rail does not appear to have any corporate affiliate or parent for which the proposed abandonment could yield a benefit to a rail operation above relief from deficit operations. Further, no one has attempted to show that the situation under Northampton for imposing labor protection in entire line abandonments exists in this case. Under the circumstances, we will not impose labor protective conditions.

Dakota Rail has submitted an environmental report with its petition and has notified the appropriate Federal, state, and local government 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 October 12, 2001, and requested comments by November 12, 2001.

In the EA, SEA recommends that three conditions be imposed on the abandonment. In response to the concerns of the Historical Society that the historical significance of the line does not appear to have been evaluated, SEA recommends that Dakota Rail retain its interest in, and take no steps to alter the historic integrity of, all sites and structures on the line until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f. SEA also recommends that Dakota Rail notify the National Geodetic Survey prior to any salvage activities that might disturb or destroy any geodetic markers on the right-of-way, and allow 90 days after the issuance of any decision granting abandonment authority for the National Geodetic Society to survey the line for historical benchmarks or monumentation. Finally, in response to the ongoing evaluation for the presence of hazardous materials along the line by the Minnesota Pollution Control Board (MPCB), SEA recommends that Dakota Rail consult with MPCB prior to undertaking any salvage operations.

In response to the EA, SEA received comments from MPCB, requesting that Dakota Rail comply with all applicable environmental regulations prior to salvaging the line and that, should Dakota Rail encounter any contaminants in the rail line right-of-way during any salvage activities, it should report them to the appropriate governing agency and investigate, clean up, and/or dispose of the contaminants in accordance with applicable laws, rules, and/or statutes of the

governing agency. SEA recommends that this condition be imposed on a decision authorizing abandonment of this line. No other comments were received in response to the EA.

We will impose the conditions recommended by SEA. Based on SEA's recommendation, we conclude that the proposed abandonment, if implemented in accordance with SEA's four conditions, will not significantly affect either the quality of the human environment or the conservation of energy resources.

As stated, Minnetrista requests interim trail use. It has submitted a statement of willingness to assume financial responsibility for the right-of-way, and has acknowledged that use of the right-of-way is subject to possible future reconstruction and reactivation of the right-of-way for rail service as required under 49 CFR 1152.29. Dakota Rail has not agreed to negotiate trail use. Therefore, because the Trails Act permits only voluntary interim trail use, a NITU cannot be issued for the line segment. See Rail Abandonments—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 598 (1986) (Trails).

As an alternative to interim trail use under the Trails Act, the right-of-way may be acquired for public use as a trail under 49 U.S.C. 10905. See Trails, 2 I.C.C.2d at 609. SEA indicated in its EA that the right-of-way may be suitable for other public use following abandonment. Minnetrista also requests that a public use condition be imposed covering the line.⁹ Specifically, Minnetrista requests that Dakota Rail be precluded from: (1) disposing of the corridor, other than the tracks, ties, and signal equipment, except for public use on reasonable terms; and (2) removing or destroying potential trail-related structures, such as bridges, trestles, culverts, and tunnels. It seeks a 180-day period in order to negotiate with Dakota Rail.

Minnetrista 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 for the period of time requested. Accordingly, a 180-day public use condition will be imposed covering the 43.9-mile line, commencing with the effective date of this decision. 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 persons to acquire a right-of-way that has been found suitable for public purposes, including trail use. Therefore, Dakota Rail is not required to deal exclusively with Minnetrista, but may engage in negotiations with other interested persons.

⁹ Other commenters also requested a public use condition and the imposition of various environmental and financial disclosure requirements on Dakota Rail. As noted below, any public use condition imposed is for the benefit of all interested persons. The other conditions requested by these parties are unnecessary because our environmental regulations and financial assistance procedures provide for consideration of these matters, as appropriate. Therefore, they will not be imposed.

The parties should note that the operation of the public use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. OFAs to acquire rail lines for continued rail service or to subsidize rail operations take priority over public use. See Trails, 2 I.C.C.2d at 608. Accordingly, if an OFA is timely filed under 49 CFR 1152.27(c)(1), the effective date of this decision 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 public use precluded. Alternatively, if a sale under the OFA procedures does not occur, the public use process may proceed.

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 Dakota Rail of the above-described rail line, subject to the condition that Dakota Rail shall leave intact all of the right-of-way, including bridges, trestles, culverts, and tunnels (but not track and track materials), for a period of 180 days from the effective date of this decision, to enable any state or local government agency or other interested person to negotiate the acquisition of the line for public use, and the conditions that Dakota Rail: (1) retain its interest in, and take no steps to alter the historic integrity of, all sites and structures on the line until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f; (2) notify the National Geodetic Survey prior to any salvage activities that might disturb or destroy any geodetic markers on the right-of-way, and allow 90 days after the issuance of any decision granting abandonment authority for the National Geodetic Society to survey the line for historical benchmarks or monumentation; (3) consult with MPCB prior to undertaking any salvage operations; and (4) comply with all applicable environmental regulations prior to salvaging the line, and should it discover any contaminants in the right-of-way during salvage activities, it shall report them to the appropriate governing agency and investigate, clean up, and/or dispose of any contaminants in accordance with applicable laws, rules, and/or statutes of the governing agency.

2. Dakota Rail is directed to serve a copy of this decision on all shippers within 5 days after the service date of this decision and certify to the Board that it has done so.

3. 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 December 10, 2001, 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 is currently set at \$1,000. See 49 CFR 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 December 30, 2001. Petitions to stay must be filed by December 17, 2001, and petitions to reopen must be filed by December 26, 2001.

6. Pursuant to the provisions of 49 CFR 1152.29(e)(2), Dakota Rail 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 Dakota Rail's filing of a notice of consummation by November 30, 2002, 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