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SERVICE DATE - JULY 27, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-55 (Sub-No. 562X)

CSX TRANSPORTATION, INC.--ABANDONMENT EXEMPTION--IN  
ROCKY MOUNT, NASH COUNTY, NC

Decided: July 25, 2000

By decision served December 1, 1999, effective December 31, 1999, the Board granted the motion of the City of Rocky Mount, NC (the City) to dismiss the above-captioned petition for exemption and vacate the prior decisions in this proceeding<sup>1</sup> on the ground that the track at issue is an exempt spur under 49 U.S.C. 10906.<sup>2</sup> NSRM timely filed a petition to stay, which was denied by the Chairman in a decision served on December 30, 1999 (Stay decision). On December 21, 1999, NSRM filed a petition to reopen, and on January 10, 2000, the City replied.

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<sup>1</sup> By decision served August 11, 1998, CSX Transportation, Inc. (CSXT) was granted an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a 0.60-mile portion of the Florence Service Lane, North End Subdivision, extending from Valuation Station 4+30 at Falls Road to Valuation Station 36+00 at the end of the track near Earl Street, in Rocky Mount, Nash County, NC. New Southern of Rocky Mount, Inc. (NSRM) timely filed an offer of financial assistance (OFA) to purchase the trackage and in a decision served August 26, 1998, NSRM was found to be financially responsible and the effective date of the decision authorizing abandonment was postponed. In a letter filed September 21, 1998, CSXT told the Board that it had reached an agreement with NSRM on the purchase price, but had not consummated the transaction. A decision was served October 1, 1998, authorizing NSRM to acquire the line and stating that the petition for exemption would be dismissed when the sale was consummated. The City filed its motion to dismiss on September 24, 1999.

<sup>2</sup> Under section 10906, the Board's jurisdiction does not extend to the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.

## DISCUSSION AND CONCLUSIONS

Under 49 CFR 1115.4, a petition to reopen will be granted only upon a showing that the prior action will be affected materially because of new evidence or changed circumstances or that it involves material error. NSRM has not shown that reopening this proceeding is warranted under these criteria. Accordingly, we will deny its petition to reopen.<sup>3</sup>

We have reviewed the additional evidence and arguments contained in NSRM's petition to reopen. NSRM in Appendix 1 submitted station maps<sup>4</sup> of Rocky Mount, dated June 30, 1917, published by a predecessor of CSXT, Atlantic Coast Line Railroad Company (ACL).<sup>5</sup> The station maps show additional side tracks adjacent to the track at issue here that NSRM states appear to have served additional shippers. NSRM argues that the number of potential shippers served demonstrates that ACL must have been providing common carrier service, and, therefore, that we must treat this trackage as a line of railroad.<sup>6</sup> We disagree. As noted in the Stay decision

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<sup>3</sup> NSRM's petition to reopen reiterates the arguments made in its petition to stay. In the Stay decision, the Chairman found that NSRM had addressed only a few of the criteria that the Board applied in the December 1999 decision, which determined that the track segment was a spur, and that NSRM's proffered evidence, even if considered to be new evidence, was not determinative of the track's status. The Chairman also addressed NSRM's main allegations of material error and concluded that NSRM was unlikely to prevail on the merits. To the extent that the Stay decision addresses the same issues raised again in the petition to reopen, we adopt its findings here.

<sup>4</sup> NSRM states that the maps were prepared in conjunction with the former Interstate Commerce Commission's (ICC) valuation of all railroad properties.

<sup>5</sup> NSRM argues that these maps are "new evidence" because "[t]hey were not available" when NSRM filed its reply. NSRM does not indicate why they were unavailable, and, as the Chairman indicated, it appears they could have been introduced earlier. See Stay decision at 3. Nevertheless, we will consider them in addressing the petition to reopen.

<sup>6</sup> NSRM submits a list of shippers that were not identified in the City's motion to dismiss as having received permission from Rocky Mount Mills (RMM) to use its tracks and argues that the alleged lack of permission indicates that the track at issue was used for common carrier service and thus is not a spur. The City responds that one of the shippers NSRM identifies, George W. Burnett, was actually The Texas Company's agent, not a shipper, and was identified by the City as having received permission to use the track. The City also states that the China-American Tobacco Co. was identified as having received permission from RMM to use its tracks and attaches a copy of the RMM authorization.

(continued...)

at 3, the maps NSRM relies on “are not determinative of the track’s status.” None of NSRM’s evidence demonstrates that the track segment at issue here was ever treated as a line of railroad or that ACL provided common carrier service to any of the shippers on RMM’s track.<sup>7</sup> Accordingly, these additional maps do not rebut our conclusion that the track segment at issue here is spur track.

Notwithstanding the general principle that issues of jurisdiction can be raised at any time, NSRM contends that a party cannot have the Board’s authorization of an abandonment revoked when the party has slept on its rights and where the OFA provisions would be derogated, citing Consolidated Rail Corp. — Aband. Exempt. — in Erie County , NY, STB Docket No. AB-167 (Sub-1164X) (STB served Oct. 7, 1994) (Erie), aff’d sub nom. Buffalo Crushed Stone, Inc. v. STB, 194 F. 3d 125 (1994), and Track Tech, Inc. -- Aband. Exempt.-- In Adair and Union Counties, IA, STB Docket No. AB-493 (Sub-No. 7X) (STB served Nov. 1, 1999) (Track Tech). NSRM notes that here the jurisdictional issue was not raised until more than a year after the exemption decision was served.

Erie and Track Tech are inapposite. Those cases did not involve jurisdictional issues, but concerned petitions to revoke based on false and misleading information and a misuse of the Board’s processes, respectively. Moreover, in both cases, unlike here, the line or part of the line already had been purchased under the OFA procedures when the petitions to revoke were filed.

NSRM reiterates its argument that we erred in finding that CSXT’s treatment of the 0.65-mile end segment of the track as exempt spur track supports our conclusion that the track at issue, which has similar characteristics, is also spur track. But the Board, like the ICC, looks at the regulatory status and history of track as an indication of the nature of connected or otherwise related track. See CNW--Aban. Exemp.--In McHenry County, IL, 3 I.C.C.2d 366, 368 (1987), rev’d on other grounds sub nom. Illinois Commerce Com’n. v. ICC, 879 F.2d 917 (D.C. Cir. 1989) (McHenry). See also Stay decision at 3.

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<sup>6</sup>(...continued)

In any event, the absence from the record of evidence of permission for other shippers, including Southern Cotton Oil Co., to use the track does not establish that the shippers received common carrier service and is not dispositive of the issue of the track’s status. As noted in the Stay decision, the lack of written permission could be attributable to the age of the records or that the records were maintained by RMM, not the City. Moreover, as the City argues, permission could have been given orally. Finally, we note that NSRM’s list of shippers refers to the tracks as industrial, spur, or side tracks.

<sup>7</sup> In recent years only two shippers have used the line and only one shipper since 1996.

Petitioner wrongly contends that we erred in finding that the 85-pound rail in the line is obsolete for modern day railroading, asserting that numerous branch lines are constructed of such rail. Regardless of whether or not 85-pound rail may be found in branch lines, the point is that 85-pound rail is light weight rail, which is one of the specific factors in determining whether a particular track segment is an exempt spur. See McHenry, 3 I.C.C.2d at 368; Southern Pacific Transportation Company--Exemption--Abandonment of Service in San Mateo County, CA, Docket No. AB-12 (Sub-No. 118X) (ICC served Mar. 8, 1991) (San Mateo). Thus, we properly relied on the 85-pound weight of the rail in determining that this is spur track.

NSRM argues that the City's failure to file its motion to dismiss before NSRM filed its OFA disqualifies the City from now arguing that this is spur track, citing Seminole Gulf Railway, Inc.--Abandonment Exemption--In Lee County, FL, Docket No. AB-400 (Sub-No. 2X) (ICC served Dec. 22, 1994), in which the ICC refused to void a notice of exemption after an OFA was filed. In that case, however, the ICC specifically considered whether the track was a rail line or a spur and concluded that the involved track was a rail line. Here, we have found that the involved track is an exempt spur. Therefore, we lack jurisdiction to authorize NSRM to purchase this trackage under the OFA procedures, regardless of the City's position as to NSRM's purchase of the track segment. See 49 U.S.C. 10906. Furthermore, it is well established that subject matter jurisdiction may be raised at any time. See, e.g., Consolidated Papers, Inc. v. CNW Transportation Co., 7 I.C.C.2d 330, 332 (1991). Therefore, the timing of the City's filing of its motion is irrelevant to the question of our jurisdiction over the involved trackage.

NSRM also continues to argue that CSXT's filing of a petition for exemption is dispositive of the jurisdictional question here. NSRM offers no support for this proposition, however, and it is contrary to the agency's governing precedent. See San Mateo, where the ICC found that it lacked jurisdiction over the involved track segment after processing the carrier's out-of-service notice of abandonment exemption and issuing a notice of interim trail use.<sup>8</sup> Finally, NSRM's argument that the rail transportation policy of 49 U.S.C. 10101 favors continued rail service does not give us jurisdiction over the construction, operation, acquisition, abandonment or discontinuance of spur trackage. See 49 U.S.C. 10906.

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<sup>8</sup> NSRM relies on Brotherhood of M. of W. Employees v. CP Rail System, STB Docket No. 32835 (STB served June 10, 1997), where the ICC found that the involved track was a line of railroad because, inter alia, the carrier had listed the terminus of the track as a station in the Official Railroad List, and the track was included in the carrier's system diagram map. NSRM argues that CSXT's filing of the petition for exemption was "the strongest indication possible" that CSXT considered the track to be a line of railroad and that we should view that as dispositive here. The City points out, however, that this track is not on CSXT's system diagram map, and no station is listed on the track in the Official Railroad Station List. Moreover, San Mateo, supra, makes clear that the filing of the petition for exemption, by itself, does not signify that the track is subject to sections 10901-10905.

For the above-stated reasons, NSRM has not demonstrated any material error in our December 1999 decision nor has it presented any new evidence or changed circumstances that would warrant reopening under 49 CFR 1115.4. The petition to reopen will therefore be denied.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition to reopen is denied.
2. This decision is effective August 26, 2000.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams  
Secretary