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SERVICE DATE - LATE RELEASE DECEMBER 30, 1999

SURFACE TRANSPORTATION BOARD

DECISION

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

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

Decided: December 29, 1999

By decision served on December 1, 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> finding that the track at issue is an exempt spur under 49 U.S.C. 10906.<sup>2</sup> The Board required that petitions to stay the December 31, 1999 effective date of the decision must be filed by December 13, 1999, and petitions to reopen must be filed by December 21, 1999. NSRM timely filed a petition to stay, stating that it intended to file a petition to reopen by the due date, and is seeking a stay of the December 31 effective date, pending disposition of its petition to reopen.<sup>3</sup> On December 17, 1999, the City filed a reply. The petition to stay will be denied.

DISCUSSION AND CONCLUSIONS

The standards governing disposition of a petition for stay are: (1) whether the petitioner is likely to prevail on the merits; (2) whether the petitioner will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other interested parties; and (4) whether issuance of a stay is in the public interest. Washington Metropolitan Area Transit

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<sup>1</sup> By decision served on 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 reached an agreement with CSXT on the purchase price, but had not consummated the transaction when the City filed its motion to dismiss on September 24, 1999.

<sup>2</sup> Under 49 U.S.C. 10906, the Board's jurisdiction does not extend to the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.

<sup>3</sup> NSRM filed its petition to reopen on December 21, 1999. The Board will address the merits of the petition to reopen in a subsequent decision.

Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); and Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). The party seeking a stay carries the burden of persuasion on all of the elements required for such extraordinary relief. Canal Authority of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974).

Likelihood of prevailing on the merits. NSRM argues that it is likely to prevail on the merits of its petition to reopen based in part on new evidence that was not previously available and in part on material error in the Board's December 1 decision. The new evidence consists of station maps of Rocky Mount published by a predecessor of CSXT, Atlantic Coast Line Railroad Company (ACL), that are being introduced to show that there were side tracks adjacent to the track at issue that served additional shippers not identified in the City's motion to dismiss as having received permission from Rocky Mount Mills (RMM) to use the track.<sup>4</sup> According to NSRM, the fact that these shippers used the track without RMM's permission demonstrates that the track was used by the public generally and, thus, was a line of railroad and not a spur.

The alleged material errors in the Board's decision are: (1) the unsupported evidentiary finding at page 3, note 8, that NSRM's predecessor, Southern Cotton Oil Co. (Southern Cotton), had received permission from RMM to use the track; (2) the unsupported legal finding at page 4 that CSXT's abandonment of the end portion of the track without authorization supports the conclusion that the remaining segment at issue is an exempt spur; and (3) additional errors of lesser significance identified in the petition to reopen including, inter alia, the finding at page 5 that 85-pound rail is obsolete for modern day railroading.

NSRM's arguments are not likely to succeed on the merits and address only a few of the criteria that the Board applied to determine that this track segment is an exempt spur.<sup>5</sup> As the City points out in its reply, NSRM has not demonstrated that its evidence is new or would require

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<sup>4</sup> The track was built in 1889 pursuant to a contract entered into by RMM and the Wilmington and Weldon Railroad Company (W&W), another predecessor of CSXT. The track connected RMM's cotton mill with a side track connected to a main line of W&W. Under the terms of the contract, the approval of RMM would be required before any other shippers were allowed to use the track.

<sup>5</sup> The Board found that the history, use, and physical characteristics of the track all indicate that the line segment is an exempt spur, taking into account such factors as the fact that the track segment is short and stub-ended, was not built to invade the territory of another railroad, never had regularly scheduled service, always had a low volume of traffic, was owned by a private shipper, was constructed with light weight rail, was used only for loading and unloading traffic, and had no stations located on it.

reopening the proceeding. The maps that it seeks to introduce could have been produced earlier,<sup>6</sup> but even if they constitute new evidence, they are not determinative of the track's status. At most, they purport to show that there are side tracks adjacent to the track at issue that connect to the facilities of other shippers. It is unlikely that the maps will demonstrate that those facilities received rail service over the track at issue and, even if there were shipments, that RMM did not give its permission.

In response to NSRM's allegations of material error, the City argues correctly that, even if the enumerated errors were committed, they are not material. While NSRM is correct that no written corroboration was submitted that directly supports a finding that RMM gave Southern Cotton permission to use its track and ACL permission to serve Southern Cotton, the record does show that Southern Cotton was located on RMM's private track and that RMM's policy both before and after Southern Cotton located on the track was to give both specific permission for its use to both the shipper and the carrier. NSRM has offered no evidence to the contrary; it notes only that the City did not submit into the record documentation of such specific authorization. Considering the age of these records and the fact that RMM, not the City, maintained them, the fact that a specific authorization was not submitted into the record is not surprising. The evidence submitted is sufficient to raise the presumption that such permission was given to Southern Cotton and NSRM has provided no evidence to rebut the presumption.

Contrary to NSRM's position, the Board's finding that CSXT may have treated the end segment of the track as exempt spur does support the conclusion that the additional track segment considered here, which has similar characteristics, is also exempt. The Board has long looked at the regulatory status and history of track as an indication of the appropriate regulatory classification 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).

Finally, the Board's statement that 85-pound rail is obsolete for modern day railroading was derived from CSXT's abandonment petition for exemption, which is part of the record in this proceeding. Whether or not 85-pound rail is obsolete, the important fact 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.

Irreparable harm. NSRM states that, if the line is eventually found not to be an exempt spur, NSRM would suffer a delay in the \$10 million renovation of its cottonseed and peanut processing plant that is located on the track segment. Accordingly, NSRM argues that, absent a stay, it would

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<sup>6</sup> NSRM states that the maps were retrieved from the archives of a government agency subsequent to the filing of NSRM's reply in opposition to the City's motion to dismiss the petition for exemption.

be damaged by lost business opportunities. The City replies that it has no intention of removing the tracks for at least 2 months, which should provide ample time for the Board to dispose of NSRM's petition to reopen, and that the alleged harm results not from whether the decision is stayed, but rather from whether the decision is affirmed on appeal. The City also notes that NSRM has not provided any evidence as to when it would actually be ready to proceed with the renovation of its plant, arguing that NSRM had stated for years it would renovate the plant, but has not even completed the design or obtained the necessary permits.

NSRM has not shown that a grant of a stay is necessary to prevent any irreparable harm. This is particularly true in light of the City's assurance about removal of the track.

Harm to other parties. NSRM recognizes that issuance of a stay might delay the City's Imperial Centre development project, but argues that it would experience a greater delay in its plant renovation if the stay is denied and the track were to be removed. NSRM also argues that, because the City did not intervene in this proceeding at the time the abandonment petition for exemption was granted by the Board, it has slept on its rights and should not be permitted to oppose the stay request.<sup>7</sup>

The alleged harm to NSRM has already been addressed and found not to be irreparable in the previous section. As far as harm to other parties is concerned, the City persuasively argues that a stay would not only delay the Imperial Centre development project, but might cause Centura Bank to withdraw from the project, resulting in the project's complete collapse.

Public interest. NSRM argues that the public interest to be protected by the Board is the public interest in continued rail transportation.<sup>8</sup> The City replies that no public interest would be served by granting the requested stay. According to the City, the Imperial Centre project is intended to be the cornerstone of the rehabilitation and redevelopment of downtown Rocky Mount and to retain for the City the corporate headquarters of one of North Carolina's largest banks, which employs over 2,600 persons, including approximately 700 in Rocky Mount. It notes that government officials from the federal, state, county, and local levels have expressed their strong support for the project and the benefits that it would bring to the public.

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<sup>7</sup> As the Board noted in its December 1 decision at page 2, note 4, questions of jurisdiction may be raised at any time.

<sup>8</sup> Again NSRM submits that issuance of a stay will require that the track remain in place pending a final decision, whereas denial of a stay will result in prompt removal of the track. This issue has already been addressed. While it is true that the primary public interest that the Board is charged with protecting is in the development and maintenance of a safe and economically viable rail system, this does not mean that a potential rail use must always be favored over all other possible public uses. See Conrail v. ICC, 29 F.3d 706 (D.C. Cir. 1994).

Given the substantial public support for the Imperial Centre project, NSRM's argument, that the public interest would be furthered by issuance of a stay, fails.

The petition to stay the effectiveness of the Board's December 1, 1999 decision in this proceeding will 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 for stay is denied.
2. This decision is effective on the date of service.

By the Board, Linda J. Morgan, Chairman.

Vernon A. Williams  
Secretary