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SERVICE DATE - FEBRUARY 3, 1999

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-290 (Sub-No. 203X)

NORFOLK SOUTHERN RAILWAY COMPANY--ABANDONMENT EXEMPTION--  
IN MADISON AND BOND COUNTIES, IL

Decided: February 1, 1999

By petition filed October 16, 1998, Norfolk Southern Railway Company (NSR)<sup>1</sup> seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a 39.1-mile branch line of railroad known as the Madison-Sorento Line or the Madison Branch, extending between milepost TS-406.6 at Sorento, IL, and milepost TS-445.7 at Madison, IL, in Madison and Bond Counties, IL. Pursuant to 49 U.S.C. 10502(b), the Board served and published a notice in the Federal Register (63 FR 60040-41) on November 6, 1998, instituting an exemption proceeding. A request for issuance of a notice of interim trail use (NITU) was filed by Madison County Transit (MCT). The United Transportation Union seeks the imposition of labor protective conditions. We will grant the exemption, subject to trail use, two environmental conditions, and standard employee protective conditions.

BACKGROUND

NSR is a Class I rail carrier and a wholly owned subsidiary of noncarrier Norfolk Southern Corporation. NSR owns and operates lines of railroad in 20 states and Canada. The line proposed for abandonment is a segment of an excess branch or secondary line that NSR claims can no longer be operated profitably in its system. According to NSR, in 1997, 542 carloads of local traffic consisting of building brick and slate moved over the line, an average of 11 carloads per week, for gross revenues of \$305,251. Petitioner adds that the total avoidable costs for the line were \$2,291,799, the avoidable loss from operations was \$1,986,548, and the avoidable loss including return on value was \$2,265,433.<sup>2</sup> Finally, NSR states that opportunity cost in connection with continued operation of the line is \$830,671.

NSR states that there is only one local shipper on the line, Richards Brick Company at

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<sup>1</sup> Effective September 1, 1998, NSR, through merger, became the successor to the Norfolk and Western Railway Company (NW). See Norfolk Southern Railway Company--Merger Exemption--Norfolk and Western Railway Company, STB Finance Docket No. 33648 (STB served Aug. 31, 1998).

<sup>2</sup> NSR states that the avoidable loss would be \$370,915 greater in the forecast year due mainly to holding gains and higher projected maintenance costs.

Edwardsville, IL. Service to the shipper has been provided 3 times weekly on an as-needed basis. NSR points out that the shipper's traffic has declined by 132 carloads from 1996 to 1997, either due to increased use of motor carrier deliveries or due to a decline in the local building industry. NSR notes that no other local businesses have shipped or received over this line in recent years. According to petitioner, there is almost no potential for additional traffic due to the rural nature of most of the adjacent area and the existence of truck and other rail line competition. NSR states that, due to rail line purchases and leases from Union Pacific Railroad Company (UP) and trackage rights over UP and The Burlington Northern and Santa Fe Railway Company lines in the general vicinity of this segment, NSR's overhead traffic was rerouted in February 1998 over a shorter and more efficient route.<sup>3</sup>

NSR argues that the proposed abandonment is justified in that: (1) overhead traffic has been rerouted over shorter, more efficient, and economical routes; (2) the line segment is now being operated at a large avoidable loss in excess of \$2 million annually; and (3) revenue from the small amount of local traffic is too low to justify continued operation, much less reinvestment in the line or equipment. According to petitioner, alternative service is available to the sole shipper on the line via truck or nearby rail lines via team tracks on several carriers still in the region, including NSR.<sup>4</sup>

#### DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without prior Board 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 of the proposed abandonment under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of an abandonment application, 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 NSR of the costs of owning and maintaining the line and allowing it to apply its assets more productively elsewhere on its system. [49 U.S.C. 10101(5) and (9)]. Other

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<sup>3</sup> See Norfolk and Western Railway Company--Trackage Rights Exemption--Union Pacific Railroad Company, STB Finance Docket No. 33488 (STB served Oct. 21, 1997); Norfolk Southern Railway Company--Purchase Exemption--Union Pacific Railroad Company, STB Finance Docket No. 33609 (STB served Oct. 29, 1998) (petition to reopen pending); and Norfolk Southern Railway Company--Lease and Operation Exemption--Union Pacific Railroad Company, STB Finance Docket No. 33610 (STB served Nov. 20, 1998) (petition to reopen pending).

<sup>4</sup> NSR states that it will still reach Edwardsville, approximately 2 miles from the shipper, via its Decatur, IL-St. Louis, MO east-west main line.

aspects of the rail transportation policy will not be affected adversely.

Regulation of the transaction is not necessary to protect shippers from an abuse of market power. The one shipper on the line has not objected to the proposed abandonment and appears to have adequate transportation alternatives available in the form of motor carrier and other rail service.<sup>5</sup> Nevertheless, to ensure that the shipper is informed of our action, we will require NSR to serve a copy of this decision on Richards Brick Company within 5 days of the service date of this decision and to certify to us that it has done so.

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. Accordingly, as a condition to granting this exemption, we will impose the employee protective conditions set forth in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979).

NSR has submitted an environmental 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 abandonment. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, analyzed the probable effects of the proposed action on the quality of the human environment, and served an environmental assessment (EA) on December 22, 1998.

In the EA, SEA indicated that the Environmental Protection Agency (EPA), Region 5, has commented that the railroad should employ soil erosion and stormweather runoff mitigation practices, including revegetating the affected area with native flora, during abandonment activities. In addition, EPA stated that removed rail equipment should be stored away from wetlands and waterbodies. SEA further indicated that the National Geodetic Survey (NGS) has identified one station marker, E 113, that may be affected by the abandonment.

SEA, therefore, recommended that the following conditions be imposed on any decision granting abandonment authority: (1) while conducting salvage activities, NSR shall employ appropriate soil erosion and stormweather runoff measures and shall ensure that removed rail equipment be stored away from wetlands and waterbodies; and (2) NSR shall provide NGS with at least 90 days' prior notice before undertaking any activities which may disturb or destroy station marker E 113.

No comments to the EA were filed by the January 15, 1999 due date. We will impose the conditions recommended by SEA. Based on SEA's recommendations, 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.

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<sup>5</sup> Given our market power finding, we need not determine whether the proposed abandonment is limited in scope.

SEA has indicated in its EA that the right-of-way may be suitable for public use after abandonment. We note that no one has sought a public use condition, and none will be imposed.<sup>6</sup>

As stated, MCT requests that interim trail use/rail banking be imposed under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act). MCT has submitted a statement of willingness to assume financial responsibility for the right-of-way between milepost TS-410.91 and milepost TS-445.7, approximately 34.79 miles, and has acknowledged that use of the right-of-way is subject to possible future reconstruction and reactivation for rail service as required under 49 CFR 1152.29. By letter filed January 7, 1999, NSR states that it consents to the trail use request and is willing to negotiate with MCT for a portion of the right-of-way, with two exceptions.<sup>7</sup>

MCT's request complies with the requirements of 49 CFR 1152.29 and NSR is willing to enter into negotiations. Therefore, we will issue a NITU for the segment of line between milepost TS-410.91 and milepost TS-444.2. The parties may negotiate an agreement during the 180-day period prescribed below. If an agreement is executed, no further Board action is necessary. If no agreement is reached within 180 days, NSR may fully abandon the line, subject to the conditions imposed below. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

The parties should note that operation of the trail use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in Rail Abandonments--Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 608 (1986) (Trails), offers of financial assistance (OFA) to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking and public use. Accordingly, if an OFA is timely filed under 49 U.S.C. 1152.27(c)(1), the effective date of this decision and notice 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 trail use precluded. Alternatively, if a sale under the OFA procedures does not occur,

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<sup>6</sup> Public use requests were due no later than 20 days after publication of the notice of the petition for exemption in the Federal Register, or by November 27, 1998.

<sup>7</sup> NSR states that it is selling a 1.5-mile segment of the line between milepost TS-445.7 and milepost TS-444.2 to UP to use as a double track within existing UP right-of-way, and that it does not consent to trail use negotiations as to this segment. NSR further states that it is its understanding that MCT is not interested in, and may not have the authority to negotiate for, trail use on the segment of line between milepost TS-410.91 and milepost TS-406.6, and that this segment also should be excluded from the NITU. Indeed, MCT's expression of interest does not include the segment between milepost TS-410.91 and milepost TS-406.6. NSR indicates that it is willing to negotiate with MCT for possible transfer of the right-of-way between milepost TS-410.91 and milepost TS-444.2.

trail use may proceed.

This decision 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 the above-described abandonment from the prior approval requirements of 49 U.S.C. 10903, subject to the employee protective conditions set forth in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979), subject to a NITU permitting interim trail use/rail banking for the segment of the line between milepost TS-410.91 and milepost TS-444.2, and subject to the conditions that: (1) while conducting salvage activities, NSR shall employ appropriate soil erosion and stormweather runoff measures and shall ensure that removed rail equipment be stored away from wetlands and waterbodies; and (2) NSR shall provide NGS with at least 90 days' prior notice before undertaking any activities which may disturb or destroy station marker E 113.

2. NSR is directed to serve a copy of this decision on Richard Brick Company within 5 days after the service date of this decision and to certify to the Board that it has done so.

3. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

4. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.

5. If interim trail use is implemented and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

6. If an agreement for interim trail use/rail banking is reached by the 180th day after service of this decision and notice, interim trail use may be implemented. If no agreement is reached by that time, NSR may fully abandon the line, provided the conditions imposed above are met.

7. An offer of financial assistance OFA under 49 CFR 1152.27(c)(1)<sup>8</sup> to allow rail service to continue must be received by the railroad and the Board by February 12, 1999 subject to time

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<sup>8</sup> See Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903, STB Ex Parte No. 537 (STB served Dec. 24, 1996, and June 27, 1997).

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 a \$1,000 filing fee. See 49 CFR 1002.2(f)(25).

8. 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.”**

9. Provided no OFA has been received, this exemption will be effective March 5, 1999. Petitions to stay must be filed by February 18, 1999, and petitions to reopen must be filed by March 1, 1999.

10. Pursuant to the provisions of 49 CFR 1152.29(e)(2), NSR 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 NSR's filing of a notice of consummation by February 3, 2000, 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 and Vice Chairman Clyburn.

Vernon A. Williams  
Secretary