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SERVICE DATE - MARCH 23, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-55 (Sub-No. 552X)

CSX TRANSPORTATION, INC.--ABANDONMENT EXEMPTION--IN  
RALEIGH COUNTY, WV

STB Docket No. AB-290 (Sub-No. 201X)

NORFOLK AND WESTERN RAILWAY COMPANY--DISCONTINUANCE OF  
TRACKAGE RIGHTS EXEMPTION--IN RALEIGH COUNTY, WV

Decided: March 19, 1998

By petition filed December 3, 1997, CSX Transportation, Inc. (CSXT), and Norfolk and Western Railway Company (N&W)<sup>1</sup> (collectively, petitioners) seek an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 for CSXT to abandon and N&W to discontinue trackage rights over a 6.24-mile railroad line between milepost 0.58 at Beckley Junction and milepost 6.82 at the end of the track at Cranberry, in Raleigh County, WV. Pursuant to 49 U.S.C. 10502(b), a notice was published in the Federal Register (62 FR 67115) on December 23, 1997, instituting an exemption proceeding. A request for imposition of a public use condition and issuance of a notice of interim trail use (NITU) was filed by the City of Beckley (the City).<sup>2</sup> The United Transportation Union requests imposition of labor protective conditions. We will grant the exemption, subject to a public use condition and standard employee protective conditions.

BACKGROUND

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<sup>1</sup> N&W is a wholly owned subsidiary of Norfolk Southern Railway Company (NS).

<sup>2</sup> The December 23 notice provided that any request for a public use condition under 49 CFR 1152.28 or for trail use/rail banking under 49 CFR 1152.29 had to be filed no later than January 12, 1998. The City's request for a public use condition and issuance of a NITU was filed on January 15, 1998, and was supplemented on February 11 and February 23, 1998. In 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), we stated that we would retain our policy of accepting filings after the due date when good cause is shown. Because the City's late-filed request has not delayed the proceeding and will not prejudice any party, we will accept the submissions.

The line of railroad proposed for abandonment was originally part of the Piney River and Paint Creek Railroad Company (PR&PC), which was incorporated in 1905. The property was owned by the New River Company (New River) and was leased from 1912 to 1917 by The Virginian Railway Company (Virginian), predecessor of NS. Virginian granted an undivided one-half interest in its leasehold to the Chesapeake & Ohio Railway Company (C&O), predecessor of CSXT. Under an agreement dated April 19, 1917, the stock of PR&PC was conveyed to C&O with a provision that C&O continue to operate over the track. On November 1, 1917, Virginian, C&O, and New River entered into a joint facility agreement covering the use of the subject track, as well as other rail properties. PR&PC merged with C&O in 1918, and, through a series of rail mergers, ultimately became CSXT. On December 1, 1959, Virginian merged with N&W. Under the 1917 joint facilities agreement, which is still in effect, CSXT owns the line and NS has trackage rights to operate over it.

CSXT states that there were only four shippers on the line in recent years and that they required only minimal rail service.<sup>3</sup> According to CSXT, these shippers have either relocated, are in the process of relocating, or use truck transportation exclusively. Austin Powder Company (Austin Powder) formerly operated an explosives manufacturing plant at Beckley.<sup>4</sup> However, as of March 1997, it began receiving all of its rail shipments at its new rail-served facility in Mt. Hope, WV. Dowell Schlumberger, Inc. (Dowell), operates an oil and gas service company in Beckley<sup>5</sup> and is in the process of relocating to another rail-served facility in Raleigh. Beckley Newspapers operates a newspaper publishing company in Beckley and, although it used rail service in the past,<sup>6</sup> it now uses motor carriers exclusively to meet its transportation needs. CSXT states that, in the unlikely event that Beckley Newspapers may desire to use rail service in the future, there are team-track facilities in Raleigh, which is located approximately two highway miles from Beckley. Southern West Virginia Asphalt (SWVA) operates an asphalt plant at Sprague, WV, and has used both rail and truck transportation to receive its inbound aggregates<sup>7</sup> and truck transportation exclusively for all outbound traffic. CSXT states that, since late 1996, SWVA has used truck transportation exclusively to receive its inbound aggregates. In addition, CSXT states that SWVA has alternative

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<sup>3</sup> Petitioners state that only CSXT has been providing rail service; presumably no traffic has moved under N&W's trackage rights.

<sup>4</sup> It received 114 carloads of ammonium nitrate in 1995, 244 in 1996, and 29 in the first quarter of 1997.

<sup>5</sup> It received 33 carloads of industrial sand in 1995, 47 carloads in 1996, and 46 carloads through the end of September 1997.

<sup>6</sup> It received 37 carloads of newsprint in 1995, 25 carloads in 1996, and 1 carload in January 1997, which was its last shipment by rail.

<sup>7</sup> It received 169 carloads in 1995 and 151 carloads in 1996.

CSXT rail-served facilities located at Dunbar and Nallon, WV. Petitioners certify that a copy of the petition was served on Austin Powder, Dowell, Beckley Newspapers, and SWVA.<sup>8</sup>

#### DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned 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 CSXT of the costs of owning and maintaining a minimally used line of railroad and allowing it to apply its assets more productively elsewhere on its rail system [49 U.S.C. 10101(5) and (9)]. 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 because the shippers on the line have either relocated, or are in the process of relocating, to other rail-served facilities or are using truck transportation exclusively. Nevertheless, to ensure that the shippers are aware of our action, we will require CSXT to serve a copy of this decision on them, including Acme, within 5 days of the service date of this decision and to certify to us that it has done so. Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

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<sup>8</sup> On March 5, 1998, Acme Limestone, Co., Inc. (Acme), filed a comment (letter) in opposition to the abandonment proceeding. Acme manufactures and ships, by rail and truck, crushed limestone from Fort Spring (Snowflake), WV, to SWVA at Sprague. Acme opposes the abandonment because the receiver of its limestone is located on the line. Acme states that it would ship substantial traffic over the line and alleges that CSXT has deliberately failed to upgrade the track at Sprague. On March 18, 1998, SWVA filed a comment (letter) joining Acme's opposition to the proposed abandonment. SWVA states that its preferred and most cost effective means of receiving raw materials into its plant is by rail. It states that Acme, its materials supplier, has been unable to ship materials to it for over 2 years because the track has not been maintained and upgraded. SWVA states that, as a result, it had to purchase materials from various other suppliers and transport them to its plant by truck at a much greater cost. Acme's and SWVA's letters do not indicate that they were served on CSXT as required by our regulations at 49 CFR 1104.12. Accordingly, we cannot consider them as protests because CSXT has not had an opportunity to respond.

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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 in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979).

Petitioners have submitted an environmental report with their petition and have 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 February 3, 1998. In the EA, SEA did not recommend imposition of any environmental conditions.

No comments to the EA were filed by the March 2, 1998 due date. Based on SEA's recommendation, we conclude that the proposed abandonment will not significantly affect either the quality of the human environment or the conservation of energy resources.

The City requests issuance of a NITU pursuant to section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act). It has submitted a statement of willingness to assume financial responsibility for the right-of-way and 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 February 24, 1998, CSXT states that it is not willing to negotiate with the City for interim trail use. Therefore, because 16 U.S.C. 1247(d) permits only voluntary interim trail use, we cannot issue a NITU in this proceeding. See Rail Abandonment--Use of Rights-of-Way as Trails, 2 I.C.C.2d 591 (1986) (Trails).

SEA has indicated in its EA that the right-of-way may be suitable for other public use after abandonment. As noted above, the City also requests imposition of a 180-day public use condition. 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. Under section 10905, we may prohibit the disposal of rail properties that are proposed to be abandoned and are appropriate for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment. The City 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, 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 person to acquire a right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, CSXT is not required to deal exclusively with the City, but may engage in negotiations with other interested persons.

It is ordered:

1. The late-filed requests for a NITU under 49 U.S.C. 1247(d) and for a public use condition under 49 U.S.C. 10905 are accepted.
2. The request for issuance of a NITU is denied.
3. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903, the abandonment by CSXT and the discontinuance of trackage rights by N&W of the above-described line, subject to: (a) the employee protective conditions in Oregon Short Line R. Co.-- Abandonment--Goshen, 360 I.C.C. 91 (1979); and (b) the condition that CSXT 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 any other interested person to negotiate the acquisition of the line for public use.
4. CSXT is directed to serve a copy of this decision on Austin Powder, Dowell, Beckley Newspapers, SWVA, and Acme within 5 days after the service date of this decision and to certify to the Board that it has done so.
5. An offer of financial assistance (OFA) under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by April 2, 1998, 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 currently is set at \$1,000. See 49 CFR 1002.2(f)(25).
6. 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.”**
7. Provided no OFA has been received, this exemption will be effective April 22, 1998. Petitions to stay must be filed by April 7, 1998, and petitions to reopen must be filed by April 17, 1998.
8. Pursuant to the provisions of 49 CFR 1152.29(e)(2), CSXT shall file 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 CSXT’s filing of a notice of consummation by March 23, 1999, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to

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consummation exists at the end of the 1-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary