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SERVICE DATE - DECEMBER 1, 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: November 30, 1999

In this decision, we are granting a motion to dismiss the above-captioned petition for exemption and vacating the prior decisions in this proceeding because the track at issue is exempt spur track.

BACKGROUND

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, subject to environmental<sup>1</sup> and standard employee protective conditions.<sup>2</sup> The exemption was scheduled to become effective on September 10, 1998, but on August 21, 1998, New Southern of Rocky Mount, Inc. (NSRM), timely filed an offer of financial assistance (OFA) under 49 U.S.C. 10904 and 49 CFR 1152.27(c) to purchase the trackage for \$17,477.28. By decision served on August 26, 1998, NSRM was found to be financially responsible and the effective date of the decision authorizing abandonment was postponed to permit the financial assistance process to proceed. By letter filed on September 21, 1998, CSXT advised the Board that it had reached an agreement with NSRM on the purchase price and would notify the Board upon consummation of the transaction.<sup>3</sup>

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<sup>1</sup> An environmental assessment (EA) was served on July 7, 1998.

<sup>2</sup> Notice of CSXT's petition for exemption filed on April 23, 1998, was served and published in the Federal Register on May 13, 1998 (63 FR 26675).

<sup>3</sup> A decision served on October 1, 1998, authorized NSRM's acquisition and dismissed the petition for exemption effective on the date the sale is consummated.

On September 24, 1999, the City of Rocky Mount, NC (the City), filed a motion to dismiss the petition for exemption and discontinue the proceeding.<sup>4</sup> The City argues that the history, use, and physical characteristics of the track demonstrate that it is a spur, and, therefore, is exempt from the Board's abandonment and acquisition jurisdiction under 49 U.S.C. 10906. As a consequence, the City requests that we dismiss CSXT's petition and vacate the order allowing NSRM to purchase the track through an OFA. The City plans to use a portion of the right-of-way for a development project, known as the Imperial Centre, that is part of the City's efforts to revitalize its downtown area.

On October 8, 1999, NSRM filed a motion requesting publication of notice of the City's motion to dismiss in the Federal Register and to extend the time for filing replies to that motion. NSRM's motion was denied by decision served on October 15, 1999, which required replies to be filed by October 25, 1999, and for any rebuttal to be filed by October 29, 1999. NSRM and CSXT timely filed separate replies opposing the City's motion, and the City timely filed a rebuttal.<sup>5</sup>

#### DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10906, our jurisdiction does not extend to the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks. While there is no single test of what constitutes an exempt track under section 10906, we consider the following criteria: the track's history, past use, and physical characteristics, taking into account such factors as the length of the track, whether it serves more than one shipper, whether it is stub-ended, whether it was built to invade the territory of another railroad, whether the shipper is located at the end of the track, whether there is regularly scheduled service, the volume of traffic moving over the track, who owns and maintains the track, whether the track was constructed with light weight rail, the condition of the track, whether the track was used only for loading, unloading, or switching, and whether stations are located on the track. See CNW--Aban. Exempt.--In McHenry County, IL, 3 I.C.C.2d 366 (1987), rev'd on other grounds sub nom. Illinois Commerce Com'n v. ICC, 879 F.2d 917 (D.C. Cir. 1989); Chicago, SouthShore & South Bend Railroad--Petition for Declaratory Order--Status of Track at Hammond, IN, STB Finance Docket No. 33522, slip op. at 4

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<sup>4</sup> CSXT, in reply to the motion to dismiss, questions the timing of the filing of the City's motion, but, as the City points out, questions of jurisdiction may be raised at any time, citing e.g., Seminole Gulf Railway, Inc.--Abandonment Exemption--In Lee County, FL, Docket No. AB-400 (Sub-No. 2X) ( ICC served Dec. 22, 1994), in which a railroad's request for dismissal for lack of jurisdiction was considered after an OFA had been filed.

<sup>5</sup> The United Transportation Union filed comments expressing an interest in participating in any further proceedings. In addition, Carolinas Gateway Partnership and Nash County filed comments in support of the City's motion, and James A. Graham, Commissioner of Agriculture of the State of North Carolina's Department of Agriculture, filed comments in support of NSRM.

(STB served Dec. 17, 1998); and Battaglia Distributing Co., Inc. v. Burlington Northern Railroad Company, STB Finance Docket No. 32058, slip op. at 3 (STB served June 27, 1997). Based on our analysis of the relevant criteria, we conclude that the track at issue here is exempt spur track.

History of the track. The City provides a detailed and well documented history of the track that is not disputed by NSRM or CSXT, except as noted below. The track was built in 1889 for Rocky Mount Mills (RMM) to connect its cotton mill with a side track that was connected to a main line of the Wilmington and Weldon Railroad Company (W&W), a predecessor of CSXT. W&W's main line was located less than two miles east of RMM's facility, and W&W's side track was used to access the Rocky Mount fairgrounds, which no longer exists.<sup>6</sup> Construction of the track at issue was pursuant to an 1889 contract entered into by RMM and W&W.

Under the terms of the contract, RMM agreed to furnish and grade the right-of-way for the track, and W&W agreed to furnish, install, and maintain the cross-ties and rails. W&W had the right to control the track and was permitted to use it for its purposes, subject to the provisos that its use would not interfere with the business of RMM, which would always have preference over any other business transacted on or over the track,<sup>7</sup> and that approval of RMM would be required before any other shippers were allowed to use it.<sup>8</sup>

RMM acquired the land for the right-of-way in a series of grants in early 1889. The track, which was 1.25 miles in length, was built between February and May of 1889. The first 0.60 miles of the track, extending from the Fair Ground side track, is proposed for abandonment in this proceeding. The last 0.65 miles of the track to RMM's facility was abandoned, apparently

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<sup>6</sup> The Fair Ground side track is shown on the map attached to the EA as the track lying between CSXT's north-south line and the point identified as Valuation Station 4+30, at or near Falls Road.

<sup>7</sup> The City submitted a letter dated April 16, 1889, from the vice president and general manager of W&W's parent company, Atlantic Coast Line (ACL), to RMM stating that under the contract "it is distinctly set forth that this road is your property and not a branch of the Weldon road, otherwise we could not make a contract to give your business precedence over all others, which would be a discrimination."

<sup>8</sup> In a supplemental agreement dated April 19, 1889, W&W states "if any other enterprise or any other parties desire to use this track that the Railroad Company will not furnish them any facilities until they have made an arrangement with the Rocky Mount Mills." RMM granted permission to a number of industries to locate along and use the track and issued a series of notices to ACL authorizing the railroad to provide service to these shippers, including NSRM's predecessor company, Southern Cotton Oil Co. (Southern Cotton). According to the City, under North Carolina law, these arrangements, which did not include payment of any consideration to RMM, created, at most, licenses for use of the track that were revocable at will by RMM.

sometime between 1989 and 1993, without authorization from our predecessor agency, the Interstate Commerce Commission.

NSRM challenges the City's claim that the 0.60-mile segment at issue rests on land owned by RMM. NSRM alleges that this segment was the original track to the fairgrounds, which was constructed more than 20 years before RMM's track, and that the location of NSRM's predecessor, Southern Cotton, as shown on an 1891 map of Rocky Mount, is adjacent to the former fairgrounds site.<sup>9</sup> NSRM argues that the circumstances of the two track sections are sufficiently different to show that the track at issue is not exempt track under section 10906.

The City, in its rebuttal, provides an analysis of deeds to the property to substantiate its claim that the underlying right-of-way for the entire track segment considered here is owned by RMM. The City also points out that the 1891 map, relied on by NSRM, shows that the track serving Southern Cotton is labeled "RMMRR," which apparently stands for Rocky Mount Mills Railroad.

On this record, we find that the track at issue is part of the original track constructed for RMM. The fact that CSXT is unable to locate any documentation concerning its abandonment of the end 0.65-mile segment of the track to RMM's former facilities indicates that CSXT treated this section of the track as an exempt spur, and supports the conclusion that the remaining 0.60-mile segment is also an exempt spur. We find that, at least as far as the history of the track is concerned, it is an exempt spur.

Use of the track. According to the verified statement of the president of RMM, which was submitted by the City to support its motion to dismiss, line haul trains never operated on the track, but rather switch engines were used to push cars, as needed, from the main line to and from the shippers' facilities. The president of RMM also states that, to the best of his knowledge, traffic over the track has always been light and no stations were ever established and no express, passenger, or mail service was ever provided. In CSXT's abandonment petition for exemption, only Log Cabin Homes and NSRM were identified as recent users of the track. Log Cabin Homes received only 6 carloads of lumber in 1996, and 10 carloads in 1997. NSRM shipped 16 carloads of vegetable oil and meal in 1996 and nothing else after that.<sup>10</sup> Based on these facts, we find that the use of the track indicates that it is an exempt spur.

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<sup>9</sup> NSRM points out that the City has not shown that RMM ever granted permission for Southern Cotton to locate on or to use its section of track, which NSRM alleges shows that RMM did not own the section of track on which its facilities are located.

<sup>10</sup> See CSXT Transportation, Inc.--Abandonment Exemption--In Rocky Mount, Nash County, NC, STB Docket No. AB-55 (Sub-No. 562X) slip op. at 2 (STB served Aug. 11, 1998).

Physical characteristics of the track. The track segment here is short and stub-ended. It was originally constructed to serve only one shipper, located at the end of the track. As such, it was not built to invade the territory of another railroad. The track was constructed on land purchased, cleared, and graded by the shipper. No stations were ever established on the track. Finally, it was constructed of 85-pound jointed rail, which is obsolete for modern day railroading. These undisputed facts meet all of the physical characteristics of an exempt spur.

Summary. The history, use, and physical characteristics of the track all indicate that this is an exempt spur. Accordingly, we find that the track, which was the subject of CSXT's abandonment petition, is exempt from our abandonment and acquisition jurisdiction under section 10906 and, therefore, grant the City's request to dismiss the petition and vacate all previous decisions in this proceeding.

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

It is ordered:

1. The motion to dismiss filed by the City of Rocky Mount is granted.
2. The previous decisions served in this proceeding are vacated, and the proceeding is discontinued.
3. This decision is effective on December 31, 1999. Petitions to stay must be filed by December 13, 1999. Petitions to reopen must be filed by December 21, 1999.

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

Vernon A. Williams  
Secretary