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SERVICE DATE – NOVEMBER 20, 2007

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-341 (Sub-No. 1X)

SOUTHWESTERN RAILROAD COMPANY, INC.–ABANDONMENT EXEMPTION–
IN ELLIS COUNTY, OK,
AND LIPSCOMB, OCHILTREE, AND HANSFORD COUNTIES, TX.

Decided: November 16, 2007

By petition filed on August 2, 2007, Southwestern Railroad Company, Inc. (SWRR), seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a line of railroad extending from milepost 0.10 at Shattuck, OK, to milepost 85.4 at Spearman, TX, a distance of 85.3 miles, in Ellis County, OK, and Lipscomb, Ochiltree, and Hansford Counties, TX (the Line). Notice of the filing was served and published in the Federal Register on August 22, 2007 (72 FR 47126). On August 28, 2007, as supplemented on August 30, 2007, the Top of Texas Rural Rail Transportation District (TTRRTD) filed a request for imposition of a public use condition and for issuance of a notice of interim trail use (NITU). We will grant the exemption, subject to trail use, public use, and standard employee protective conditions.

BACKGROUND

SWRR acquired the Line from the former Atchison, Topeka and Santa Fe Railway Company in 1990.¹ No service has been conducted since June 2006, when a bridge at the eastern end of the Line was destroyed by fire, isolating all shippers on the Line from the interstate rail network. Prior to the bridge fire, SWRR served five shippers: Perryton Equity Exchange (Perryton); Hi-Planes Hull Company (Hi-Planes); Dowell Schlumberger, Inc. (Dowell); W-B Supply (W-B); and Cargill Inc (Cargill). According to SWRR, 627 carloads moved on the Line in 2006 prior to the fire, 1,150 carloads in 2005, and 1,258 carloads in 2004. These shipments were primarily outbound agricultural products, and some inbound shipments of sand, clay, and pipe.

SWRR states that, even before the fire, outbound agricultural traffic began to decline significantly after what is now the BNSF Railway Company (BNSF) opened a 110-car transloading facility at Shattock and Union Pacific Railroad Company (UP) opened a 110-car

¹ See Southwestern Railroad Company, Inc.–Acquisition and Operation Exemption–Whitewater and Shattuck Branches of The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 31613 (ICC served Apr. 20, 1990).

transloading facility at Liberal, KS. SWRR points out that the cost of trucking agricultural products from locations along the Line to these transload facilities was more than offset by the reduced rail rates charged by BNSF and UP for unit train movements from these facilities. SWRR notes further that all traffic on the Line is truck competitive, and shippers have more than adequate alternative transportation options available.

SWRR also submits a forecast year projection based on 2005 revenues and costs, the last full year it operated the Line. In the forecast year SWRR projects gross revenues of \$477,805 from rail operations and other sources, such as leases along the Line, and avoidable costs totaling \$980,550 (excluding the cost of bridge repair), resulting in an avoidable loss from operations of \$502,745. SWRR states further that, before it could resume rail operations on the Line, it would have to repair the bridge at an estimated cost of \$208,000.² SWRR also estimates that it would incur opportunity costs of \$686,418 if it continued to operate the Line.³ Since no objection has been received to SWRR's revenue and cost data, we will accept these data as showing SWRR's economic burden if it continues to provide rail service on the Line.

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 also will foster sound economic conditions and encourage efficient management by allowing SWRR to avoid the significant rehabilitation and maintenance costs necessary to reactivate the Line and the ownership costs associated with retaining a line that has been out of service since June 2006. [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be adversely affected.

² SWRR's forecast year projection improperly included its estimated cost for bridge repair as an on-branch avoidable cost. The bridge repair cost should have been included as rehabilitation under subsidization costs, rather than as an on-branch cost.

³ SWRR estimated opportunity costs, based on a net liquidation value of land and track of \$4,761,634, plus working capital of \$48,285, less income tax consequences of \$887,528 and a nominal rate of return of 17.50%. According to SWRR, the valuation of track components was based on an inspection conducted in June 2006 by Railroad Materials Salvage, Inc., and the valuation did not include the net salvage value of ballast or reusable ties.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. The shippers who had used the Line before the bridge fire have not objected to the proposed abandonment. Moreover, these and other shippers along the Line have been using trucks and the nearby transloading services on BNSF and UP lines, showing that adequate transportation alternatives are available. Nevertheless, to ensure that Perryton, Hi-Planes, Dowell, W-B and Cargill are informed of our action, we will require SWRR to serve a copy of this decision and notice on each of these shippers within 5 days of the service date and certify to us that it has done so. Given our market power finding, we need not determine whether the proposed abandonment is limited in scope.

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).

SWRR has submitted an environmental and historic 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 action. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment. SEA served an environmental assessment (EA) on October 1, 2007, requesting comments by October 30 2007. In the EA, SEA has not recommended the imposition of any environmental conditions on a decision granting abandonment authority.

No comments to the EA were filed by the October 30, 2007 due date. As noted, SEA did not recommend that any conditions be imposed. Based on SEA's recommendation, we conclude that the proposed abandonment, if implemented, will not significantly affect either the quality of the human environment or the conservation of energy resources.

As we previously noted, TTRRTD has filed a request for the issuance of a NITU under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act). TTRRTD has submitted a statement of willingness to assume financial responsibility for the right-of-way and has acknowledged that use of the right-of-way is subject to possible future reconstruction and reactivation of the right-of-way for rail service as required under 49 CFR 1152.29. By letter dated September 13, 2007, SWRR states that it is willing to negotiate with TTRRTD for interim trail use. Because TTRRTD's request complies with the requirements of 49 CFR 1152.29, and SWRR is willing to enter into negotiations, we will issue a NITU for the Line. 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, SWRR 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.

SEA has indicated in its EA that the right-of-way may be suitable for other public use following abandonment. TTRRTD also requests imposition of a 180-day public use condition, precluding SWRR from: (1) disposing of the corridor, other than the tracks, ties and signal equipment, except for public use on reasonable terms; and (2) removing or destroying potential trail-related structures such as bridges, trestles, culverts and tunnels. TTRRTD states that the corridor would make an excellent recreational trail, and that conversion of the property to trail use is in accordance with local plans.

We have determined that persons who file under the Trails Act may also file for public use under 49 U.S.C. 10905. See Rail Abandonments—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986) (Trails). When the need for both conditions is established, it is our policy to impose them concurrently, subject to the execution of a trail use agreement. TTRRTD 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 of the period of time requested. Accordingly, a 180-day public use condition also will be imposed, commencing from the effective date of this decision and notice, to enable any state or local government agency or other interested person to negotiate the acquisition of the Line for public use. If a trail use agreement is reached on a portion of the right-of-way, SWRR must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, 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, SWRR is not required to deal exclusively with TTRRTD, but may engage in negotiations with other interested persons.

The parties should note that operation of the trail use and public use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in Trails, 2 I.C.C.2d at 608, 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 CFR 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 and public use precluded. Alternatively, if a sale under the OFA procedures does not occur, trail use and public use may proceed.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903 the abandonment by SWRR of the above-described Line, subject to the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91

(1979), and the conditions that: (1) SWRR shall leave intact all of the right-of-way, including bridges, trestles, culverts and tunnels (but not track, ties or signal equipment), for a period of 180 days from the effective date of this decision and notice, to enable any state or local government agency or any other interested person to negotiate the acquisition of the Line for public use; and (2) SWRR shall comply with the interim trail use/rail banking procedures set forth below.

2. 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.

3. 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.

4. 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.

5. 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, SWRR may fully abandon the Line, provided the conditions imposed above are met.

6. SWRR is directed to serve a copy of this decision and notice on Perryton, Hi-Planes, Dowell, W-L and Cargill within 5 days after the service date of this decision and notice and to certify to the Board that it has done so.

7. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by November 30, 2007, 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 \$1,300. 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 December 20, 2007. Petitions to stay must be filed by December 5, 2007, and petitions to reopen must be filed by December 17, 2007.

10. Pursuant to the provisions of 49 CFR 1152.29(e)(2), SWRR 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 SWRR's filing of a notice of consummation by November 20, 2008, 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 Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary