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SERVICE DATE - JUNE 20, 2003

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-468 (Sub-No. 5X)

PADUCAH & LOUISVILLE RAILWAY, INC.–ABANDONMENT EXEMPTION–IN
McCRACKEN COUNTY, KY

Decided: June 18, 2003

By petition filed on March 4, 2003, the Paducah & Louisville Railway, Inc. (P&L), seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon approximately 5,780 feet of rail line extending from station number 17+55, near Caldwell Street, to station number 64+00, near 6th Street, on each side of railroad milepost 1, in the city of Paducah, McCracken County, KY (the line). Notice of the petition was served and published in the Federal Register (68 FR 14273) on March 24, 2003. Boral Bricks Inc. (Boral), filed a protest to the exemption and P&L filed a rebuttal. 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 Paducah, KY (the City).¹ The petition for exemption will be granted, subject to trail use, public use, historic preservation, environmental, and standard employee protective conditions.

PRELIMINARY MATTER

Boral filed a motion to strike P&L's rebuttal as a prohibited reply to a reply under 49 CFR 1104.13(c). P&L replied in opposition to the motion, arguing, among other things, that its rebuttal was proper and should be accepted "to provide the Board with a full and precise record." If P&L desired to assure itself of the right to file the last word through a rebuttal, it should have filed a formal application. See Central Railroad Company of Indiana–Abandonment Exemption–in Dearborn,

¹ The March 24th notice instituting the exemption proceeding 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 was due no later than April 14, 2003. The City's request for a public use condition and issuance of a NITU was filed on April 21, 2003. However, in Aban. and Discon. of R. Lines and Transp. Under 49 U.S.C. 10903, 1 S.T.B. 894 (1996) and 2 S.T.B. 311 (1997), the Board retained the 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 there is no indication that the request will prejudice any party, it will be accepted. See Wheeling & Lake Erie Railway Company–Abandonment Exemption–in Starke County, OH, STB Docket No. AB-227 (Sub-No. 10X), slip op. at 1 n.1 (STB served Nov. 7, 1997).

Decatur, Franklin, Ripley, and Shelby Counties, IN, STB Docket No. AB-459 (Sub-No. 2X) (STB served May 4, 1998); Central Kansas Railway, L.L.C.–Abandonment Exemption–in Sedgwick County, KS, STB Docket No. AB-406 (Sub-No. 14X) (STB served Apr. 10, 2001). Also, P&L’s rebuttal includes detailed cost data and other materials that P&L should have included in its petition. While the Board has allowed the filing of additional argument and evidence in certain limited instances, P&L has not shown that such a filing is warranted here. Accordingly, P&L’s rebuttal will be rejected.

BACKGROUND

The line was acquired by P&L from the Illinois Central Gulf Railroad in 1986. Boral, the only shipper on the line, manufactures, distributes, and sells bricks and other materials for the building and construction industries. The Franklin Brick Company (Franklin) used the line until March 2003, when Boral acquired substantially all of Franklin’s assets. As a result of that acquisition, Boral currently owns and operates the stockyard and warehouse showroom facility (the Distribution Center) that is served by the line. P&L states that it is not aware of any other business planning to locate along the line and that there is no overhead traffic.

P&L seeks to abandon the line, asserting that any traffic-generated revenues are outweighed by the projected costs of rehabilitation and maintenance. Over the past 2 years, Franklin used the line to a limited extent; it received 66 carloads in 2001 and 58 carloads in 2002, generating total revenues of approximately \$80,000.² According to P&L, the line is in poor condition and is in need of significant rehabilitation and repair of the seven grade crossings. P&L estimates that it would cost approximately \$210,668 to rehabilitate the line and \$405,398 to repair the seven grade crossings, for a total cost of \$616,066. P&L submits that these costs far exceed the revenues and justify abandonment of the line. P&L further submits that, if the line is abandoned, alternative transportation is available.

Boral, without providing specific data to contradict that provided by P&L, opposes abandonment of the line. It denies that it has viable transportation alternatives and claims that abandonment would cause severe economic hardship to its business. Also, Boral contends that it plans to “grow its business” in the future but offers no specifics. Boral states that it does not know of any other commercially appropriate location for its Distribution Center and that, in the event of abandonment of the line, its productivity would decrease due to congestion and delay, because its facility is designed to be served by rail and has room for only two trucks at a time. Boral further

² P&L contends that Franklin used truck transportation for more than 90% of its inbound shipments and had indicated that it might be willing to relocate its facilities to another rail-served site in the area.

contends that abandonment of the line would increase its shipping costs.³ Finally, Boral argues that the community and the environment would suffer harm as more trucks would be on the highways.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without the Board's prior approval. Under 49 U.S.C. 10502, however, the Board must exempt a transaction or service from regulation when it finds 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.

P&L has produced unrefuted evidence that revenues are inadequate to cover the cost of operation and the projected cost of line rehabilitation. Additionally, the low traffic levels in recent years do not support any prediction of significant traffic increases in the future. Boral's assertion that traffic on the rail line will increase once it expands its business in the next few years is speculative and unsupported by any evidence. Speculation that additional traffic might materialize in the future does not justify forcing the railroad to incur losses by operating this rail line.

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 P&L of the expense of maintaining a line that generates marginal amounts of traffic and by allowing P&L to use its assets more productively elsewhere on its rail system [49 U.S.C. 10101(5) and (9)]. Moreover, the increase in motor traffic resulting from the abandonment will not violate the energy conservation policy [49 U.S.C. 10101(14)].⁴ Other aspects of the rail transportation policy will not be adversely affected.

³ Boral asserts that truck transportation would be more expensive than rail service. It estimates that it will incur additional rates of \$5-7 or more per 1,000 bricks for shipment by truck. Also, labor costs will increase, and there will be higher costs for brick breakage. Boral acknowledges that it uses motor carriers for 50% of its inbound shipments.

⁴ In its Environmental Assessment (EA), the Board's Section of Environmental Analysis (SEA) calculated that the abandonment would generate approximately two additional trucks per day on area roads during a 240-workday year, using a rail-to-truck conversion of four trucks per carload. This increase will not exceed the Board's threshold of an average increase in truck traffic of more than 10% of the average daily traffic or 50 vehicles a day on any affected road segment [49 CFR 1105.7(e)].

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power because Boral, the only active shipper on the line, has alternative transportation service available. Boral's current use of truck transportation for 50% of its inbound shipments indicates that this is a viable transportation option. Nevertheless, to ensure that this shipper is informed of our action, P&L will be required to serve a copy of this decision on Boral within 5 days of the service date and certify to the Board that it has done so. Given the market power finding, it is not necessary to determine whether the proposed transaction is limited in scope.

Under 49 U.S.C. 10502(g), the Board may not use its 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, the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), will be imposed.

P&L 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 action. See 49 CFR 1105.11. 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 EA on May 2, 2003, and requested comments by June 2, 2003.

In the EA, SEA notes that the National Geodetic Survey (NGS) has identified one geodetic marker that may be affected by the proposed abandonment. Therefore, SEA recommends that P&L provide NGS with at least 90 days' notice prior to initiation of any salvage operations that may disturb or destroy the survey marker so that plans can be made for its relocation. Also, the Kentucky Heritage Council (the State Historic Preservation Officer) has not completed its assessment of the potential impact of this action on historic resources. Accordingly, SEA also recommends that P&L retain its interest in and take no steps to alter the historic integrity of all sites and structures on the right-of-way until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f.

No comments were filed by the June 2, 2003 due date. Accordingly, the conditions recommended by SEA in the EA will be imposed. The proposed abandonment, as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

As indicated, on April 21, 2003, the City late-filed a request for issuance of a NITU under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act) and a request for public use under 49 U.S.C. 10905. The City 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. P&L has indicated that it is willing

to negotiate for interim trail use. Because the City's request complies with the requirements of 49 CFR 1152.29, and P&L is willing to enter into negotiations, a NITU will be issued as requested. 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, P&L may fully abandon the line segment, 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 the EA that, if abandonment and salvage of the line does take place, the right-of-way may be suitable for other public use. The City requests imposition of a 180-day public use condition to allow it to assemble or review title information and to commence negotiations with P&L. Specifically, the City requests that P&L be precluded from: (1) disposing of the corridor, other than 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.

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 has been established, it is the Board's policy to impose them concurrently, subject to execution of a trail use agreement. 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 on the rail line to be abandoned, 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. 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 the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, P&L is not required to deal exclusively with the City, 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, the trail use and public use processes may proceed.

It is ordered:

1. Boral's motion to strike is granted.
2. The City's late-filed request for issuance of a NITU and for imposition of a public use condition is accepted.
3. Under 49 U.S.C. 10502, an exemption from the prior approval requirements of 49 U.S.C. 10903 for the abandonment by P&L of the above-described line is granted, subject to the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), and subject to the conditions that P&L shall: (1) leave intact all of the right-of-way, including bridges, trestles, culverts, and tunnels (but not track and track material) 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; (2) comply with the terms and conditions for implementing interim trail use/rail banking as set forth below; (3) provide NGS with at least 90 days' notice prior to initiation of any salvage operations that may disturb or destroy the geodetic station marker so that plans can be made for its relocation; and (4) retain its interest in and take no steps to alter the historic integrity of the right-of-way until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f.
4. P&L is directed to serve a copy of this decision on Boral within 5 days after the service date of this decision and notice and to certify to the Board that it has done so.
5. 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.
6. 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.
7. 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.
8. 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, P&L may fully abandon the line, provided the conditions imposed above are met.

9. 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 June 30, 2003, 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 \$1,100. See 49 CFR 1002.2(f)(25).

10. 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.”**

11. Provided no OFA has been received, this exemption will be effective July 20, 2003. Petitions to stay must be filed by July 7, 2003, and petitions to reopen must be filed by July 15, 2003.

12. Pursuant to the provisions of 49 CFR 1152.29(e)(2), P&L 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 P&L’s filing of a notice of consummation by June 20, 2004, 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 no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary