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SERVICE DATE – DECEMBER 9, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-290 (Sub-No. 240X)

NORFOLK SOUTHERN RAILWAY COMPANY—ABANDONMENT EXEMPTION—
IN GASTON COUNTY, NC

Decided: December 8, 2003

By petition filed on August 21, 2003,¹ Norfolk Southern Railway Company (NSR) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a 5-mile rail line, extending between milepost HG-47.0 at Gastonia and milepost HG-52.0 at Dallas (Gebo), in Gaston County, NC. A request for imposition of a public use condition and issuance of a notice of interim trail use (NITU) was jointly filed by the Town of Dallas, the City of Gastonia, and Gaston County (Town, City, and County). The exemption will be granted, subject to public use, environmental, and standard employee protective conditions.

BACKGROUND

NSR serves only one shipper on the line proposed for abandonment. The shipper, Webb Metals Limited (Webb), is a scrap metal dealer. Webb shipped 67 carloads of scrap iron (an exempt commodity) in 2002, a decrease from 114 carloads in 2001. NSR states that this traffic produced gross annual revenues for the line of \$29,947. Total avoidable costs for the line were \$285,679. The avoidable loss from operations was \$255,732 and the avoidable loss, including return on value, was \$260,171. NSR estimates these losses would be greater for calendar year 2003 because an increase in traffic is unlikely and the salvage value of the line has increased.

In February 2003, NSR took the line out of service because the condition of the track was no longer safe. Specifically, timber and surface and ditching work needs to be performed immediately before service can be restored, and bridge rehabilitation work will need to be performed over the next several years. NSR seeks abandonment because the maintenance and rehabilitation costs, which NSR estimates would be \$456,100, are significantly greater than the revenue the line produces.

¹ Notice of the filing was served and published in the Federal Register on September 10, 2003 (68 FR 53427).

NSR offered Webb assistance with transportation needs and transition costs, but Webb did not respond. Webb has not opposed the abandonment, however. According to NSR, Webb uses motor carriers for most of its transportation needs.

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 an abuse of market power.

Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy in this case. 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 NSR of the expense of owning and maintaining a rail line that is little used and allowing it to use its assets more productively elsewhere on its system [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be affected adversely.

Regulation of the transaction is not necessary to protect shippers from the abuse of market power. The only active shipper on the line, Webb, has been informed of the NSR's proposal and has not objected to the abandonment. Nevertheless, to ensure that Webb is informed of the Board's action, NSR will be required to serve a copy of this decision on the shipper within 5 days of the service date and to 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's exemption authority may not be used 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.

NSR has submitted a combined environmental and historic report with its petition and has notified the appropriate Federal, state, and local government agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed abandonment. See 49 CFR 1105.11. The Board's Section of Environmental Analysis (SEA) has examined the 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 20, 2003, and requested comments.

In the EA, SEA sets forth concerns raised by various agencies. First, the U.S. Department of Commerce, National Geodetic Survey (NGS) has identified nine survey markers that could be affected by the proposed abandonment. Therefore, SEA recommends that NSR notify the NGS prior to any salvage activities that will disturb these survey markers, as well as allow the NGS 90 days after the service date of the decision to survey the line for historical benchmarks or monumentation. Second, the U.S. Department of Interior, Fish and Wildlife Service (FWS) raised concerns regarding the endangered Schweinitz's sunflower (*heliopsis scouleriana*) and the Georgia aster (*aster georgianus*). Therefore, SEA recommends that NSR be prohibited from salvaging or disposing of the entire right-of-way until after consultation with the FWS. Third, the North Carolina Department of Environment and Natural Resources, Division of Parks and Recreation (NC-DENR), has identified the bog turtle (*desmognathus muhlbergii*) and the bald eagle (*haliaeetus leucocephalus*) as threatened species that could be affected by the abandonment, and therefore recommends that NSR consult with the NC-DENR before being allowed to salvage or dispose of the entire right-of-way. Fourth, the North Carolina Wildlife Resources Commission (NC-WRC) has indicated that it has not yet completed its review. Finally, SEA recommends that NSR consult with the City of Gastonia's Engineering Department, at its request, regarding the removal of all rails, crossing materials, railroad signalization, and signage, before beginning any salvage activities.

SEA received a comment to the EA from the NC-WRC indicating that NSR's line crosses the South Fork of the Catawba River, Little Long Creek, and Long Creek, as well as various 100-year flood plains and wetlands. Therefore, SEA further recommends that NSR consult with the U.S. Army Corps of Engineers (Corps), NC-DENR, and NC-WRC regarding all applicable permits and certifications, including sediment and erosion control, before removing railroad structures. SEA also recommends that NSR consult with NC-WRC regarding the bog turtle, native planting schedules, and any proposed reclamation activities, and that NSR also consult with FWS regarding the bog turtle, before beginning any salvage activities.

The conditions recommended by SEA 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.

A request for interim trail use/rail banking under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and for a public use condition under 49 U.S.C. 10905 was filed on September 30, 2003, on behalf of the Town, City, and County. By letter filed on November 13, 2003, NSR states that it is unable to negotiate for trail purposes at this time because it is considering offers to purchase the property from the North Carolina Department of Transportation (NC-DOT) and the North Carolina Railroad Company (NCR), respectively. By letter addressed to NSR dated December 4, 2003, NC-DOT states that it has no interest in acquiring the line and supports the trail use request filed by the Town, City, and County. NSR responded in a December 5, 2003 letter that it is

still in negotiations with NCRR to sell the line and, therefore, still does not agree to the trail use request. However, NSR states that if NCRR decides not to purchase the line, NSR would be willing to consider trail use requests. NSR further states that it will not consummate the abandonment for at least 90 days after the effective date of the exemption while it continues negotiations with NCRR. If NSR does not agree to purchase the line, NSR would agree to negotiate trail use with the Town, City, and County. Therefore, because the Trails Act permits only voluntary interim trail use, a NITU cannot be issued at this time. See Rail Abandonments—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 598 (1986) (Trails).

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. 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 Town, City, and County request imposition of a 180-day public use condition for the line, precluding NSR 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. They state that the corridor provides important green space and wildlife habitat and would make an excellent recreational public trail, joining together other existing trails in accordance with local and state regional plans. They request a 180-day period to assemble and review title information, complete a trail plan, and to negotiate with NSR.

The Town, City, and County have 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 right-of-way to be abandoned, commencing from the effective date of this decision, 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 a right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, NSR is not required to deal exclusively with the Town, City, and County, but may engage in negotiations with other interested persons.

The parties should note that operation of the public use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. An offer of financial assistance (OFA) to acquire a rail line for continued rail service or to subsidize rail operations takes priority over public use.² Accordingly, if an OFA is timely filed under 49 CFR 1152.27(c)(1), the effective date of this decision will be postponed beyond the effective date indicated here. See 49 CFR 1152.27(e)(2).

² See Trails, 2 I.C.C.2d at 608.

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 public use precluded. Alternatively, if a sale under the OFA procedures does not occur, the public use process may proceed.

It is ordered:

1. Under 49 U.S.C. 10502, an exemption from the prior approval requirements of 49 U.S.C. 10903 for the abandonment by NSR 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 NSR shall: (1) notify the NGS prior to any salvage activities that will disturb or destroy any of the nine survey markers and allow NGS 90 days from the service date of the decision to survey the rail line for any historical benchmarks or monumentation; (2) consult with the FWS regarding the Schweinitz’s sunflower, the Georgia aster, and the bog turtle before salvaging or disposing of the entire right-of-way; (3) consult with the NC-DENR regarding the bog turtle and the bald eagle before salvaging or disposing of the entire right-of-way; (4) consult with the NC-WRC regarding the bog turtle, native planting schedules, and any proposed reclamation activities before salvaging or disposing of the entire right-of-way; (5) consult with the City of Gastonia’s Engineering Department before beginning salvage activities; (6) consult with the Corps, NC-DENR, and NC-WRC regarding all applicable permits and certifications, including sediment and erosion control, before removing railroad structures; and (7) leave intact all of the right-of-way, including bridges, trestles, culverts, and tunnels (but not track, ties, and signal equipment), for a period of 180 days from the effective date of this decision, to enable any state or local government agency or other interested person to negotiate the acquisition of the line for public use.

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

3. 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 December 19, 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 a \$1,100 filing fee. See 49 CFR 1002.2(f)(25).

4. 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.”**

5. Provided no OFA has been received, this exemption will be effective on January 8, 2004. Petitions to stay must be filed by December 24, 2003, and petitions to reopen must be filed by January 5, 2004.

6. 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 December 9, 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