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SERVICE DATE – MARCH 21, 2006

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-988X

NEBKOTA RAILWAY, INC.–ABANDONMENT EXEMPTION–
IN SHERIDAN AND CHERRY COUNTIES, NE

Decided: March 17, 2006

By petition filed on December 1, 2005, Nebkota Railway, Inc. (NRI) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a 43-mile portion of its line of railroad extending from milepost 374 at Rushville 69360 to the end of the line at milepost 331 at Merriman 69218 in Sheridan and Cherry Counties, NE. Notice of the filing was served and published in the Federal Register on December 21, 2005 (70 FR 75860). The Nebraska Game and Parks Commission (NGPC) filed a request for issuance of a notice of interim trail use (NITU). Rails to Trails Conservancy (RTC) and NGPC jointly filed a reply to NRI's petition and a request for imposition of a public use condition. NRI responded. We will grant the petition for exemption, subject to public use, trail use, environmental, and standard employee protective conditions.

BACKGROUND

The line proposed for abandonment is part of a 73.5-mile rail line acquired by NRI from the Chicago and North Western Transportation Company (CNW) in Nebkota Railway, Inc.–Acquisition and Operation Exemption–Line of Chicago and North Western Transportation Company, Finance Docket No. 32442 (ICC served Feb. 4, 1994). The 73.5-mile line extends from Merriman to Chadron, NE. In that proceeding, NRI also acquired incidental trackage rights over 27.8 miles of CNW's rail line extending from Chadron to Crawford, NE, to allow NRI to interchange with the Burlington Northern Railroad Company (BN). The line is a part of what had been CNW's Cowboy Line, which was mostly abandoned by CNW pursuant to authority granted in Chicago and North Western Transportation Company–Abandonment Exemption–Between Norfolk and Merriman, NE, Docket No. AB-1 (Sub-No. 249X) (ICC served June 2, 1994).

There are three shippers on the portion of the line proposed for abandonment, Farmers Co-op Elevator Company of Gordon, Retzlaff Grain Co., Inc., and West Plains Grain, Inc. According to NRI, the traffic on that portion, which constitutes the eastern end of its line, has declined dramatically over the past few years and has proven to be a

drain on the remainder of its operations. NRI's traffic data show that the number of revenue carloads being transported has dropped from 346 in the year 2002 to 108 in the year 2004. NRI states that, in the 3-year period, it has sustained an operating loss of \$24,309.80. No overhead traffic moves over the line and NRI does not anticipate any increase in local traffic within the foreseeable future. NRI states that, if the 43-mile portion is authorized for abandonment, the tracks, ties, and other track materials will be salvaged and sold to help NRI retain and profitably operate the remainder of its railroad system, extending between Chadron and Rushville, with incidental trackage rights between Chadron and Crawford. NRI states that it has notified the three shippers on the line of the abandonment proposal and that they do not oppose the abandonment.

In a joint reply filed on January 10, 2006, RTC and NGPC have expressed concern regarding the disposition of the right-of-way (ROW) should the Board authorize the abandonment. They contend that NRI, CNW, and RTC entered into a master agreement to settle a prolonged dispute between CNW and the State of Nebraska regarding abandonment of the Cowboy Line. RTC and NGPC point out that the master agreement, among other things, requires NRI to consent to rail bank its line under section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and convey the ROW to RTC or its assignee should NRI seek to abandon all or a portion of its line. Because NRI has disputed its obligations under the master agreement, RTC and NGPC request that the Board impose a public use condition in the instant proceeding and retain jurisdiction over the line by various other means until the contractual dispute with NRI is resolved.

In a letter dated January 26, 2006, NRI has responded that, without accepting the arguments advanced in support of the request for the public use condition, NRI agrees upon the Board's approval of its abandonment petition to convey the ROW to NGPC to be used as a recreational trail pursuant to the Trails Act. NRI believes that this action would obviate the need for imposition of a public use condition.

On February 17, 2006, RTC and NGPC jointly filed a status report on their negotiations, to which NRI responded by letter dated February 24, 2006. RTC and NGPC jointly filed a further reply on February 28, 2006, and NRI responded by letter dated March 1, 2006.

Subsequently, by facsimile filed on March 1, 2006, RTC and NGPC have informed the Board that they have resolved their dispute with NRI. Consequently, they withdraw their objections and requests for relief regarding retention of jurisdiction by the Board in this proceeding.

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 relieving NRI from the expense of maintaining and operating a line that continues to operate at a loss and by allowing NRI 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 adversely affected.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. NRI has informed the three shippers on the line of its abandonment proposal, and they have not objected. Nevertheless, to ensure that the shippers are informed of our action, we will require NRI to serve a copy of this decision and notice on Farmers Co-op Elevator Company of Gordon, Retzlaff Grain Co., Inc., and West Plains Grain, Inc., within 5 days of the service date of this decision and notice and to certify to the Board 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).

NRI 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 abandonment. 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 January 31, 2006, requesting comments by March 2, 2006. In the EA, SEA discussed concerns expressed by, or reviews not yet completed by, various agencies. Based on the record at that time, SEA recommended that five conditions be imposed on any decision granting abandonment authority.

In the EA, SEA noted that the U.S. Fish and Wildlife Service, Mountain-Prairie Region (FWS), had not yet completed its review of the proposed abandonment. Therefore, SEA recommended that, prior to the onset of salvage operations, NRI be required to consult with the FWS and report the result of these consultations to SEA.

SEA also stated that the U.S. National Park Service, Midwest Regional Office (NPS), had not yet completed its review. Therefore, SEA recommended that, prior to the onset of salvage operations, NRI be required to consult with NPS and report the result of these consultations to SEA.

At the time the EA was prepared, the U.S. Environmental Protection Agency, Region 7 (USEPA), had not provided comments regarding potential permitting requirements of the proposed abandonment under section 402 of the Clean Water Act. Therefore, SEA recommended that NRI be required to consult with USEPA and report the result of these consultations to SEA prior to the onset of salvage operations.

SEA indicated in the EA that the U.S. Department of Commerce, National Geodetic Survey (NGS), had not completed its review. Therefore, SEA recommended that, prior to the onset of salvage operations, NRI be required to consult with NGS and report the result of these consultations to SEA.

Finally, SEA stated in the EA that the Supervisors of Cherry and Sheridan Counties had not yet completed their review of the proposed abandonment. Therefore, SEA recommended that, prior to the onset of salvage operations, NRI be required to consult with the Supervisors of those counties and report the result of these consultations to SEA.

Comments in response to the EA were received and considered by SEA. In particular, SEA received input from FWS, NPS, and USEPA stating that they had no comment on the abandonment as proposed. SEA also received comments from the Supervisors of Cherry and Sheridan Counties stating that they had no objection to the abandonment as proposed. Based on these comments, SEA has modified its recommendations. Because most of the concerns raised in the EA have been satisfied, SEA now recommends only the imposition of a condition requiring NRI to consult with NGS and report the result of these consultations to SEA prior to the onset of salvage operations. Accordingly, we will impose the environmental condition recommended by SEA. Based on SEA's recommendation, we conclude that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

On January 4, 2006, NGPC filed a request for issuance of a NITU for the 43-mile line under the Trails Act. NGPC has submitted a statement of willingness to assume financial responsibility for the ROW and has acknowledged that use of the ROW is subject to possible future reconstruction and reactivation of the ROW for rail service, as required under 49 CFR 1152.29. By letter filed on January 26, 2006, NRI states that it is willing to convey the ROW for use as a trail under the Trails Act. Because NGPC's request complies with the requirements of 49 CFR 1152.29 and NRI is willing to enter into negotiations, we will issue a NITU for the subject 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, NRI 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, following abandonment and salvage of the line, the ROW may be suitable for other public use. RTC and NGPC have requested imposition of a 180-day public use condition to ensure preservation of the ROW and to provide sufficient time to negotiate for the acquisition of the ROW for use of as a trail. RTC and NGPC also request that NRI be prohibited from disposing of any interest in real estate, bridges, culverts, roadbed and any potential trail-related structures other than to RTC or NGPC for a 180-day period from the effective date of the abandonment.

Persons who request a Trails Act condition may also request a public use condition 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 both conditions are appropriate, it is our policy to impose them concurrently, subject to the execution of a trail use agreement. RTC and NGPC 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, commencing from the effective date of this decision and notice, will be imposed on the line to be abandoned 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 ROW, NRI must keep the remaining ROW 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 negotiate to acquire the ROW that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, NRI is not required to deal exclusively with RTC and NGPC, 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. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903 the abandonment by NRI of the above-described line, 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 NRI (1) comply with the terms and conditions for implementing interim trail use/rail banking and permitting public use negotiations as set forth below, for a period of 180 days commencing from the April 22, 2006, effective date of this decision and notice (until October 19, 2006), and (2) consult with NGS and report the result of these consultations to SEA prior to the onset of salvage operations.

2. NRI is directed to serve a copy of this decision and notice on Farmers Co-op Elevator Company of Gordon, Retzlaff Grain Co., Inc., and West Plains Grain, Inc., within 5 days after the service date of this decision and notice and to certify to the Board that it has done so.

3. Consistent with the public use and interim trail use/rail banking conditions imposed in this decision and notice, NRI may discontinuance service and salvage track and related materials. NRI shall keep intact the ROW, including bridges, culverts, roadbed and any potential trail-related structures, for a period of 180 days 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 an interim trail use/rail banking agreement is executed before October 19, 2006, the public use condition will expire to the extent the trail use/rail banking agreement covers the same line.

4. 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 ROW.

5. 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 ROW.

6. 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.

7. If an agreement for interim trail use/rail banking is reached by October 19, 2006, interim trail use may be implemented. If no agreement is reached by that time, NRI may fully abandon the line provided the other conditions imposed in this proceeding are met.

8. 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 March 31, 2006, 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 \$1,200. See 49 CFR 1002.2(f)(25).

9. 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.”**

10. Provided no OFA has been received, this exemption will be effective on April 22, 2006. Petitions to stay must be filed by April 7, 2006, and petitions to reopen must be filed by April 17, 2006.

11. Pursuant to the provisions of 49 CFR 1152.29(e)(2), NRI 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 NRI's filing of a notice of consummation by March 21, 2007, 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 Buttrey and Vice Chairman Mulvey.

Vernon A. Williams
Secretary