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SERVICE DATE – JANUARY 22, 2010

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-497 (Sub-No. 5X)

MINNESOTA NORTHERN RAILROAD, INC.–ABANDONMENT EXEMPTION–IN
ROSEAU COUNTY, MN

Decided: January 21, 2010

By petition filed on October 5, 2009, Minnesota Northern Railroad, Inc. (MNN), seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a 20.035-mile portion of its Warroad Subdivision between milepost 83.6, located approximately 300 feet west of Roseau County Road 124 (11th Ave, SE) in Roseau, and milepost 103.635, at the end of the line at Warroad, in Roseau County, MN. Notice of the filing was served and published in the Federal Register on October 23, 2009 (74 FR 13616). On December 16, 2009, the Roseau County Trailblazers (Trailblazers) late-filed a request for issuance of a notice of interim trail use (NITU) and for imposition of a public use condition. MNN filed a response to the Trailblazers' request. We will grant the exemption, subject to trail use, public use, environmental, and standard employee protective conditions, as set forth below.

BACKGROUND

MNN states that the line is part of its 81-mile Warroad Subdivision that extends from St. Hilario, MN, to its terminus at Warroad. MNN acquired the Warroad Subdivision from RailAmerica Transportation Corp. in 1997. KBN, Inc. acquired MNN in 2000.¹

MNN states that abandonment of the above-described rail line is consistent with the public interest and would save the U.S. Army Corps of Engineers (Corps) \$1.3 million in funds. MNN explains that the Corps is proposing to construct a flood control diversion channel to reroute the Roseau River on the east side of Roseau. The diversion channel would cross MNN's tracks at approximately milepost 83.86, and the Corps has proposed to construct a replacement bridge to carry MNN's tracks across the diversion channel. Abandonment of the line would render the replacement bridge unnecessary.

MNN states that it currently serves two shippers on the line, Strata Corp. (Strata), which ships crushed stone outbound, and Marvin Windows (Marvin), which ships cullet (glass) outbound. In the base year, which ended on July 31, 2009, MNN transported a total of

¹ See KBN, Inc.–Control Exemption–Minnesota Northern Railroad, Inc. and St. Croix Valley Railroad Company, STB Finance Docket No. 33911 (STB served Aug. 31, 2000).

97 carloads (96 carloads for Strata and 1 carload for Marvin). Based on this traffic, MNN earned \$58,672 in revenue. MNN expects to ship the same amount of traffic in the forecast year and, because of an increase in rates, earn \$60,432 in revenue on these carloads.

MNN claims, however, that its expenses will exceed its revenues. MNN estimates that, based on maintenance-of-way and train crew costs alone, such operations would result in an operating loss of \$95,722 (\$121,210 to maintain track and bridges, plus \$34,944 in operating costs, minus \$60,432 in revenues). MNN also estimates that an expenditure of \$670,990 would be required to rehabilitate the line to comply with Federal Railroad Administration Class I safety standards.² With the decline in traffic on the line, MNN states that it would not generate enough revenue from rail operations to justify the costs to rehabilitate and maintain the line. Neither of the shippers has filed a protest to MNN's petition.

According to MNN, the shippers on the line have feasible transportation alternatives. MNN states that the line parallels an arterial highway that is in good condition, and that the active shippers on the line, which are both located at Warroad, would have service available to them by Canadian National Railway Company (CN), as CN serves Warroad.

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 expedite regulatory action and reduce regulatory barriers to exit [49 U.S.C. 10101(2) and (7)]. An exemption will also foster sound economic conditions and encourage efficient management by allowing MNN to save the expenses of maintaining and operating a line that is minimally used and unprofitable [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. Strata and Marvin, the only active shippers on the line, appear to have alternative transportation available and have not filed in opposition to the proposed abandonment. Nevertheless, to ensure that they are informed of our action, we will require MNN to serve a copy of this decision on Strata and Marvin so that it is received by the shippers within 5 days of the service date of this decision, and to certify contemporaneously to us that it has done so. Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

² This figure consists of \$320,600 to replace ties, \$162,240 to line and surface, \$87,300 to replace defective rail and fasteners, and \$100,800 to repair public grade crossings.

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).

MNN 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 and historic report, verified the data it contains, analyzed the probable effects of the proposed action on the quality of the human environment, and issued an Environmental Assessment (EA) for public comment. The EA was served on December 4, 2009, and comments to the EA were due by January 4, 2010.

In the EA, SEA states that the National Geodetic Survey (NGS) has advised that it has identified 23 geodetic station markers that could be disturbed by the proposed abandonment. Therefore, SEA recommends that MNN consult with NGS at least 90 days prior to beginning salvage activities that would disturb or destroy any of the 23 geodetic station markers.

SEA also states in the EA that MNN submitted its historic report to the Minnesota Historical Society Historic Preservation Office (SHPO), pursuant to 49 CFR 1105.8(c). However, SEA has not heard from the SHPO and therefore has not been able to consider the SHPO's opinion before determining if the line may be potentially eligible for listing on the National Register of Historic Places (National Register). Accordingly, SEA recommends that MNN be required to retain its interest in and take no steps to alter the historic integrity of all potentially historic sites and structures within the project right-of-way (the Area of Potential Effect) until completion of the section 106 process of the National Historic Preservation Act (NHPA), 16 U.S.C. 470(f).

Based on further comments received, SEA has issued a Post EA in which SEA continues to recommend the conditions discussed above and a new condition. SEA notes that it received a letter on December 21, 2009, but dated September 29, 2009, from the SHPO that the information provided by MNN does not adequately address the identification and evaluation of historic properties as required by 36 CFR 800. That filing provides further support for the imposition of the historic preservation condition recommended by SEA in the EA.

SEA also notes that the Minnesota Pollution Control Agency (MPCA) has submitted a letter expressing concerns about the handling of any unreported hazardous spills or contamination that may be discovered during salvage activities and about the handling and disposal of any railroad ties treated with pentachlorophenol or creosote. SEA therefore has recommended a new condition in the Post EA requiring MNN to consult with MPCA, prior to commencing any salvage activities, regarding MPCA's requirements and, if applicable, to comply with all reasonable requirements of MPCA.

We will impose the conditions recommended by SEA. Based on SEA's recommendations, we conclude that the proposed abandonment, as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

As previously noted, the Trailblazers late-filed a request for issuance of a NITU under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and 49 CFR 1152.29. The October 23, 2009 notice provided that any request for trail use/rail banking under 49 CFR 1152.29 was due by November 12, 2009. The Trailblazers originally sent a letter on October 28, 2009, making the trail use and public use requests (in a timely manner), but that letter was not received by the Board. No one has objected to the late-filed notice. In revising its abandonment rules 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. Given these circumstances and the agreement by MNN to negotiate for trail use as discussed below, the Trailblazers' request will be accepted.

The Trailblazers have submitted a statement of willingness to assume financial responsibility for the right-of-way and have 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. MNN, in its response, has stated that it is only willing to negotiate for a portion of the line, a 19.75-mile segment of the right-of-way between milepost 83.6 located approximately 300 feet west of Roseau County Road (11th Ave, SE) at Roseau, and milepost 103.35 at Minnesota Highway 313 (DOT No. 0626457P) at Warroad. Because the Trailblazers' request complies with the requirements of 49 CFR 1152.29, and MNN is willing to enter into negotiations for a portion of the line, a NITU will be issued for that portion of the line as described above. The parties may negotiate an agreement during the 180-day period prescribed below. If an agreement is executed with regard to the above-described portion, no further Board action is necessary regarding that portion. If no agreement as to that portion is reached within 180 days, MNN 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 any future use of the property for restoration of railroad operations.

The Trailblazer's interim trail use request for the 0.285-mile segment of the right-of-way between milepost 103.35 and milepost 103.635 will be denied. MNN is unwilling to negotiate for this section of the right-of-way because it runs through the middle of the Marvin plant.³ Under the Trails Act, the trail use program is voluntary and consensual between the railroad and

³ We note that MNN excluded this portion of the line when it filed a letter agreeing to negotiate trail use for the remainder of the line on November 2, 2009, responding to a letter MNN received from the Trailblazers requesting trail and public use conditions but which the Board did not receive. Following contact by Board staff, Trailblazers perfected its filing with the Board on December 16, 2009. MNN responded by a short letter on December 17, 2009, agreeing in general to negotiate for trail use. While MNN's December 17 letter does not address the portion to be excluded, we believe that MNN remains unwilling to negotiate trail use for this portion of the line, which continues to run through the Marvin plant.

the trail user. See 49 CFR 1152.29; Citizens Against Rails to Trails v. STB, 267 F.3d 1144 (D.C. Cir. 2001); National Wildlife Federation v. I.C.C., 850 F.2d 694, 699-702 (D.C. Cir. 1988); Rail Abandonments—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 598 (1986) (Trails). The Board will not impose a trail use condition on an unwilling party. See, e.g., Consolidated Rail Corporation—Abandonment Exemption—Lancaster and Chester Counties, PA, STB Docket No. AB-167 (Sub-No. 1095X) (STB served June 3, 2004).

The imposition of a public use condition does not require a carrier's consent. See Boston and Maine Corporation—Abandonment Exemption—In Hartford County, CT, STB Docket No. AB-32 (Sub-No. 101X) (STB served Apr. 3, 2008). SEA has indicated in its EA that the right-of-way may be suitable for other public use following abandonment. The Trailblazers also request the imposition of a 180-day public use condition, precluding MNN 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. The Trailblazers state that the line connects the cities of Roseau, Salol, and Warroad, all of which have possible trail connections to other trail systems traversing through Roseau County. The Trailblazers state that the corridor would make an excellent recreational trail, that conversion of the property to trail use is in accordance with planning activities of recreational clubs in Minnesota, and that its preservation as a trail would provide an important wildlife habitat for the Sharp Tailed Grouse and Ruffed Grouse in Northwestern Minnesota, along with a variety of mammals. The Trailblazers request 180 days for the condition so that they can engage in various activities such as work on a trail plan.

The Board has determined that persons who file under the Trails Act may also file for public use under 49 U.S.C. 10905. See Trails, 2 I.C.C.2d at 609. When the need for both conditions is established, as is the case with regard to the above-described portion of the line, it is the Board's policy to impose them concurrently, subject to the execution of a trail use agreement. The Trailblazers 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 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, MNN 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 negotiate 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, MNN is not required to deal exclusively with the Trailblazers, but may engage in negotiations with other interested persons. Because, as noted above, public use conditions do not require the railroad's consent, the public use condition will apply to the entire line.

The request for a public use condition was due on November 12, 2009. It was late-filed on November 30, 2009. Neither the railroad nor anyone else objected to the late-filing. We will therefore accept it.

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.

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

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 MNN 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 MNN shall: (1) leave intact the right-of-way, including the bridges, trestles, culverts, and tunnels (except tracks, ties, and signal equipment), for a period of 180 days from the effective date of this decision and notice, to enable any State or local government agencies, or other interested person, to negotiate the acquisition of the line for public use; and (2) with regard to the above-described 19.75-mile portion of the line, comply with the interim trail use/rail banking procedures set forth below; (3) consult with NGS at least 90 days prior to the beginning of salvage activities that will disturb or destroy any of the 23 geodetic station markers; (4) retain its interest in and take no steps to alter the historic integrity of all historic properties including sites, buildings, structures, and objects within the project right-of-way (the Area of Potential Effect) that are eligible for listing or listed in the National Register until completion of the section 106 process of the NHPA, report back to SEA regarding any consultations with the SHPO and the public, and not file its consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties) until the section 106 process has been completed and the Board has removed this condition; and (5) prior to commencing any salvage activities, consult with MPCA regarding its requirements and, if applicable, comply with all reasonable requirements of MPCA.

2. MNN must serve a copy of this decision on Strata and Marvin so that they receive a copy within 5 days of the service date of this decision and certify to the Board contemporaneously that it has done so.

3. 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, for 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.

4. Interim trail use/rail banking is subject to any future use of the property for restoration of railroad operations and to the user's continuing to meet the financial obligations for the right-of-way.

5. If interim trail 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.

6. If an agreement for interim trail use/rail banking is reached by July 21, 2010, interim trail use may be implemented. If no agreement is reached by that time, MNN may fully abandon the 19.75-mile portion of the line described above, provided the conditions imposed in this proceeding are met.

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 February 1, 2010, 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 \$1,500 filing fee. 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 on February 21, 2010. Petitions to stay must be filed by February 8, 2010, and petitions to reopen must be filed by February 16, 2010.

10. Pursuant to the provisions of 49 CFR 1152.29(e)(2), MNN 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 MNN's filing of a notice of consummation by January 22, 2011, 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 Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.