

38056  
EB

SERVICE DATE – AUGUST 22, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-988 (Sub-No. 1X)

NEBKOTA RAILWAY, INC.—ABANDONMENT EXEMPTION—IN DAWES AND  
SHERIDAN COUNTIES, NE

Decided: August 20, 2007

By petition filed on May 4, 2007, 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 30.3-mile segment of its line of railroad between milepost 404.3 near Chadron 69337 and the end of the line at milepost 374 at Rushville 69360, in Dawes and Sheridan Counties, NE. Notice of the filing was served and published in the Federal Register on May 24, 2007 (72 FR 29205). We will grant the petition for exemption, subject to 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) extending 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 what is now BNSF Railway Company (BNSF). The line is 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). NRI was authorized to abandon the east end of the rail line (a 43-mile portion 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) in Nebkota Railway, Inc.—Abandonment Exemption—in Sheridan and Cherry Counties, NE, STB Docket No. AB-988X (STB served Mar. 21, 2006).

NRI states that the subject rail line is an agrarian line serving country grain elevators situated along its right-of-way. NRI adds that the grain elevators lack the capacity to amass 100-car or even 50-car unit train loads to be interlined with Class I railroads, which increasingly are insistent that their short line connections tender them grain shipments in no lesser quantities. According to NRI, this has placed it at a competitive disadvantage and has contributed to a decline in the traffic handled by it. NRI states it has become evident that it must abandon more of its rail line, i.e., the segment between Chadron and Rushville.

According to NRI, only two shippers are situated on the segment proposed for abandonment—Farmers Co-op Elevator Company of Hay Springs and West Plains Grain, Inc., the owner of NRI and the operator of elevators at Chadron and Rushville and a transloading facility at Rushville. NRI states that, over the past three years, there has not been a single inbound shipment consigned to either shipper and their combined outbound shipments have averaged only 336 carloads a year, or about 11 carloads per mile, per year. NRI asserts that this is far too little traffic to generate sufficient revenue to maintain and operate the segment proposed for abandonment,<sup>1</sup> and there is no realistic likelihood that the situation will improve in the foreseeable future. Further, NRI states that the shippers would be able to continue to receive rail service via NRI at Chadron and between Chadron and Crawford, and adds that, because the rail line is paralleled by U.S. Highway 20, trucking alternatives are readily available. Finally, NRI states that neither shipper opposes the proposed abandonment.

### 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 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 on Farmers Co-op Elevator Company and West Plains Grain, Inc., within 5 days of the service date of this decision 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.

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.

---

<sup>1</sup> In support, NRI claims losses of \$140,653 over the last three years.

SEA served an environmental assessment (EA) on July 3, 2007, requesting comments by August 2, 2007. In the EA, SEA states that, in a letter dated March 2, 2007, addressed to NRI, the U.S. Fish and Wildlife Service (FWS) in Grand Island, NE, stated that no significant adverse impacts to Federally listed threatened or endangered species protected under section 7 of the Endangered Species Act are anticipated from the proposed abandonment. However, FWS noted that, in the event that NRI must dispose of waste or spoil material outside the project's current scope, further section 7 consultation may be required to assure that no adverse impacts occur to Federal trust fish and wildlife resources, including Federally listed species and Federally designated critical habitats.

SEA also states that FWS indicated that the proposed abandonment is not likely to affect the eagles protected under the Bald and Golden Eagle Protection Act. However, FWS noted that migratory birds, provided consideration under the Migratory Bird Treaty Act, could be impacted by the proposed abandonment if salvage activities are conducted during the following migratory bird nesting seasons: April 1 to July 15; February 1 through July 15; and July 15 through September 10. According to SEA, FWS: (1) recommends that field surveys for nesting birds be conducted if salvage activities are planned during these periods; (2) requests that equal consideration be given regarding potential impacts to wetlands or streams; and (3) points out that compensation or restoration of wetlands may be required if significant impacts to these resources are anticipated. In order to address FWS' concerns, SEA recommends that a condition be imposed requiring NRI to consult with FWS in Grand Island, NE, prior to initiating any salvage activities along the line proposed for abandonment.

SEA also states that the National Geodetic Survey (NGS) has identified 44 geodetic station markers that may be affected by the proposed abandonment. SEA recommends that a condition be imposed requiring NRI to provide NGS with 90 days' written notice prior to initiating salvage activities on the line proposed for abandonment.

No comments to the EA were filed. Accordingly, we will impose the conditions recommended by SEA in the EA. 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. Although SEA has indicated in the EA that the right-of-way may be suitable for public use under 49 U.S.C. 10905, no one has sought a public use condition, and none will be imposed.<sup>2</sup>

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).

---

<sup>2</sup> Public use requests were due no later than 20 days after publication of the notice in the Federal Register, or by June 13, 2007.

It is ordered:

1. Under 49 U.S.C. 10502, the Board exempts from the 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 the conditions that NRI: (1) consult with FWS in Grand Island, NE, prior to initiating salvage activities; and (2) provide NGS with 90 days' written notice prior to initiating salvage activities in order that NGS may plan for the possible relocation of the geodetic station markers.

2. NRI is directed to serve a copy of this decision on Farmers Co-op Elevator Company and West Plains Grain, Inc., 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 August 31, 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 is currently set at \$1,300. 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 September 21, 2007. Petitions to stay must be filed by September 6, 2007, and petitions to reopen must be filed by September 17, 2007.

6. 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 August 22, 2008, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or statutory 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 Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams  
Secretary