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SERVICE DATE – JULY 16, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-882

MINNESOTA COMMERCIAL RAILWAY COMPANY—ADVERSE DISCONTINUANCE—
IN RAMSEY COUNTY, MN

STB Docket No. AB-884

MT PROPERTIES, INC.—ADVERSE ABANDONMENT—
IN RAMSEY COUNTY, MN

Decided: July 15, 2008

On March 28, 2008, The City of New Brighton, MN (the City), filed an application under 49 U.S.C. 10903 asking the Board to find that the public convenience and necessity (PC&N) require or permit the third-party, or “adverse,” abandonment and discontinuance of service over an approximately 0.69-mile line of railroad, known as the Butcher’s Spur, extending from a junction switch near milepost 10.5 on Minnesota Commercial Railway Company’s (MCRC) main industrial lead track and terminating at the western right-of-way of Interstate Highway 35W (the Line).¹ Neither the Line’s owner nor its operating railroad opposes the City’s application.

BACKGROUND

According to the City, the Line was constructed circa 1890 by the Minnesota Transfer Railway Company (MTRC). MTRC conducted freight operations on the Line from the 1890s to 1987. In 1987, ownership of the Line was transferred to MT Properties, Inc. (MTP), as successor to MTRC. MTP leased the Line to MCRC. MCRC provided freight service on the Line between 1987 and 2007. Traffic on and revenue from the Line have diminished significantly in recent years.

Since 2003, only three shippers have used the Line, and only one remains located on it: Boulder Images, which has since relocated, last used the Line in 2007; Midwest Asphalt, which also has since relocated, last used the Line in 2006; and Ferrelgas d/b/a Suburban Gas, which has since changed its distribution practices, last used the Line in 2005 and no longer ships by rail. MCRC has used the Line for storing unused rail cars.

¹ The Line is stub-ended and has no mileposts.

The City, based on evidence from MCRC, provides revenue and cost data for a base year (September 1, 2006 through August 31, 2007), forecast year, and subsidy year. In the base year, MCRC transported 165 carloads of traffic, which generated revenues of \$33,000. No service has been provided on the Line in 2008. The forecast-year and subsidy-year revenues have declined to \$0 because all of the shippers have been accommodated on other MCRC lines.

According to the City, because of its location approximately 10 miles from Minneapolis, MN, and St. Paul, MN, there are several transportation alternatives nearby, including other railroads, the Mississippi River, interstate highways, and the Minneapolis-St. Paul International Airport.² In addition, MCRC would continue to serve its customers in the area after the abandonment and discontinuance on a new team track constructed for its use by the City.

The City seeks the discontinuance of service and abandonment of the Line so that it can redevelop the former 100-acre industrial property known as the Northwest Quadrant (which encompasses 15 properties including the Line and right-of-way) into a mixed-use development that would include residential, office, and commercial activities. According to the City, its plans for the land would significantly contribute to the City's economic growth and development.

The City states that starting in 2003 it sought to obtain the consent of MTP to abandon and MCRC to discontinue use of the Line so that the City could redevelop the site as a non-industrial commercial property. In October 2007, the City reached agreement with MTP and MCRC to support the City's application for adverse abandonment and discontinuance of the Line. In return, the City would acquire another parcel suitable for MCRC's construction of the aforementioned team track and pay for MCRC to relocate its rail operation.

In a decision served in these proceedings on January 25, 2008, the Board granted the City exemptions from certain statutory provisions and waivers of certain Board regulations at 49 CFR 1152 that were not relevant to its adverse abandonment and discontinuance application or that sought information not available to it. Specifically, the City was granted, as pertinent, exemptions from 49 U.S.C. 10903(c), and waivers from 49 CFR 1152.10-14, 49 CFR 1152.21, 49 CFR 1152.22(a)(5), 49 CFR 1152.24(e)(1), and 49 CFR 1152.22(j).

² The City names BNSF Railway Company, Union Pacific Railroad Company, Canadian Pacific Railway Company, Canadian National Railway Company, Dakota, Minnesota & Eastern Railroad Corporation, Twin Cities & Western Railroad Company, Iowa, Chicago and Eastern Railroad Corporation, and Progressive Rail, Incorporated, as railroads that serve the Twin Cities area. In addition, the City states that the Great Western Dock & Terminal Co. of St. Paul operates a facility for the loading and unloading of water-borne freight arriving via the Mississippi River.

DISCUSSION AND CONCLUSIONS

A. Legal Standard

Under 49 U.S.C. 10903(d), the standard governing any application to abandon or discontinue service over a line of railroad, including an adverse abandonment or discontinuance, is whether the present or future PC&N require or permit the proposed abandonment or discontinuance. In implementing this standard, we must consider whether there is a present or future public need for rail service over the line and whether that need is outweighed by other interests.³

We have exclusive and plenary jurisdiction over rail line abandonments to protect the public from an unnecessary discontinuance, cessation, interruption, or obstruction of available rail service.⁴ Accordingly, we typically preserve and promote continued rail service where a carrier has expressed a desire to continue operations and has taken reasonable steps to acquire traffic.⁵ But we do not allow our jurisdiction to be used to shield a line from the legitimate processes of state law where no overriding Federal interest exists.⁶ In an adverse abandonment case, if we conclude that the PC&N does not require or permit continued operation over the line, our decision removes the shield of our jurisdiction, enabling the applicant to pursue other legal remedies, if necessary, to force the carrier off the line.⁷

³ See New York Cross Harbor R.R. v. STB, 374 F.3d 1177, 1180 (D.C. Cir. 2004); City of Cherokee v. ICC, 727 F.2d 748, 751 (8th Cir. 1984). See also Seminole Gulf Railway, L.P.—Adverse Abandonment—in Lee County, FL, STB Docket No. AB-400 (Sub-No. 4) (STB served Nov. 18, 2004).

⁴ See Modern Handcraft, Inc.—Abandonment, 363 I.C.C. 969, 972 (1981) (Modern Handcraft).

⁵ See Chelsea Property Owners—Abandonment—Portion of the Consolidated RailCorp.’s West 30th Street Secondary Track in New York, NY, 8 I.C.C.2d 773, 779 (1992) (Chelsea), aff’d sub nom., Consolidated Rail Corp. v. ICC, 29 F.3d 706 (D.C. Cir. 1994) (Conrail).

⁶ See Kansas City Pub. Serv. Frgt. Operation—Exempt.—Aban., 7 I.C.C.2d 216 (1990) (Kansas City). See also CSX Corporation and CSX Transportation, Inc.—Adverse Abandonment Application—Canadian National Railway Company and Grand Trunk Western Railroad, Inc., STB Docket No. AB-31 (Sub-No. 38) (STB served Feb. 1, 2002).

⁷ See Conrail, 29 F.3d at 709; Modern Handcraft, 363 I.C.C. at 972.

B. PC&N Analysis

Here, the PC&N support the requested grant of abandonment and discontinuance authority, under this unique situation where both the owner and operator of the Line do not oppose the requested abandonment and discontinuance, and there are no remaining shippers who desire service.

No service is currently provided on the Line because the Line's last three rail customers identified above have relocated or no longer use rail service at this location. The Line is stub-ended with no prospect of future shippers. Even in the unlikely event that demand for freight rail service were to materialize at some point in the future, the City has demonstrated that shippers would have sufficient alternative transportation options. In addition to the fact that freight could be shipped on other railroads, or by truck along highways in the area, MCRC would continue to provide rail service to the area via another team track. According to the City's combined environmental and historic report, MCRC's new team track was constructed slightly to the south of the current track and located along MCRC's main line, and may be in use already. Therefore, there is little need or potential for future rail service on the Line.

In considering the relevant factors in an adverse abandonment case, we also weigh the public interest associated with the City's plans for the property.⁸ In its application, the City states that it plans to redevelop the 100-acre site that encompasses 15 properties, including the Line and right-of-way, into a mixed-use development. The benefits that these projects will bring weigh in favor of granting the proposed abandonment.

Under 49 U.S.C. 10903(d), the Board must consider whether the abandonment would have a serious, adverse impact on rural and community development. Given that there is no realistic potential for freight rail service on the Line, removing this line from the interstate rail system would not adversely impact rural and community development. In fact, abandonment would help foster community development, consistent with the public uses that the City has identified in this proceeding.

For these reasons, we find that a balancing of the interests favors granting the City's application in this case. Nevertheless, to ensure that Boulder Images, Midwest Asphalt, and Ferrelgas are fully informed of this action, the City will be required to serve a copy of this decision on these shippers within 5 days of the service date and to certify to the Board that it has done so.

⁸ See, e.g., Conrail, 29 F.3d at 712 (interests of state agencies in favor of abandonment indicates that adverse abandonment would serve the public interest by allowing possible development of other public projects); Norfolk & W. Ry. Co.—Aban. Exem.—Cinn., Hamilton County, OH, 3 S.T.B. 110, 118-20 (1998) (agency will allow displacement of rail service for other public purposes where public interest justifies it).

C. Labor Protection

In approving this application, we must ensure that affected rail employees will be adequately protected. 49 U.S.C. 10903(b)(2). Therefore, we will impose the conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

D. Environmental Matters

The Board is required to consider the environmental and energy impacts of the proposed abandonment. The City has submitted a combined environmental and historic report with its application, and 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. The Board's Section of Environmental Analysis (SEA) has examined the environmental report, verified its data, and analyzed the probable effects of the proposed action on the quality of the human environment. SEA served an Environmental Assessment (EA) on May 2, 2008. Public comments on the EA were due by June 2, 2008.

As explained in the EA, the Minnesota Pollution Control Agency (MPCA) expressed concerns related to the proposed abandonment. MPCA specifically commented that: (1) the City's environmental and historic report was not specific regarding what efforts of demolition, salvage, construction, or other actions of physical alteration would be undertaken to effect this proposed abandonment; (2) the report should identify Long Lake, listed on the 2006 MPCA 303d Impaired Waters list for excess nutrients and mercury; (3) a site erosion plan should be developed and incorporated into any construction effort; (4) a National Pollutant Discharge Elimination System Permit may be required; (5) all railroad ties and other demolition debris should be reused or disposed of in accordance with MN Rule 7035 for disposal of solid waste; (6) the City should identify the extent of any 100-year flood plains; (7) the City should contact the U.S. Army Corps of Engineers, St. Paul District, if the proposed action would result in the placement of fill material into any water of the United States; (8) in the area are two Superfund sites (Northwest Refinery and Trio Solvent), two voluntary Investigation and Cleanup sites (Northwest Refinery and Midwest Asphalt), four Brownfield sites (Northwest Refinery, Midwest Asphalt, and the Eastern NW Quadrant); (9) the City would be required to submit a sampling work plan for Butcher's Spur to the MPCA for review and approval; and (10) depending on any required investigations, additional actions may be required to prevent possible stormwater or wetland impacts resulting from abandonment activities. In the EA, SEA recommended that the Board impose a condition requiring that, prior to conducting any salvage activities, the City, in coordination with MCRC, consult with MPCA and submit the results of those consultations in writing to SEA prior to the onset of salvage operations.

The City has served the historical report on the Minnesota Historical Society, which is the State Historic Preservation Office (SHPO), pursuant to 49 CFR 1105.8(c). In response, the SHPO stated that: (1) the submitted photographs do not meet the requirement for historic review; and (2) the Line needs to be evaluated by a qualified historic consultant for eligibility for the National Register of Historic Places (National Register). Therefore, SEA recommended in

its EA that the Board impose a condition barring the City from taking any steps to alter the historic integrity of any 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 National Historic Preservation Act, 16 U.S.C. 470f (NHPA).

Two comments were filed after issuance of the EA. In one, the City states that it has retained an historical consultant. In the second, Mr. Lawrence Zdon, Senior Engineer Specialist, Stormwater Section, MPCA, confirms that the City has consulted with MPCA regarding hazardous material remediation. Based on Mr. Zdon's letter, there is no need for us to impose a condition requiring the City to consult with MPCA and SEA thus recommends that the condition not be imposed. We will, however, impose the historic preservation condition recommended by SEA and apply it to MCRC and MTP as well.

Based on the record before us, including the EA and SEA's Post-EA recommendations, 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.

E. Exemption from OFA Process

Finally, the City has asked for an exemption from the offer of financial assistance (OFA) provisions of 49 U.S.C. 10903(a)(2)(C) and 49 U.S.C. 10904, as well as waiver of the related regulations at 49 CFR 1152.27. The City argues that conducting the OFA process is not necessary here to carry out the rail transportation policy of 49 U.S.C. 10101 because the Line is of little or no actual use to any shipper or carrier and the abandonment of this line is of limited scope.

The purpose of a third-party abandonment proceeding is to withdraw the Board's primary jurisdiction so as to permit local, state, or other Federal law to apply where there is no overriding Federal interest in interstate commerce. See Kansas City, 7 I.C.C.2d at 225; Modern Handcraft, 363 I.C.C at 972. To permit the filing of an OFA after finding that an abandonment of this sort should be allowed would defeat the purpose of the proceeding and would be inconsistent with our conclusion that the public interest justifies the withdrawal of its jurisdiction. Because we find that the public convenience and necessity require or permit withdrawal of the Board's regulatory authority in this third party abandonment proceeding, we will grant the City's request for exemption from, and waiver of, the pertinent OFA provisions of the statute and the Board's regulations, respectively.

The City has also asked for an exemption from the public use provisions of 49 U.S.C. 10905 but no one has sought a public use condition and, as a result, the City's request for an exemption is moot.

We find:

1. The present or future public convenience and necessity permit the abandonment and discontinuance of the Line, subject to the employee protective conditions in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), and the condition that neither MCRC, MTP, nor the City take any steps to alter the historic integrity of any historic properties including sites, buildings, structures and objects within the project right-of-way (the Area of Potential Effect) eligible for listing or listed in the National Register until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f.

2. Abandonment of the Line will not have a serious, adverse impact on rural and community development.

3. As conditioned, this action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The application is granted subject to the conditions specified above.

2. The City is directed to serve a copy of this decision on Boulder Images, Midwest Asphalt, and Ferrelgas within 5 days after the service date of this decision and to certify to the Board that it has done so.

3. The City's request for an exemption from the OFA provisions at 49 U.S.C. 10903(a)(2)(C) and 49 U.S.C. 10904, and for waiver of the related regulations at 49 CFR 1152.27, is granted.

4. This decision will be effective on August 15, 2008. Any petition to stay or petition to reopen must be filed as provided at 49 CFR 1152.25(e).

By the Board Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary