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SERVICE DATE – OCTOBER 4, 2005

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-254 (Sub-No. 8X)

PROVIDENCE AND WORCESTER RAILROAD COMPANY—ABANDONMENT
EXEMPTION—IN PROVIDENCE COUNTY, RI

Decided: September 30, 2005

By petition filed on June 16, 2005,¹ Providence and Worcester Railroad Company (P&W) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon approximately 4.79±miles of its lines of railroad, in Providence County, RI. The lines proposed for abandonment include: (1) a portion of P&W's branch line, known as the East Providence Branch (EP Branch), extending from the switch at milepost 5.53± near Dunnellen Road south to the end of the track at milepost 9.84± near Whipple Avenue in East Providence, a distance of approximately 4.31± miles; and (2) a portion of P&W's branch line, known as the East Junction Branch (EJ Branch), extending from milepost 0.48± at the north side of Dexter Road south to its connection with the EP Branch at milepost 0.0 north of Waterman Avenue in East Providence, a distance of approximately 0.48± miles. Notice of the filing was served and published in the Federal Register on July 6, 2005 (70 FR 39010). Also, on July 6, 2005, the Rhode Island Department of Transportation (RIDOT) filed a request for a public use condition and for issuance of a notice of interim trail use (NITU). We will grant the exemption, subject to trail use, public use, environmental, and standard employee protective conditions.

BACKGROUND

The lines proposed for abandonment were constructed in the mid-1800's and were used primarily to serve local shippers. The only active shipper is William J. Canaan, Inc. (Canaan), a receiver of fresh fruits and vegetables, located at milepost 6.4± on the EP branch.² According to P&W, Canaan received nine cars during the period 2002 to 2004, and two cars in the first half of 2005. P&W states that Canaan currently uses motor carriers to meet most of its transportation needs, as most of Canaan's inbound rail shipments are transported by CSX Transportation, Inc. (CSXT), to Chelsea, MA, where they are transloaded to trucks for delivery to Canaan. P&W also notes that Canaan's facility is for sale. However, in the event that Canaan should require rail service in the future, P&W

¹ Amendments were filed on June 24, and June 29, 2005.

² There are active shippers on the EJ Branch, but they are located on the portion of the line that is not proposed for abandonment.

indicates that it would be willing to provide rail service to a transload facility in Pawtucket, RI, approximately 4 or 5 miles from Canaan's existing facility. P&W states that it does not transport any overhead traffic and is unaware of any potential new source of local rail traffic from businesses located on the lines to be abandoned.

P&W indicates that the right-of-way is located in an area where the State of Rhode Island (the State) and the City of East Providence (the City) are working on a roadway improvement project. The purpose of the project is to improve vehicular access and facilitate development of certain waterfront property in the City. In connection with this project, the State, acting through RIDOT, has requested P&W to relinquish its rights in and to the property for which P&W is seeking abandonment authority. RIDOT and P&W have reached an agreement, subject to the effectiveness of the proposed abandonment.

In conjunction with the proposed agreement and abandonment, P&W states that it has begun construction of a track from milepost 5.07± of the EP Branch to the EJ Branch at milepost 0.87± (Connector Track), thus connecting those portions of the EP and EJ Branches that are not being abandoned.³ Upon completion of the Connector Track, P&W will be able to provide direct rail service to existing industries on those branch lines.⁴ Therefore, P&W asserts that the abandonment, coupled with the Connector Track, will be beneficial to P&W, the State, the City, and interstate commerce.

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 will also foster sound economic conditions and encourage efficient management by allowing P&W to avoid the cost of owning and maintaining lines that are not being used or are rarely

³ In its June 24, 2005 amendment to the petition, P&W states that the Connector Track is not an extension of a line of railroad and does not constitute an additional line of railroad that is subject to the Board's jurisdiction under 49 U.S.C. 10901, citing Port Authority of New York and New Jersey—Petition for Declaratory Order, STB Finance Docket No. 34428 (STB served Jan. 21, 2004), and Union Pacific RR Co.—Petition—Rehabilitation of MO-KS-TX RR, 3 S.T.B. 646, 651 (1998).

⁴ Currently, any traffic movement between the branch lines requires a reverse move.

used [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be affected adversely. An exemption will have the added benefit of permitting P&W to work with the State and the City on a project that would improve vehicular access and facilitate development of waterfront property in the City.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power because Canaan, the only active shipper on the line, has not objected to the proposed abandonment, apparently uses truck transportation, and may be closing its facility. Furthermore, P&W indicates that it would be willing to provide rail service to Canaan at an existing transload facility, should Canaan require it in the future. Nevertheless, to ensure that Canaan is informed of our action, we will require P&W to serve a copy of this decision on Canaan within 5 days of the service date and to certify to us that it has done so. Given our market power finding, we need not determine whether the proposed transaction 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 the exemption, we will impose the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

P&W has submitted environmental and historic reports with its petition⁵ 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 August 15, 2005, and requested comments by September 15, 2005.

In the EA, SEA sets forth concerns expressed or reviews not completed by various agencies and recommends that conditions be imposed on any decision granting abandonment authority. First, SEA states that the National Park Service, Northeast Regional Office (NPS) has not completed its review of the proposed abandonment. Therefore, SEA recommends that P&W be prohibited from salvaging or disposing of the right-of-way until consultation with NPS has been completed. Second, SEA states that the Rhode Island Department of Environmental Management, Office of Water Resources (DEM—WR) has not completed its review of the proposed abandonment. Therefore, to ensure compliance with the National Pollution Discharge Elimination System requirements, SEA recommends that P&W consult with DEM—WR prior to commencement of any salvage activities and report the results of this consultation to SEA. Third, SEA states that the State of Rhode Island and Providence Plantations, Coastal Resources Management Council (RI—CRMC) indicated that any site

⁵ P&W's amendment to the petition filed on June 29, 2005, corrects the service dates of these reports.

work in this area would require an assent, which will constitute P&W's federal consistency determination. Therefore, SEA recommends that, prior to beginning any salvage activities, P&W consult with RI-CRMC to determine whether state coastal management consistency certification is required. If consistency certification is required, P&W shall be prohibited from performing any salvage activities until it obtains certification and shall notify SEA, pursuant to the Coastal Zone Management Act, 16 U.S.C. 1451 et seq.

Comments in response to the EA were received and considered by SEA. Based on the comments received, SEA has modified its recommendations. Because many of the concerns raised in the EA have been satisfied, SEA no longer recommends imposing several of the conditions previously contained the EA. Also, because of new concerns raised, SEA recommends two new conditions.

With respect to the first condition, on September 14, 2005, Ms. Jacki Katzmire, Regional Environmental Coordinator, Northeast Region, NPS, notified SEA that NPS has no concerns but that SEA should contact a representative of the Blackstone River Valley National Heritage Corridor (the Corridor), because the Corridor is located in the vicinity of the proposed abandonment. On September 19, 2005, Ms. Joanna Doherty, a representative of the Corridor, stated that the proposed action would have no impact on cultural resources.

With respect to the second condition, on September 15, 2005, Mr. Joe Antonio, Senior Environmental Scientist, DEM's Office of Technical & Customer Assistance (DEM-OTCA) notified SEA that copies of the EA were delivered to all appropriate personnel for review, and that, as of September 15, 2005, no response had been received from DEM's Office of Water Resources.

With respect to the third condition, on September 14, 2005, Mr. Grover J. Fugate, Executive Director of RI-CRMC, informed SEA that P&W does not need a consistency certification because on August 9, 2005, the RIDOT obtained a permit for the work that is to be performed.

Accordingly, SEA recommends that the previously recommended conditions in the EA regarding the concerns of NPS, DEM-OTCA, and RI-CRMC not be imposed.

As to the new conditions, on September 15, 2005, Mr. Jeff Crawford, Rhode Island Department of Environmental Management, Office of Waste Management (DEM-WM), stated that several actual and potential hazardous materials sites exist within P&W's right-of-way. Therefore, Mr. Crawford suggested that P&W consult with DEM-OTCA, to coordinate among appropriate DEM offices. Accordingly, SEA recommends that P&W be prohibited from salvaging or disposing of the right-of-way until consultation with DEM-OTCA has been completed.

Also, on September 16, and September 19, 2005, Mr. Doug Harris of the Narragansett Indian Tribe's Historical Preservation Office (THPO) contacted SEA, and stated that the

THPO had not yet completed its review of the proposed abandonment. Mr. Harris noted that it is not known whether any culturally important archaeological resources and/or resources important to the Narragansett Indian Tribe were destroyed at the time the rail line was originally constructed. He also noted that archaeological surveys or analyses have never been conducted by a professional archaeologist and he requested that an analysis of the archaeological potential of the rail corridor be conducted by a professional archaeologist. However, in a letter dated June 15, 2005, the State of Rhode Island and Providence Plantations, Historical Preservation & Heritage Commission (SHPO), concluded that the sections of the rail line proposed for abandonment do not meet the criteria for listing on the National Register of Historic Places. On September 20, 2005, the SHPO opined that no sensitive cultural or archaeological areas exist within the area of the proposed abandonment. In light of the concerns raised by the THPO, SEA recommends that, in the event that any archaeological sites, human remains, funerary items or associated artifacts are discovered during P&W's salvage activities, P&W will immediately cease all work and notify SEA, the THPO, and the SHPO. SEA, the SHPO, the THPO, and P&W will then conduct consultations to determine whether any mitigation measures are necessary.

The environmental conditions recommended by SEA, based on comments received, will be imposed. 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.

As previously noted, RIDOT filed a request for the issuance of a NITU under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and 49 CFR 1152.29. RIDOT has submitted a statement of willingness to assume financial responsibility for the right-of-way and has acknowledged that use of the right-of-way is subject to possible future reconstruction and reactivation of the right-of-way for rail service as required under 49 CFR 1152.29. In a letter filed on July 8, 2005, P&W indicates that it has been working with RIDOT over the last year on the City's waterfront development project and they anticipate that the property will be used for highway purposes, trail and bike path use, and utility easements. P&W states that it fully supports RIDOT's request. Because RIDOT's request complies with the requirements of 49 CFR 1152.29 and P&W is willing to enter into negotiations, we will issue a NITU authorizing the parties to negotiate an agreement for interim trail use/rail banking 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, P&W 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 the right-of-way may be appropriate for other public use. As noted, RIDOT filed a request for a public use condition under 49 U.S.C. 10905 for 180 days.

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. RIDOT has 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 rail lines to be abandoned to enable any state or local government agency or other interested person to negotiate the acquisition of the lines for public use. If a trail use agreement is reached on a portion of the right-of-way, P&W 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, P&W is not required to deal exclusively with RIDOT, 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 P&W 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 P&W: (1) leave intact all of the right-of-way, including bridges, trestles, culverts and tunnels (except track, 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 agency or any other interested person to negotiate the acquisition of the lines for public use; (2) be prohibited from salvaging or disposing of the right-of-way until consultation with DEM—OTCA has been completed; (3) in the event that any archaeological sites, human remains, funerary items or associated artifacts are discovered during P&W's salvage activities, cease all work immediately and notify SEA, the THPO, and

the SHPO, who will then conduct consultations with P&W to determine whether any mitigation measures are necessary; and (4) comply with the terms and conditions for implementing interim trail use/rail banking as set forth below.

2. P&W is directed to serve a copy of this decision on Canaan within 5 days after the service date of this decision and notice and to certify to the Board 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, 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 the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.

5. 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.

6. If an agreement for interim trail use/rail banking is reached by the 180th day after service of this decision and notice, interim trail use may be implemented. If no agreement is reached by that time, P&W may fully abandon the line provided the other conditions imposed in this proceeding are met. See 49 CFR 1152.29(d)(1).

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 October 14, 2005, 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).

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 November 3, 2005. Petitions to stay must be filed by October 19, 2005, and petitions to reopen must be filed by October 31, 2005.

10. Pursuant to the provisions of 49 CFR 1152.29(e)(2), P&W 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 P&W's filing of a notice of consummation by October 4, 2006, 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, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary