

SERVICE DATE – JUNE 6, 2013

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 55 (Sub-No. 726X)

CSX TRANSPORTATION, INC.—ABANDONMENT AND DISCONTINUANCE OF SERVICE EXEMPTION—IN THE CITY OF RICHMOND AND HENRICO COUNTY, VA.

Docket No. AB 290 (Sub-No. 303X)

NORFOLK SOUTHERN RAILWAY COMPANY—ABANDONMENT AND DISCONTINUANCE OF SERVICE EXEMPTION—IN THE CITY OF RICHMOND AND HENRICO COUNTY, VA.

Digest:¹ This decision allows CSX Transportation, Inc. and Norfolk Southern Railway Company (collectively, Petitioners) to end their responsibility to provide freight rail service over a 1.55-mile railroad line in the City of Richmond and Henrico County, Va., subject to standard employee protection conditions. It also imposes environmental conditions requiring Petitioners to consult with certain government agencies prior to removing railroad tracks and ties on the line. Finally, the decision requires Petitioners to keep certain structures in place and sets a time period for Petitioners to negotiate with parties interested in turning portions of the line into a recreational trail.

Decided: June 4, 2013

By petition filed on February 21, 2013, CSX Transportation, Inc. (CSXT) and Norfolk Southern Railway Company (NSR) (collectively, Petitioners) jointly seek an exemption under 49 U.S.C. § 10502 from the provisions of 49 U.S.C. § 10903 for CSXT and NSR to abandon and discontinue service over a 1.55-mile railroad line known as the James River Industrial Track, between State Road 5 and the end of the line, located in the City of Richmond and Henrico County, Va. (the Line).² Petitioners explain that they have made this joint filing because they jointly own a portion of the Line, they each individually own different portions of the Line, and they both are authorized to operate over the entire Line. Notice of the exemption was served and published in the Federal Register on March 13, 2013 (78 Fed. Reg. 16,045-46).

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² Petitioners state that there are no mileposts on the Line.

On March 25, 2013, the City of Richmond (City) filed a request for imposition of a public use condition and issuance of a notice of interim trail use (NITU) for a 0.468-mile portion of the Line extending from the City of Richmond-Henrico County boundary line to the northern end of the Line. Petitioners responded, indicating that they did not oppose the public use condition and agreeing to negotiate with the City for interim trail use/rail banking of this portion of the Line. On May 1, 2013, the Virginia Department of Transportation (VDOT) filed a request for imposition of a public use condition and issuance of a NITU for a 0.650-mile portion of the Line extending from the City of Richmond-Henrico County boundary line to the southern end of the Line.³ Petitioners responded, again indicating that they did not oppose the public use condition and agreeing to negotiate with VDOT for interim trail use/rail banking of that portion of the Line. For the reasons discussed below, the Board will grant the exemption, subject to public use, trail use, environmental and standard employee protective conditions.

BACKGROUND

According to Petitioners, the Line has been owned and jointly operated by CSXT, NSR, and their respective predecessors since 1923. Petitioners state that flooding badly damaged the Line in 1985 and it was subsequently reconstructed. Petitioners state that the only shipper on the Line, Lehigh Cement Company, LLC (Lehigh), is located at the end of the Line and that the lease for its facility on the Line terminated on October 31, 2012, at which time Lehigh relocated its facility. Petitioners state that CSXT provided service to Lehigh until Lehigh ceased operations, but NSR ceased operating over the Line over two years ago.⁴ According to Petitioners, Lehigh does not oppose the proposed abandonment and discontinuance of service.⁵

Petitioners claim that the proposed abandonment and discontinuance would allow CSXT and NSR to save approximately \$15,500 in annual maintenance costs, which are being incurred despite the fact that the Line is not generating rail business or revenue. Petitioners also estimate that valuation of the property is approximately \$185,918 (net liquidation value of \$222,031 less income tax consequences of \$84,372 plus working capital of \$48,259). Petitioners assert that they have opportunity costs of \$31,383.⁶ Petitioners state that they are amenable to the proposal of the City of Richmond and Henrico County to use the right-of-way for the purpose of extending the Virginia Capital Trail.

³ The deadline for filing trail use/rail banking requests was April 2, 2013. However, the Board will accept VDOT's late-filed submission because it has not delayed the proceeding and will not prejudice any party. See Wheeling & Lake Erie Ry.—Aban. Exemption—in Starke Cnty., Ohio, AB 227 (Sub-No. 10X), slip op. at 1 n. 1 (STB served Nov. 7, 1997).

⁴ Pet. 5.

⁵ Petitioners included a copy of a letter of support from Lehigh stating that it does not oppose the abandonment.

⁶ The calculation of opportunity costs is based on 16.88%, the 2010 pre-tax rate of return, rather than the 2011 pre-tax value of 17.88%.

DISCUSSION AND CONCLUSIONS

Exemption from Section 10903. Under 49 U.S.C. § 10903, a rail line may not be abandoned, nor service discontinued, without the Board's prior approval. Under 49 U.S.C. § 10502, however, the Board must exempt a transaction or service from regulation when it finds that: (1) continued regulation is not necessary to carry out the rail transportation policy (RTP) 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 of the proposed abandonment and discontinuance under 49 U.S.C. § 10903 is not necessary to carry out the RTP here. It is undisputed that the Line is no longer needed for continued freight rail service, as there has been no demand for service over the Line since Lehigh relocated its facility. Nor does any local or overhead traffic move over the Line to cover the costs of maintenance. By minimizing the administrative expense of the application process, an exemption in this case would minimize the need for Federal regulatory control over the rail transportation system and would reduce regulatory barriers to exit, in accordance with 49 U.S.C. §§ 10101(2) and (7). Consistent with 49 U.S.C. §§ 10101(5) and (9), an exemption would also foster sound economic conditions and encourage efficient management by permitting the rationalization of an unnecessary common carrier rail line. Other aspects of the RTP would not be adversely affected by the use of the exemption process.

We also find that regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power.⁷ As explained earlier, the last shipper on the Line, Lehigh, has relocated and does not oppose the proposed abandonment and discontinuance. Nevertheless, to ensure that Lehigh is informed of our action, we will require Petitioners to serve a copy of this decision and notice on Lehigh so that it is received within five days of the service date of this decision and notice, and to certify contemporaneously to the Board that they have done so.

Employee protection. Under 49 U.S.C. § 10502(g), the Board may not use its 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 upon Petitioners the employee protective conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979) (Oregon Short Line).

Environmental review. Petitioners have submitted environmental and historic reports with their petition and notified the appropriate Federal, state, and local agencies of the

⁷ Because we find that regulation of the proposed abandonment and discontinuance is not necessary to protect shippers from the abuse of market power, we need not determine whether the proposed abandonment is limited in scope.

opportunity to submit information concerning the environmental impacts of the proposed action. See 49 C.F.R. § 1105.11. The Board's Office of Environmental Analysis (OEA) has examined the reports, verified the data they contain, and analyzed the probable effects of the proposed action on the quality of the human environment.

OEA issued an Environmental Assessment (EA) for public review and comment on April 22, 2013, recommending that two conditions be imposed on any decision granting abandonment authority. In the EA, OEA states that the U.S. Army Corps of Engineers, Norfolk District (Corps) has indicated that the proposed action would not require authorization from the Corps. However, according to OEA, the Corps would require additional information regarding salvage activities and conversion of the Line to a trail before it could make a determination if wetlands located adjacent to the Line would be impacted. Thus, OEA recommends a condition requiring Petitioners to consult with the Corps regarding potential impacts of salvage activities to adjacent wetlands prior to initiating salvage activities on the Line.

OEA states in the EA that the National Geodetic Survey (NGS) has identified three geodetic station markers that may be located in the area of the proposed abandonment. Therefore, OEA recommends that Petitioners be required to consult with NGS at least 90 days before beginning any salvage activities that would disturb or destroy any geodetic station markers.

Comments on the EA were due by May 21, 2013. No comments were received. Accordingly, we will impose the conditions recommended by OEA in the EA. Based on OEA's recommendation, we conclude that the proposed abandonment and discontinuance, as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

Interim Trail Use. As indicated above, the City and VDOT have filed requests for the issuance of a NITU for portions of the Line, as described above, under the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d), and 49 C.F.R. § 1152.29 to provide time to negotiate with Petitioners for acquisition of the sought portions of the right-of-way for use as a recreational trail and for rail banking. For the respective portions of the right-of-way being sought, the City and VDOT have each submitted a statement of willingness to assume full responsibility for the management of that portion of the right-of-way, for any legal liability arising out of the transfer or use of that portion of the right-of-way, and for the payment of any and all taxes that may be levied or assessed against that portion of the right-of-way, as required by 49 C.F.R. § 1152.29. The City and VDOT have also acknowledged that the use of the respective portions of the right-of-way for trail purposes is subject to the trail sponsor's continuing to meet its responsibilities described above and subject to possible future reconstruction and reactivation of the respective portions of the right-of-way for rail service. In its responses filed on April 3 and May 2, 2013, Petitioners state that they agree to negotiate for an interim trail use/rail banking agreement for the sought portions of the Line.

Because the City and VDOT requests comply with the requirements of 49 C.F.R. § 1152.29 and Petitioners are willing to enter into interim trail use negotiations, we will issue a NITU for the respective portions of the Line, as described above. The parties may negotiate an agreement during the 180-day period prescribed below. If an interim trail use agreement is reached (and thus interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2) and (h); Nat'l Trails Sys. Act & R.R. Rights-of-Way, EP 702 (STB served Apr. 30, 2012). If no agreement is reached within 180 days, Petitioners may fully abandon the Line, subject to the conditions imposed below. See 49 C.F.R. § 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service.

Public use. The Board has determined that persons who request a NITU under the Trails Act may also seek a public use condition under 49 U.S.C. § 10905. See Rail Abans.—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986) (Rail Abans.). When the requirements for both conditions are met, it is the Board's policy to impose them concurrently, subject to the execution of a trail use agreement. As for the respective portions of the Line they are seeking for interim trail use, the City and VDOT each have met the public use criteria prescribed at 49 C.F.R. § 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) the justification for the period of time requested. Accordingly, a 180-day public use condition will be imposed on those portions of the Line, 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 those portions of the Line for public use. If a trail use agreement is reached on a portion of the right-of-way being sought, Petitioners must keep the remaining right-of-way intact for the remainder of the 180-day public use condition period to permit public use negotiations. Also, 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 a right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, Petitioners are not required to deal exclusively with the City and VDOT, 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 Rail Abans., 2 I.C.C.2d at 608, an offer of financial assistance (OFA) to acquire rail lines for continued rail service or to subsidize rail operations takes priority over interim trail use/rail banking and public use. Accordingly, if an OFA is timely filed under 49 C.F.R. § 1152.27(c)(1), the effective date of this decision and notice will be postponed beyond the effective date indicated here. See 49 C.F.R. § 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. See 49 C.F.R. § 1152.27(f). Finally, if the Line is sold under the OFA procedures, the petition for abandonment and discontinuance 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 and discontinuance of service by Petitioners of the above-described line, subject to the employee protective conditions set forth in Oregon Short Line, and subject to the conditions that Petitioners shall:

(1) be prohibited from disposing of those portions of the corridor sought by the City and VDOT for interim trail use (other than tracks, ties, and signal equipment) and from removing or destroying potential trail-related structures (such as bridges, trestles, culverts, and tunnels) for a 180-day period 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 those portions of the Line for public use;

(2) comply with the interim trail use/rail banking procedures, for those portions of the Line being sought for interim trail use by the City and VDOT, set forth below;

(3) consult with the Corps regarding potential impacts of salvage activities to adjacent wetlands prior to initiating any salvage activities on the Line; and

(4) consult with NGS prior to beginning salvage activities that would disturb or destroy any geodetic station markers.

2. Petitioners are directed to serve a copy of this decision and notice on Lehigh so that it is received within five days of the service date of this decision and notice and certify contemporaneously to the Board that they have done so.

3. If an interim trail use/rail banking agreement is reached for a portion of the Line, it must require the trail sponsor to assume for that portion of the Line, for the term of the agreement, full responsibility for: (i) managing the right-of-way; (ii) any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability); and (iii) 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 possible future reconstruction and reactivation of the right-of-way for rail service and to the trail sponsor's continuing to meet its responsibilities described in ordering paragraph 3 above.

5. If an agreement for interim trail use/rail banking is reached by December 3, 2013, the parties shall jointly notify the Board within ten days that an agreement has been reached, 49 C.F.R. § 1152.29(d)(2) and (h), and interim trail use may be implemented. If no agreement is reached by that time, Petitioners may fully abandon the Line, provided the conditions imposed above are met. See 49 C.F.R. § 1152.29(d)(1). If an interim trail use/rail banking agreement is executed before December 3, 2013, the public use condition will expire to the extent the trail use/rail banking agreement covers the same portion of the Line.

6. If interim trail use is implemented, and subsequently the trail sponsor intends to terminate trail use on all or any portion of the rail line covered by the interim trail use agreement, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

7. An OFA under 49 C.F.R. § 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by June 17, 2013, subject to time extensions authorized under 49 C.F.R. § 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27(c)(1). Each OFA must be accompanied by the filing fee of \$1,600. See 49 C.F.R. § 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 July 6, 2013. Petitions to stay must be filed by June 21, 2013. Petitions to reopen must be filed by July 1, 2013.

10. Pursuant to the provisions of 49 C.F.R. § 1152.29(e)(2), Petitioners 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 Petitioners’ filing of a notice of consummation by June 6, 2014, 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 one-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 Begeman, and Commissioner Mulvey.