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SERVICE DATE - JUNE 26, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-492 (Sub-No. 1X)

FILLMORE WESTERN RAILWAY COMPANY--ABANDONMENT EXEMPTION--
IN FILLMORE, JEFFERSON, SALINE AND THAYER COUNTIES, NE

Decided: June 23, 1998

By petition filed March 9, 1998,¹ as supplemented on June 17, 1998,² Fillmore Western Railway Company (FWRY) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon the following lines of railroad: (1) the Bruning Line, extending from milepost 10.0 near Geneva to milepost 24.5 near Bruning; (2) the Daykin Line, extending from milepost 35.8 at East Strang Junction to milepost 23.2/28.4 at Tobias and continuing to the end of the line at milepost 36.2 at Daykin; and (3) the Shickley Line, extending from milepost 37.5 near West Strang Junction to milepost 45.0 at Shickley, a total distance of 42.40 miles in Fillmore, Jefferson, Saline and Thayer Counties, NE. We will grant the exemption, subject to environmental and standard employee protective conditions.

BACKGROUND

FWRY, a Class III carrier, purchased the lines at issue from Burlington Northern Railroad Company (BNSF)³ on November 25, 1996. Approximately three months later, in February of 1997, FWRY placed an embargo on the lines due to the condition of the track.⁴ According to FWRY, the lines are not in good condition and it would cost \$6.5 million to rehabilitate them to Federal Railroad Administration (FRA) Class 2 safety standards.⁵

¹ Notice of the filing was served and published in the Federal Register on March 27, 1998, (63 FR 14999).

² An exhibit containing carload information was inadvertently omitted from the petition.

³ We will refer to this carrier as BNSF in this decision as it became The Burlington Northern and Santa Fe Railway Company on December 31, 1996.

⁴ While FWRY states that an embargo was issued in February 1997, the Association of American Railroads embargo notice for June 12, 1997, shows an effective date of June 11, 1997.

⁵ We do not normally accept rehabilitation costs in excess of those necessary to bring a line up to FRA Class 1 standards unless there are circumstances that justify the additional cost. Central Railroad Company of Indiana--Abandonment Exemption--In Dearborn, Decatur, Franklin, Ripley, and Shelby Counties, IN, STB Docket No. AB-459 (Sub-No. 2X) (STB served May 4, 1998), slip (continued...)

FWRY states that there are shippers on the line but no overhead traffic. On the Bruning Line, Bruning Grain & Feed, located at Bruning, received three carloads in 1997. On the Daykin Line, Dorchester Farmers Co-op has two grain storage warehouses, one at Ohioa and the other at Tobias. It shipped 30 carloads in 1997 from its Ohioa warehouse and none from its Tobias warehouse. According to FWRY, Dorchester Farmers Co-op's main offices and grain loading and storage facilities are located in Milligan, and it will continue to receive rail services from FWRY at this location. Also on the Daykin Line at Daykin is a grain storage warehouse owned by Plymouth Farmers Co-op, which is headquartered at Plymouth, approximately 15 miles east of Daykin, on the Union Pacific Railroad Company's (UP) north-south main line. Plymouth Farmers Co-op shipped 190 carloads in 1997. On the Shickley Line at Shickley is Biegert Brothers Feed Mill (Biegert Brothers) and Shickley Grain Company (Shickley). In 1997, Biegert Brothers received 200 carloads and Shickley shipped 5 carloads. As of November 1, 1997, Biegert Brothers closed its operation and relocated its facilities to Bradshaw, on BNSF's main line.

FWRY contends that the traffic density of the lines will not support continued operation, and it submits that alternative transportation is available from other rail and motor carriers in the area.⁶

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 relieving FWRY from the costs of rehabilitating and maintaining the line, and allowing FWRY's assets to be used more productively elsewhere on its system [49 U.S.C.10101(5) and (9)]. Other aspects of the rail transportation policy will not be affected adversely.

⁵(...continued)
op. at 11.

⁶ According to FWRY, BNSF has two lines, the Hastings Subdivision, which is 17 miles north of Strang, and the Lester Subdivision, which is 15 miles east of Daykin, and UP has one line, the Marysville Subdivision, which is 4 miles south of Bruning and 8 miles south of Shickley. In addition, FWRY states that there are numerous trucking companies, which haul grain and fertilizer, operating in the area.

Regulation of the transaction does not appear to be necessary to protect shippers from an abuse of market power. While FWRY handled a total of 428 carloads of traffic in the month or so before it embargoed the lines, alternative rail and motor carrier service is apparently available and no one has filed comments in opposition to the proposed abandonment.⁷ Nevertheless, to ensure that the shippers are informed of our action, we will require FWRY to serve a copy of this decision on the shippers within 5 days of the service date of this decision and certify to us that it has done so.

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 in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979).

FWRY has submitted an environmental 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 report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment, and served an environmental assessment (EA) on May 8, 1998. In the EA, SEA indicated that the U.S. Department of Commerce, National Geodetic Survey (NGS), has identified 11 geodetic station markers that could be affected by the proposed abandonment. Therefore, SEA recommends that a condition be imposed requiring FWRY to notify NGS at least 90 days prior to any salvage activities that may disturb or destroy these geodetic markers so that plans can be made for their relocation.

No comments to the EA were filed by the June 5, 1998 due date. Based on SEA's recommendation, 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.

SEA states that, following the line's abandonment, the right-of-way may be suitable for other public use under 49 U.S.C. 10905. We note that no one has sought a public use condition, and none will be imposed.

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 of the above-described 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 FWRY shall notify NGS at least 90 days prior to any salvage activities that may disturb or destroy any geodetic markers so that plans can be made for their relocation.

⁷ Given our market power finding, we need not determine whether the proposed abandonment is limited in scope.

2. FWRY must serve a copy of this decision on the shippers on the line within 5 days after the service date of this decision and certify to the Board that it has done so.

3. An offer of financial assistance (OFA) under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by July 6, 1998, 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 \$1,000 filing fee. 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 July 26, 1998. Petitions to stay must be filed by July 13, 1998, and petitions to reopen must be filed by July 21, 1998.

6. Pursuant to the provisions of 49 CFR 1152.29(e)(2), FWRY 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 FWRY’s filing of a notice of consummation by June 26, 1999, 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 not later than 60 days after satisfaction, expiration or removal of the legal or regulatory barrier.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary