

SERVICE DATE - AUGUST 11, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34191

CHARLES M. SOTELO-PETITION FOR DECLARATORY ORDER-LINE  
RELOCATION IN COCHISE COUNTY, AZ

Decided: August 7, 2003

By petition filed on January 21, 2003 (Petition), and supporting documentation,<sup>1</sup> Charles M. Sotelo (Mr. Sotelo) appealed a decision served October 25, 2002, in this proceeding. In that decision, the Director of the Office of Proceedings (Director) denied Mr. Sotelo's petition asking the Board to issue an order declaring that the construction of a 1,775-foot rail line from a point on the Douglas Branch, about a mile east of the city of Naco, in Cochise County, AZ, to the international border with Mexico is a line relocation and as such does not require prior Board approval under 49 U.S.C. 10901. The Petition will be denied.

BACKGROUND

An extensive description of the background of this proceeding is set forth in the Director's decision under appeal, and it will not be repeated here in detail. It is sufficient to note that, in a decision served on February 14, 1997,<sup>2</sup> the Board granted SWKR Operating Co. (SWKR) an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a 41.5-mile segment of the Douglas Branch.<sup>3</sup> Chemical Lime Company (CLC), a shipper on the line, filed an offer of financial assistance (OFA). The OFA process ended without the line being sold or subsidized.

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<sup>1</sup> Mr. Sotelo attempts to bolster his Petition, originally dated January 6, with a letter dated January 10 (January 10 Letter) and another letter dated May 15 (May 15 Letter). Although Mr. Sotelo basically argues the same points in his letters as he originally does in his Petition, the Board will also consider these arguments in support of his Petition.

<sup>2</sup> SWKR Operating Co.-Abandonment Exemption-in Cochise County, AZ, STB Docket No. AB-441 (Sub-No. 2X) (STB served Feb. 14, 1997) (SWKR Abandonment).

<sup>3</sup> In 1995, the Douglas Branch extended 84.90 miles in a southeasterly direction from milepost 1032.84 at Benson to the end of the line at 1107.96 at Douglas in Cochise County, AZ. The 41.5-mile segment ran between milepost 1055.8 near Charleston and milepost 1097.30 near Paul Spur.

In a decision and notice of interim trail use or abandonment served on July 7, 1998, the Board, pursuant to a request by San Pedro Trails, Inc. (San Pedro), issued a notice of interim trail use (NITU) for 180 days under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act). SWKR and San Pedro reached an agreement for interim trail use and rail banking within the 180-day period. According to the reply filed on May 27, 2003, by SWKR and San Pedro to Mr. Sotelo's Petition and May 15 Letter, RailAmerica acquired SWKR and San Pedro in 2001.<sup>4</sup>

Mr. Sotelo wants to build a 1,775-foot line off the 41.5-mile rail banked line to the international border with Mexico. To facilitate this plan, Mr. Sotelo petitioned the Board to issue an order declaring the construction of the 1,775-foot section a line relocation of a 2,090-foot line one mile to the west.<sup>5</sup> The Director denied the request for a declaratory order not only because Mr. Sotelo did not own the 2,090-foot line, but also because neither SWKR nor any other possible owner was interested in the plan. Mr. Sotelo appealed the Director's decision in his Petition dated January 6, 2003, and filed on January 21. Mr. Sotelo sent his January 10 Letter and May 15 Letter to support the arguments he made in his Petition. And, as noted, SWKR and San Pedro (Respondents) filed a reply on May 27, 2003, to Mr. Sotelo's May 15 Letter and Petition.

#### PRELIMINARY MATTERS

An appeal of the Director's decision was due November 3, 2003, 10 days after October 25, 2002.<sup>6</sup> Therefore, Mr. Sotelo filed his Petition several months late. Yet, because Mr. Sotelo is unfamiliar with Board rules and practice, the Board will accept and consider his Petition. Additionally, in the interests of a complete record, the Board will consider the supplemental arguments and information Mr. Sotelo raises in his January 10 Letter and May 15

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<sup>4</sup> See RailAmerica, Inc.-Control Exemption-StatesRail Acquisition Corp. and StatesRail, Inc., STB Finance Docket No. 34129 (STB served Dec. 28, 2001).

<sup>5</sup> This 2,090-foot line originated on the Douglas Branch in Naco, passed through the center of Naco, and terminated at the Mexican border where it connected with Ferrocarriles Nacionales de Mexico. Although the line section is no longer in place, it is unclear when or if any party sought authority from the Board, or the Interstate Commerce Commission before it, to abandon this section of line. Additionally, although it is unclear who owns the line, SWKR, a subsidiary of RailAmerica, appears to be the most likely owner of the line.

<sup>6</sup> See 49 CFR 1115.1(c) and 49 CFR 1011.7(b)(6).

Letter. And the Board will accept Respondents' reply even though it is also late,<sup>7</sup> as Respondents would be unduly prejudiced if they were not allowed to respond to Mr. Sotelo's arguments.

#### DISCUSSION AND CONCLUSIONS

Under 49 CFR 1115.1(c), an appeal of the denial of a request to institute a declaratory order proceeding will be granted only to "correct a clear error of judgment or to prevent manifest injustice." Because Mr. Sotelo has not demonstrated that the Director's decision contains either a clear error of judgment or creates manifest injustice, the appeal will be denied.

The Director is correct that Mr. Sotelo must show either ownership of the 2,090-foot line or that SWKR or another potential owner of that line segment wishes to participate in his plan for it properly to be considered a line relocation. Mr. Sotelo simply cannot show that SWKR or any other possible owner of the 2,090-foot line is interested in the plan through vague references to an unnamed carrier or a nonowner like the Sierra Madre Express. Furthermore, while Mr. Sotelo claims that he has two rail carriers interested in the project to construct the 1,775-foot line, he supports this claim only with an advertisement for the Sierra Madre Express, a tourist train to Copper Canyon, Mexico, that runs through Nogales, and with the assertion that SWKR had been interested in the project at one time. Mr. Sotelo's evidence falls far short of demonstrating a clear error in judgment or manifest injustice. And, even if Respondents had been interested in Mr. Sotelo's project at one time, their reply demonstrates that they are certainly not interested in it now. Finally, Mr. Sotelo's "new evidence" -- that the proposed line relocation will not invade new territory and that RailAmerica is in the process of selling the 41.5-mile line for salvage -- does not show that the owner of the subject 2,090-foot line segment is joining in Mr. Sotelo's plan.

Moreover, the Director's decision does not create a manifest injustice. Mr. Sotelo apparently is claiming that the Director's finding, that his decision declining to grant the request for a declaratory order will not significantly affect the quality of the human environment, ignores and compounds certain social and economic problems. Yet, the Director's decision only denied Mr. Sotelo's petition for a declaratory order. The Board is not preventing Mr. Sotelo from constructing the line. He merely must seek Board authority under 49 U.S.C. 10901, or an exemption from that provision, like any other interested party in these circumstances. The socioeconomic benefits of the 1,775-foot line will be considered if or when he files an

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<sup>7</sup> Respondents should have replied to Mr. Sotelo's Petition 10 days after he filed it as provided under 49 CFR 1115.1(c).

application or exemption for authority to construct the line. Therefore, Mr. Sotelo's argument concerning the environmental finding lacks merit.<sup>8</sup>

Lastly, the Board will not issue a cease and desist order, as requested by Mr. Sotelo,<sup>9</sup> to stop RailAmerica's proposed sale of the salvage rights for the 41.5-mile line to salvage companies. When the Board issues a NITU, the railroad is permitted to salvage the line.<sup>10</sup> The parent company's sale of this right is not inconsistent with the Respondents' statutory obligations under the Trails Act. Moreover, Mr. Sotelo has not shown any legitimate reason why the Board should either reopen SWKR Abandonment<sup>11</sup> or revoke the NITU. Therefore, there is no reason to prevent RailAmerica from selling salvage rights.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Mr. Sotelo's Petition is accepted.
2. Respondents' reply is accepted.

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<sup>8</sup> Even if Mr. Sotelo is actually attacking the Director's finding that the decision did not require environmental documentation under the National Environmental Policy Act, there is no clear error in judgment. Normally, the Board's regulations do not require environmental documentation when the Director decides to institute a declaratory order proceeding. 49 CFR 1105.6(c)(2)(iii). Mr. Sotelo has not pointed to any potentially significant environmental impacts associated with the Director's decision. And the Board finds no reason to justify reclassifying this proceeding to require an Environmental Assessment or Environmental Impact Statement.

<sup>9</sup> Mr. Sotelo has requested a "cease and desist order" to prevent RailAmerica from selling salvage rights for the 41.5-mile section of the Douglas Branch to salvage companies before he can appeal to the Board and participate in the bidding.

<sup>10</sup> See 49 CFR 1152.29(d).

<sup>11</sup> Mr. Sotelo asserts that cargo was arriving at Bisbee Junction from Grupo Mexico. SWKR states in a recent petition filed in SWKR Operating Co.-Abandonment Exemption-in Cochise County, AZ, STB Docket No. AB-441 (Sub-No. 3X) (STB filed July 17, 2003), that overhead traffic did pass over the 41.5-mile segment in 2001 and 2002. Yet, the Board sees no reason to reopen SWKR Abandonment. SWKR indicates that none of the shippers, including Grupo Mexico, who have shipped over the 41.5-mile segment continue to do so, and that those shippers do not oppose this most recent abandonment proposal.

3. Mr. Sotelo's Petition is denied.
4. This decision is effective on its service date.

By the Board, Chairman Nober.

Vernon A. Williams  
Secretary