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SERVICE DATE – AUGUST 5, 2005

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-70 (Sub-No. 4X)

FLORIDA EAST COAST RAILWAY, L.L.C. – ABANDONMENT EXEMPTION – IN MIAMI-DADE COUNTY, FL

Decided: August 4, 2005

By petition filed on April 19, 2005, Florida East Coast Railway, L.L.C. (FEC) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a portion of its South Little River Branch Line (SLR Branch), extending from milepost LR 13.0± to milepost LR 18.0±, a distance of approximately 5 miles in Miami-Dade County, FL (the line). Notice of the filing was served on May 9, 2005, and published in the Federal Register on May 6, 2005 (70 FR 24166).

BACKGROUND

Most of the SLR Branch was constructed by FEC in 1932. It traverses commercial, industrial, and residential areas in Miami-Dade County and was primarily used to serve local shippers. According to FEC, the only current shippers on the line are Best Truss Company, Inc. (Best Truss), a manufacturer and seller of roof trusses, and Gulfside Supply, Inc. (Gulfside), a roofing material distributor. Traffic data submitted by FEC show that Best Truss received 35 rail cars in 2002, 33 rail cars in 2003, and 32 rail cars in 2004. The traffic data also show that Gulfside began shipping by rail in 2003 and received a total of 5 rail cars during 2003 and 23 rail cars in 2004. Neither shipper had outbound traffic during the above time periods.

In August 2004, FEC embargoed the line in order to perform emergency repair work on a bridge located at milepost LR 12.23± of the SLR Branch; although the bridge is located north of the segment proposed for abandonment, the temporary closure cut off rail access to the line. In response to the embargo, Best Truss shifted its traffic to a rail-truck transload movement from FEC's 16th Street Facility, while Gulfside discontinued rail service entirely. When the embargo was lifted, Best Truss continued to route its traffic through the 16th Street Facility, while Gulfside did not resume its use of rail service, instead opting to use truck service exclusively. FEC has included letters from the two shippers indicating that they do not object to the proposed abandonment. According to FEC, it does not move any overhead traffic over the SLR Branch and is unaware of any potential new sources of local traffic.

FEC states that the line is in poor physical condition and in need of substantial rehabilitation. In the absence of any known source of rail traffic for the line, FEC submits that there is no justification for the expense of rehabilitating it.

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 FEC of the expense of rehabilitating and maintaining a line that is no longer used and allowing FEC to use its assets 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.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. The two rail shippers on the line, Best Truss and Gulfside, do not oppose the abandonment and will continue to have access to rail service via FEC's 16th Street Facility and have alternative truck service available. Nevertheless, to ensure that the shippers are informed of our action, FEC will be required to serve a copy of this decision on the shippers 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 of granting this exemption, we will impose the employee protective conditions set forth in Oregon Short Line R. Co – Abandonment – Goshen, 360 I.C.C. 91 (1979).

FEC 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. The Board's 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 June 17, 2005.

In the EA, SEA notes that the U.S. Department of Commerce, National Geodetic Survey (NGS), has identified two geodetic station markers that may be affected by the proposed abandonment. Therefore, SEA recommends that FEC notify NGS at least 90 days prior to conducting any salvage activities that may disturb or destroy any geodetic station markers located on the line.

SEA also notes that the U.S. Fish and Wildlife Service, Region 4 (FWS), has not completed its review of the proposed abandonment. Therefore, SEA recommends that a

condition be placed on any decision granting abandonment authority prohibiting FEC from salvaging or disposing of the right-of-way until consultation with FWS has been completed.

SEA further notes that the National Park Service, Southeast Regional Office (NPS), has not completed its review of the proposed abandonment. Therefore, SEA recommends that a condition be placed on any decision granting abandonment authority prohibiting FEC from salvaging or disposing of the right-of-way until consultation with NPS has been completed.

In addition, SEA states that the Florida Department of Environmental Protection, Bureau of Solid and Hazardous Waste, Resource Conservation and Recovery Act Compliance and Enforcement Section (FL-S&HW), raised concerns regarding the proper disposal of any mercury-containing batteries used at highway/rail at-grade crossing signals and the use of herbicides containing arsenic tri-oxide during salvage operations on the right-of-way. Therefore, SEA recommends that FEC consult with FL-S&HW prior to any salvage activities on the line.

Finally, SEA states that the Florida Department of Environmental Protection, Bureau of Water Resource Management (FL-WRM), has not completed its review of the proposed abandonment. Therefore, SEA recommends that a condition be placed on any decision granting abandonment authority prohibiting FEC from salvaging or disposing of the right-of-way until consultation with FL-WRM has been completed.

Comments on the EA were due by July 18, 2005. 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 recommended in the EA. Also, because of new concerns raised about historic resources, SEA recommends the addition of a salvage condition.

In a letter dated March 23, 2005, FWS states that, due to its urban setting, the proposed abandonment will not result in any adverse effects to fish or wildlife. Accordingly, SEA no longer recommends that a consultation condition with FWS be imposed.

Also, Mr. Bill Lane of NSP, informed SEA that NPS has no outstanding issues or concerns related to the proposed abandonment. Accordingly, SEA no longer recommends that a consultation condition with NPS be imposed.

In a letter dated July 15, 2005, FEC states that it will properly dispose of any mercury containing batteries and that it has never used herbicides containing arsenic tri-oxide along the railroad's right-of-way. Accordingly, SEA no longer recommends that a consultation condition with FL-S&HW be imposed.

Finally, Mr. Steve Terry, of the Miccosukee Tribe, informed SEA that he has no issues or concerns related to section 106 of the National Historic Preservation Act, 16 U.S.C. 470f, with regard to the proposed abandonment. Also, in a letter dated March 31, 2005, the Florida Department of State, Division of Historical Resources (SHPO), states that they do not believe that the proposed abandonment will have an effect on historic properties. However, in an e-mail, Mr. Jim Pepe, Deputy Tribal Historic Preservation Officer, for the Seminole Tribe of Florida,

requests that an analysis of the archaeological potential of the rail corridor be conducted by a professional archaeologist. Accordingly, in light of the concerns raised by the Seminole Tribe of Florida, SEA recommends that, in the event that any archaeological sites, human remains, funerary items or associated artifacts are discovered during FEC's salvage activities, FEC be required to cease all work immediately and notify and consult with SEA, affected Federally recognized tribes, and the SHPO to determine whether any mitigation measures are necessary.

The environmental conditions recommended by SEA in the EA, as supplemented and modified 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.

SEA has indicated in the EA that the right-of-way may be suitable for other public use following abandonment. Public use requests were due no later than 20 days after publication of the notice of the petition in the Federal Register, or by May 31, 2005. No one has sought a public use condition and none will be granted.

By letter to FEC dated June 27, 2005, Hust Brothers, Inc. (Hust), expressed an interest in filing an offer of financial assistance (OFA) to purchase the line, and asked that FEC provide it with the financial data and information prescribed in 49 CFR 1152.27(a) (copies of the most recent report of the physical condition of the line, the carrier's estimate of the net liquidation value of the line, with supporting data, and the minimum purchase price that the railroad seeks).

In a letter to the Board dated July 19, 2005, Hust stated that FEC had not provided the requested information. Accordingly, Hust requested in that letter that the period for submitting its OFA be tolled from its due date of August 17, 2005, to September 19, 2005, and that the railroad be required to produce the information by August 18, 2005. In a letter dated July 27, 2005, Hust advises that it has been assured by FEC that it would provide the requested data no later than July 29, 2005. Accordingly, Hust requests that the period for submitting its OFA be tolled until September 1, 2005, rather than September 19, 2005.

On July 27, 2005, FEC filed a reply containing some of the information required by 49 CFR 1152.27(a) and a response to Hust's tolling request. In its reply, FEC states that it has conferred with Hust regarding the information sought, and the extension request, and that they have agreed to an extension of the due date for filing an OFA by Hust until September 1, 2005. Because both parties agree, the extension will be granted. As a result, any OFA will be due by September 1, 2005. Because an OFA is due by September 1, 2005, the effective date of the exemption will be delayed until September 11, 2005.

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 conditions that FEC shall: (1) provide NGS with at least 90 days' notice prior to conducting any salvage activities that may disturb or destroy any geodetic station markers located on the line;

(2) consult with FL-WRM prior to any salvage activity on the line or disposal of the right-of-way; and (3) in the event that any archaeological sites, human remains, funerary items or associated artifacts are discovered during FEC's salvage activities, cease all work immediately and notify and consult with SEA, affected Federally recognized tribes, and the SHPO to determine whether any mitigation measures are necessary.

2. FEC is directed to serve a copy of this decision on Best Truss and Gulfside within 5 days after the service date of this decision and to certify to the Board that it has done so.

3. 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 September 1, 2005. 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).

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. If no OFA is received, the exemption will become effective on September 11, 2005. Petitions to stay must be filed by August 22, 2005, and petitions to reopen must be filed by August 30, 2005.

6. Pursuant to the provisions of 49 CFR 1152.29(e)(2), FEC 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 FEC's filing of a notice of consummation by August 5, 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