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SERVICE DATE – JANUARY 28, 2008

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE

STB Docket No. AB-290 (Sub-No. 291X)

NORFOLK SOUTHERN RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN  
GRANT COUNTY, IN

Decided: January 24, 2008

By petition filed on October 10, 2007, Norfolk Southern Railway Company (NSR) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon 3.66 miles of rail line between mileposts TS 153.35 and TS 157.01 at Marion, in Grant County, IN (line).<sup>1</sup> Notice of the filing was served and published in the Federal Register on October 30, 2007 (72 FR 61421). On November 21, 2007, the City of Marion, IN (City), and Greenways Foundation, Inc. (together, proponents), filed a request for imposition of a public use condition and for issuance of a notice of interim trail use (NITU). The Board will grant the exemption, subject to trail use, public use, environmental, and standard employee protective conditions.

BACKGROUND

According to NSR, since 2002, Central Railroad Company of Indianapolis (CERA) has provided the only rail service over the line, operating over a 2.36-mile segment of the line between milepost TS 154.65 and milepost TS 157.01 under trackage rights from NSR. NSR states that CERA ceased its operations over that portion of the line on May 10, 2006. On April 23, 2007, CERA filed a petition for exemption to discontinue service over the 2.36-mile segment. The Board granted that petition and, on August 31, 2007, CERA's exemption for discontinuance became effective.<sup>2</sup> NSR states that the remaining segment of the line (between milepost TS 153.35 and milepost 154.65) has been out of service for many years.

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<sup>1</sup> In its environmental and historic reports and its newspaper notice, NSR states that the proposed abandonment will cover 3.91 miles of rail line, between mileposts TS 153.10 and TS 157.01. Prior to filing its petition for exemption, NSR determined that it still required the use of the segment between mileposts TS 153.10 and TS 153.35, and therefore would seek an abandonment exemption only for the shorter segment described above. NSR states in its petition that it has notified recipients of the environmental and historic reports in writing about the change.

<sup>2</sup> See Central Railroad Company of Indianapolis—Discontinuance of Service Exemption—in Grant County, IN, STB Docket No. AB-511 (Sub-No. 3X) (STB served Aug. 1, 2007).

NSR adds that there have been two shippers on the line that have received rail service in recent years. According to NSR, one of them, Bell Fiber Corporation (Bell Fiber), ceased using rail service at least 2 years ago and the other, Essex Wire, Incorporated (Essex Wire), can be served by a turnout from another NSR line. NSR contends that there is no demand for service over the line and that no customer will lose rail service due to the abandonment of the line. The Board has received no filings in opposition to NSR's petition.

## DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without prior approval from the Board. Under 49 U.S.C. 10502, however, the Board must exempt a proposed abandonment from regulation under 49 U.S.C. 10903 when it finds 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 of this transaction under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of an abandonment application, an exemption will expedite regulatory decisions and reduce regulatory barriers to exit [49 U.S.C. 10101(2) and (7)]. An exemption also will foster sound economic conditions and encourage efficient management by relieving NSR from the cost of owning and maintaining this line [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. No traffic presently is moving over the line as Bell Fiber has not used the line in the last 2 years and Essex Wire, according to NSR, can be served by a turnout from another NSR line. Nevertheless, to ensure that the shippers are aware of the proposed abandonment, NSR will be required to serve a copy of this decision on each shipper on the line within 5 days of the service date of this decision and to certify to the Board that it has done so. Given the market power finding here, the Board need not determine whether the proposed transaction is limited in scope.

Under 49 U.S.C. 10502(g), the Board's exemption authority may not be used to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, the employee protective conditions in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), will be imposed.

As required by the Board's environmental regulations, NSR submitted environmental and historic reports with its petition and notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the potential environmental impacts of the proposed action. See 49 CFR 1105.11. The Board's Section of Environmental Analysis (SEA) has examined the environmental and historic reports, verified NSR's data, analyzed the probable effects of the proposed action on the quality of the human environment, and issued an Environmental Assessment (EA) for public review and comment. The EA was served on December 7, 2007. Comments to the EA were due by January 7, 2008.

In the EA, SEA notes that the Indiana Department of Natural Resources (DNR) states that NSR must use appropriate measures to control erosion and sediment until salvage activities are completed and all disturbed areas are stabilized. Accordingly, SEA recommends that, prior to commencement of any salvage activities, NSR be required to consult with DNR regarding abandonment and salvaging procedures, including erosion control measures.

No comments to the EA were filed by the January 7, 2008 due date. The condition recommended by SEA will be imposed. Based on SEA's recommendation, the Board concludes 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, proponents have filed a request for the issuance of a NITU under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act). Proponents have submitted a statement of willingness to assume financial responsibility for the right-of-way and have 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. By letter filed on December 21, 2007, NSR states that it is willing to negotiate with proponents for interim trail use. Because proponents' request complies with the requirements of 49 CFR 1152.29, and NSR is willing to enter into negotiations, a NITU will be issued for the line. The parties may negotiate an agreement 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, NSR 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 suitable for other public use following abandonment. Proponents also request imposition of a 180-day public use condition, precluding NSR from: (1) disposing of the corridor, other than the tracks, ties, and signal equipment, except for public use on reasonable terms; and (2) removing or destroying potential trail-related structures such as bridges, trestles, culverts, and tunnels. Proponents state that the line is located within the City, crosses an existing railway, and passes through another area where there currently exists a waterpark recreational facility operated by the public park system of the City. Proponents state that the corridor would make an excellent recreational trail and indicate that conversion of the property to trail use is in accordance with local plans.

The Board has determined that persons who file under the Trails Act may also file for public use 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 the need for both conditions is established, it is the Board's policy to impose them concurrently, subject to the execution of a trail use agreement. Proponents have 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 of the period of time requested. Accordingly, a 180-day public use condition also will be imposed, 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 the line for public use. If a trail use agreement is reached on a portion of the right-of-way, NSR must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, it should be noted 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 acquire a right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, NSR is not required to deal exclusively with proponents, 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.

On November 26, 2007, Bergen Passaic Rail Corporation D/B/A BP Rail (BPR) filed a formal expression of intent to file an OFA to purchase the line. In its filing, BPR, pursuant to 49 CFR 1152.27(a), requested that NSR provide it with the minimum purchase price of the line and copies of the most recent report on the physical condition of the line and traffic, revenue and other data necessary to determine NSR's estimate of the net liquidation value of the line, with supporting data reflecting available real estate appraisal, assessments of quality and quantity of track material in the line and removal cost estimates used to obtain net liquidation value. In a letter filed on December 14, 2007, NSR acknowledged receipt of BPR's intent to file an OFA and indicated that it would compile the requested information and forward it to BPR as soon as it is available. No other filing by either party has been made with reference to an OFA.<sup>3</sup>

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<sup>3</sup> In its November 26, 2007 filing, BPR requests that the Board toll the 30-day period for submitting OFAs for an additional 60 days to provide offerors with an adequate opportunity to

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

It is ordered:

1. Under 49 U.S.C. 10502, NSR is exempted from the prior approval requirements of 49 U.S.C. 10903 for 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 subject to the conditions that NSR shall: (1) leave intact the right-of-way, including bridges, trestles, culverts, and tunnels (except tracks, 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 other interested person, to negotiate the acquisition of the line for public use; (2) comply with the interim trail use/rail banking procedures set forth below; and (3) prior to commencement of any salvage activities, consult with DNR regarding abandonment and salvaging procedures, including erosion control measures.

2. NSR must serve a copy of this decision on each shipper on the line within 5 days of the service date of this decision and 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 the effective date of this decision and notice, interim trail use may be implemented. If no agreement

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receive, review and analyze the material provided by NSR and submit their OFA. In light of NSR's commitment to provide BPR with the requested information, no action will be taken on the tolling request in this decision. If BPR does not receive the information in time to submit an OFA by the due date, BPR may refile its tolling request and that request will be addressed in a subsequent decision.

is reached by that time, NSR may fully abandon the line, provided the conditions imposed above are met.

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 February 7, 2008, 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 of \$1,300. 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 February 27, 2008. Petitions to stay must be filed by February 12, 2008, and petitions to reopen must be filed by February 22, 2008.

10. Pursuant to the provisions of 49 CFR 1152.29(e)(2), NSR 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 NSR’s filing of a notice of consummation by January 28, 2009, 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 Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan  
Acting Secretary