

SERVICE DATE – MAY 2, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-290 (Sub-No. 283X)

NORFOLK SOUTHERN RAILWAY COMPANY—
ABANDONMENT EXEMPTION—IN ORANGE COUNTY, NY

Decided: April 30, 2007

By petition filed on January 12, 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 a 1.64-mile line of railroad, extending from milepost ZU 45.00 to milepost ZU 46.64 at Harriman, Orange County, NY. NSR also seeks an exemption from the offer of financial assistance (OFA) requirements of 49 U.S.C. 10904 and the public use requirements of 49 U.S.C. 10905. Pursuant to 49 U.S.C. 10502(b), the Board served and published a notice in the Federal Register (72 FR 4767) on February 1, 2007, instituting an exemption proceeding. On February 20, 2007, Mr. James Riffin filed a motion for leave to intervene in this proceeding for the purpose of opposing the proposed exemption from the OFA provisions of section 10904. Also on February 20, 2007, Mr. Riffin filed with the Board a notice of his intent to file an offer of financial assistance.¹ The Board will grant the exemptions from 49 U.S.C. 10903 and 49 U.S.C. 10905, subject to environmental and standard employee protective conditions, but will deny the request for an exemption from 49 U.S.C. 10904.

BACKGROUND

NSR seeks to abandon a 1.64-mile dead-end spur, formerly owned by Consolidated Rail Corporation (Conrail), and once part of an Erie Railroad main line. According to NSR, the only shipper on the line, Nepera Chemical Company, permanently ceased operations in October 2005. NSR asserts that no traffic has moved over the line since that date. NSR states that it intends to retain the line after abandonment, and to reclassify the segment between mileposts ZU 45.00 and ZU 45.90 as industrial or other house track, rather than a common carrier line.² NSR states that the site might be subject to future industrial development, which could result in renewed demand for service. NSR states that it can save maintenance costs by abandoning now, and that it can promptly sell the line at a later date, should no industrial development occur adjacent to the line.

¹ On February 20, 2007, Mr. Riffin filed a petition to toll the due date for an OFA. Until NSR has learned the outcome of its abandonment petition and its petition for exemption from the OFA provisions, it is premature for the Board to entertain requests to toll the due date for any OFA. Therefore, we will not address Mr. Riffin's request in this decision.

² According to NSR, the remaining portion between mileposts ZU 45.90 and ZU 46.64 was taken out of service and salvaged by Conrail prior to NSR's acquisition of the line in 1999.

DISCUSSION AND CONCLUSIONS

Abandonment exemption. 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 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 would reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption would also foster sound economic conditions and encourage efficient management by allowing NSR to use the line as industrial storage or house track [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy would not be affected adversely.

Regulation of the proposed transaction is not necessary to protect shippers from an abuse of market power. The sole shipper on the line permanently ceased operations in October 2005. There is no overhead traffic on the line, and the line is a dead-end spur with little or no potential for future overhead traffic. Given our market power finding, we need not determine whether the proposed abandonment is limited in scope.

Other exemptions. To expedite the post-abandonment reclassification of a portion of the right-of-way to industrial or house track, NSR requests that the abandonment of the line be exempted from the OFA requirements of 49 U.S.C. 10904 and the public use requirements of 49 U.S.C. 10905. According to NSR, the OFA and public use procedures are unnecessary because it intends to retain ownership of the line and use the segment of the line between mileposts ZU 45.00 and ZU 45.90 as industrial storage track. According to NSR, there is potential for future industrial development. Therefore, NSR wishes to retain the line should demands for service materialize. NSR states that between mileposts ZU 45.90 and ZU 46.64, the track has already been salvaged by Conrail, the previous owner. NSR states that it is willing to negotiate regarding trail use for the salvaged portion of the line with Orange County, which has apparently shown interest in extending its Heritage Trail.

According to Mr. Riffin, an exemption from the OFA procedures would establish a dangerous precedent whereby carriers could circumvent the OFA process on lines with no current traffic by converting the right-of-way to excepted track status. Mr. Riffin argues that carriers could then salvage and sell the real estate, with no recourse for any new shipper seeking service. Mr. Riffin cites Interstate Commerce Commission and Board decisions where exemptions from the OFA requirements were granted. He argues that the circumstances of those cases do not mirror NSR's petition. In particular, Mr. Riffin argues that no exemption from the OFA requirements has been granted where a notice of intent to file an OFA has been filed.

The OFA provisions—which permit a party genuinely interested in providing continued rail service to acquire a line for that purpose over the objections of the owner—reflect a Congressional intent that rail service be preserved whenever possible. While exemptions from 49 U.S.C. 10904 have been granted from time to time, they have been granted when the right-of-way is needed for an overriding public purpose³ or an important private undertaking,⁴ and there is no apparent interest in continued rail service.⁵ Here, the petition for abandonment is not tied to a public project, and no transfer to facilitate private rail operations is referenced by NSR. Also, Mr. Riffin has shown an interest in providing continued rail service, despite the absence of an active shipper on the line for almost 2 years. Accordingly, the Board finds no basis for undercutting the Congressional objective of maintaining rail service, despite the fact that prospects for a successful OFA are marginal. Therefore, NSR’s request for an exemption from the OFA requirements of 49 U.S.C. 10904 will be denied.

NSR’s request for an exemption from the requirements of section 10905 will be granted. The abandonment petition and the request for exemption from the public use provisions have been noticed in the Federal Register. Neither Mr. Riffin nor any other interested party has objected to the proposed exemption from section 10905. Accordingly, the petition for exemption of the proposed abandonment from the public use requirements of 49 U.S.C. 10905 will be granted.

The evidence of record establishes that the proposed exemption from 49 U.S.C. 10905 meets the criteria of 49 U.S.C. 10502. Applying the public use requirements in this instance is not necessary to carry out the rail transportation policy. Moreover, allowing the abandonment exemption to become effective without first being subject to these requirements will minimize the need for Federal regulatory control over the rail system, expedite regulatory decisions, and reduce regulatory barriers to exit [49 U.S.C. 10101(2) and (7)]. The Board has already determined that regulation is not necessary to protect shippers from an abuse of market power.

Labor protection. 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,

³ See Southern Pacific Transportation Company—Discontinuance of Service Exemption—In Los Angeles County, CA, Docket No. AB-12 (Sub-No. 172X) (ICC served Dec. 23, 1994) (exemption from OFA requirements granted where owner planned to use the rail corridor for mass transit purposes).

⁴ See The Cincinnati, New Orleans and Texas Pacific Railway Company—Abandonment Exemption—In Cumberland and Roane Counties, TN, STB Docket No. AB-290 (Sub-No. 208X) (STB served Nov. 15, 2000) (exemption from OFA and public use requirements granted in order to facilitate a prompt transfer of the line to the shipper, who sought to begin rehabilitation and maintenance operations prior to operating the line as private industrial lead track).

⁵ See 1411 Corporation—Abandonment Exemption—In Lancaster County, PA, STB Docket No. AB-581X, et al., slip op. at 4 (STB served Sept. 6, 2001).

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).

Environmental conditions. NSR 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, analyzed the probable effects of the proposed action on the quality of the human environment, and served an environmental assessment (EA) on March 13, 2007.

In the EA, SEA stated that the National Geodetic Survey (NGS) commented that one geodetic station marker may be located in the area of the proposed abandonment. NGS requested 90 days' advance notice of any salvage activities, in order to relocate the station marker. SEA, therefore, recommended that a condition be imposed on any decision granting abandonment authority that NSR notify NGS at least 90 days prior to beginning salvage activities in order to plan for the possible relocation of the geodetic station marker identified by NGS.

Comments to the EA were due by April 12, 2007. No additional comments were received. SEA has made no changes to the condition it previously recommended in the EA. Accordingly, we will impose the condition recommended by SEA in the EA. Based on SEA's recommendations, 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.

Other matters. The Board will provide an opportunity for interested persons to file trail use/rail banking requests. Under section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d), trail use/rail banking is voluntary and can only be implemented if the abandoning railroad agrees to negotiate an agreement. Here, NSR has stated its willingness to entertain trail use requests for the previously salvaged portion of the above-described line. However, the deadline for timely filing a petition for interim trail use in this proceeding has passed. See 49 CFR 1152.29(b)(2). Late-filed trail use petitions must be supported by a statement showing good cause for the late filing.⁶ See 49 CFR 1152.29(b)(3).

Interested parties should note that operation of the trail use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in Rail Abandonments–Use of Rights-of-Way As Trails, 2 I.C.C.2d 591, 608 (1986), OFAs to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail

⁶ See Aban. And Discon. of R. Lines and Transp. Under 49 U.S.C. 10903, 1 S.T.B. 894 (1996) and 2 S.T.B. 311 (1997) (policy of accepting filings after the due date when good cause is shown retained by the Board in revising its abandonment rules).

use/rail banking. 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 precluded. Alternatively, if a sale under the OFA procedures does not occur, the trail use process may proceed.

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, we exempt NSR from the requirements of 49 U.S.C. 10903 and 49 U.S.C. 10905 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 condition that NSR shall notify the NGS at least 90 days prior to beginning salvage activities in order to plan for the possible relocation of the one geodetic station marker identified by NGS.

2. Mr. James Riffin’s motion for leave to intervene in the proceeding is granted.

3. The request for an exemption from the OFA requirements of 49 U.S.C. 10904 is denied.

4. 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 May 11, 2007, 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).

5. 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.”**

6. Provided no OFA has been received, this exemption will be effective on June 1, 2007. Petitions to stay must be filed by May 17, 2007, and petitions to reopen must be filed by May 29, 2007.

7. 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 May 2, 2008, 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 Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary