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SERVICE DATE – DECEMBER 3, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-497 (Sub-No. 4X)

MINNESOTA NORTHERN RAILROAD, INC.—ABANDONMENT EXEMPTION—
IN NORMAN COUNTY, MN

Decided: November 26, 2008

By petition filed on August 15, 2008, Minnesota Northern Railroad, Inc. (MNN), seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a 19.2-mile portion of its “P Line” subdivision between milepost 21.0, at or near Perley, and milepost 40.2, at the north end of the Marsh River Bridge south of Shelly, in Norman County, MN (the line). Notice of the filing was served and published in the Federal Register on September 4, 2008 (73 FR 51698-99). A request for imposition of a public use condition and issuance of a notice of interim trail use (NITU) was filed by Fertile-Beltrami Sandhill Snowcruisers (FBSS). We will grant the petition for exemption, subject to public use, environmental, historic preservation, and standard employee protective conditions.

BACKGROUND

MNN states that the line is part of the 44-mile “P Line” Subdivision that extends from Crookston, MN, to its stub-end at or near Perley. The line was acquired by MNN in 1997.

According to MNN, a pier in the bridge at milepost 29.2 shifted, causing a significant lateral shift in the track structure and making rail operations over the bridge unsafe. Due to this shift, MNN embargoed all traffic at the stations of Hendrum, MN, and Perley in June 2008. MNN states that it currently serves three shippers: Perley Community Cooperative (PCC); Halstad Farmers Elevator (Halstad); and Mitchell Forms (Mitchell). In the base year from May 1, 2007, to April 30, 2008, MNN transported: (1) 327 cars of corn, wheat, and soybeans for PCC, earning revenues of \$34,895; (2) 13 cars of fertilizer for Halstad, earning revenues of \$3,549; and (3) nothing for Mitchell. MNN predicts that, in a forecast year beginning August 1, 2008, it would transport: (1) 330 cars of corn, wheat and soybeans for PCC, earning revenues of \$41,250; (2) 8 cars of fertilizer for Halstad, earning revenues of \$2,184; and (3) 2 cars of sunflower seeds for Mitchell, earning revenues of \$546. Accordingly, total revenues for the forecast year would be \$43,980.

MNN estimates that normalized maintenance-of-way costs for the forecast year that are necessary to retain minimum FRA Class 1 track safety standards would amount to approximately

\$334,240,¹ and crew costs would be about \$34,944 for a total cost of \$369,184. Thus, there would be a forecast year operating loss of \$325,204 (\$369,184 - \$43,980). MNN notes that the opportunity costs of maintaining the line are substantial; although MNN has not yet valued the land in the right-of-way, which it owns, the salvage value of the track materials alone amounts to approximately \$850,000. MNN estimates that it would cost \$750,000 just to inspect and repair the damaged bridge at milepost 29.2. MNN states that this amount would be too costly given that the line is not profitable; thus, the cost could not be amortized within a reasonable period of time from profits from operating the line.

According to MNN, all of the shippers on the line have used alternative transportation ever since the line was embargoed. MNN states that the line is paralleled by two major highways and BNSF's Fargo-Grand Forks main line. None of the shippers on the line have opposed the abandonment.

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 foster sound economic conditions and encourage efficient management by relieving MNN from the expense of maintaining a line that is no longer used and allowing MNN to apply its assets more productively elsewhere on its rail system [49 U.S.C. 10101(5), and (9)]. Other aspects of the rail transportation policy will not be adversely affected.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. The line is stub-ended with no other prospects for future rail traffic. Also, PCC, Halstad, and Mitchell, the only shippers that have used the line in the recent past, have been using alternative transportation ever since the line was embargoed and have not filed in opposition of the proposed abandonment. Nevertheless, to ensure that the shippers are informed of our action, we will require MNN to serve a copy of this decision on PCC, Halstad, and Mitchell within 5 days from its service date and to certify to us that it has done so. Given our market power finding, we need not determine whether the proposed abandonment 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 to

¹ This figure consists of \$192,000 to replace ties plus \$142,240 to line and surface 4 of the 19.2 miles each year (5-year cycle).

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).

MNN has submitted a combined environmental and historic 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 abandonment. 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.

SEA served an environmental assessment (EA) on October 14, 2008, requesting comments by November 11, 2008. In the EA, SEA recommends that four conditions be imposed on any decision granting abandonment authority.

In the EA, SEA stated that the Minnesota Department of Agriculture (MDA) submitted comments stating that its Incident Response Unit (IRU) has concerns regarding the proposed abandonment because MNN has not determined whether there are any known hazardous material spills along the right-of-way. Additionally, IRU has concerns about wood treated compounds that may have seeped out of the wood used in bridges on the line and about the waste that would be generated after the line is abandoned. Accordingly, SEA recommends that, prior to salvage, MNN be required to consult with MDA to address its concerns about hazardous waste on the right-of-way.

SEA also stated that the Minnesota Pollution Control Agency (MPCA) stated that it has not conducted an in-depth review of the proposed abandonment. According to MPCA, it is the responsibility of MNN to secure any required permits. MPCA included in its comments a list identifying permits that the abandonment may require. Accordingly, SEA recommends that, prior to commencement of any salvage activities, MNN consult with MPCA regarding any required permits and comply with any reasonable requirements.

SEA also stated that the U.S. Department of Commerce, National Geodetic Survey (NGS), has advised that 16 geodetic station markers are located in the area of the proposed abandonment. Therefore, SEA also recommends that MNN be required to notify the NGS at least 90 days prior to beginning salvage activities that will disturb any geodetic station markers.

Finally, SEA states that the Minnesota State Historic Preservation Office (SHPO) has advised that the information submitted by MNN discusses the National Register of Historic Places (National Register) eligibility of the bridges on the line but does not address the significance of the line itself. The SHPO stated that it needs an evaluation of the significance of the line in order to complete the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f (NHPA). Accordingly, SEA recommends that MNN retain its interest in and take no steps to alter the historic integrity of sites, buildings, and structures within the project right-of-way that are eligible for listing or listed in the National Register (generally, 50 years or older) until completion of the section 106 process of NHPA. SEA also recommends that MNN be required to report back to SEA regarding any consultations with the SHPO and any other section 106 consulting parties, and that MNN be prohibited from filing its consummation notice

or initiating any salvage activities related to abandonment (including removal of track and ties) until the section 106 process has been completed and the Board has removed this condition.

No comments on the EA were received by the November 11, 2008 due date. Therefore, we will impose the conditions recommended by SEA. Accordingly, 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.

On September 10, 2008, FBSS submitted requests for a NITU and a public use condition for the purpose of acquiring the line for use as a recreational trail. On September 19, 2008, MNN submitted a response to FBSS's requests. MNN states that it is willing to negotiate with FBSS for rail banking and interim trail use over the right-of-way but only if a request is made for a NITU rather than a public use condition.

FBSS's NITU request will be denied. Rail banking/trail use is provided for under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act). Under the Trails Act and its implementing regulations at 49 CFR 1152.29, however, the prospective trail sponsor must state that it is willing to assume full responsibility for managing the right-of-way; for any legal liability arising out of the use of the right-of-way (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 assessed against the right-of-way, and an acknowledgement that interim trail use is subject to the user's continuing to meet its responsibilities and to the possible future reconstruction and reactivation of the right-of-way for rail service. FBSS did not make these representations in its NITU request. Because FBSS did not fulfill the requirements of the Trails Act and 49 CFR 1152.29, the Board will not grant a NITU.

The imposition of a public use condition does not require the carrier's consent. SEA found in its EA that, following abandonment and salvage of the line, the right-of-way may be suitable for other public use. FBSS requests imposition of a 180-day public use condition precluding MNN from: (1) disposing of the rail 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. FBSS states that the corridor would be used for recreational trails in accordance with local plans, that it would connect the cities of Perley, Hendrum, Halstad, and Shelly, all of which have connections to other trail systems traversing through Norman County, that the corridor also would provide an important habitat for local wildlife such as the greater prairie chicken, sharp-tailed grouse, and turkey in Northwestern Minnesota, along with a variety of local mammals, and that the trail sponsor would focus on the restoration of native prairie when applicable. FBSS adds that it needs the entire 180 days from the effective date of the abandonment authorization to assure that all the land titles are cleared, to work on a trail plan, and to begin financial networking with other state agencies.

FBSS has 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 for the period of time requested.

Accordingly, a 180-day public use condition, commencing from the effective date of this decision, will be imposed on the line to be abandoned to enable any state or local government agency or other interested person to negotiate the acquisition of the line for public use. Also, we note 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 negotiate to acquire the right-of-way that has been found suitable for public purposes. Therefore, with respect to the public use condition, MNN is not required to deal exclusively with FBSS, but may engage in negotiations with other interested persons.

The parties should note that operation of the public 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), offers of financial assistance (OFA) to acquire rail lines for continued rail service or to subsidize rail operations take priority over public use. Accordingly, if an OFA is timely filed under 49 CFR 1152.27(c)(1), the effective date of this decision 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 public use precluded. Alternatively, if a sale under the OFA procedures does not occur, the public use processes may proceed.

It is ordered:

1. FBSS' request for issuance of a NITU is denied.
2. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903 the abandonment by MNN of the above-described line, subject to the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), and subject to the conditions that MNN shall (1) leave intact all of the right-of-way, including bridges, trestles, culverts, tunnels, and other potential trail-related structures (except track, ties, and signal equipment), for a period of 180 days from the effective date of this decision, to enable any state or local government agency or any other interested person to negotiate the acquisition of the line for public use; (2) prior to salvage, consult with MDA to address its concerns about hazardous waste on the right-of-way; (3) prior to salvage, consult with MPCA regarding any required permits and comply with any reasonable requirements; (4) notify the NGS at least 90 days prior to beginning salvage activities that will disturb any geodetic station markers; and (5)(a) retain its interest in and take no steps to alter the historic integrity of all sites, buildings, and structures within the project right-of-way that are eligible for listing or listed in the National Register (generally 50 years or older) until completion of the section 106 process of the NHPA, (b) report back to SEA regarding any consultations with the SHPO and any other section 106 consulting parties, and (c) be prohibited from filing its consummation notice or initiating any salvage activities related to abandonment (including removal of track and ties) until the section 106 process has been completed and the Board has removed this condition.
3. MNN is directed to serve a copy of this decision on PCC, Halstad, and Mitchell within 5 days after the service date of this decision and to certify to the Board that it has done so.

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 December 12, 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, which currently is set at \$1,500. 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 January 2, 2009. Petitions to stay must be filed by December 18, 2008, and petitions to reopen must be filed by December 29, 2008.

7. Pursuant to the provisions of 49 CFR 1152.29(e)(2), MNN 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 MNN’s filing of a notice of consummation by December 3, 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