

30188
EB

SERVICE DATE - JULY 2, 1999

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-560 (Sub-No. 1X)

ABERDEEN & ROCKFISH RAILROAD COMPANY D/B/A DUNN-ERWIN RAILWAY
--ABANDONMENT AND DISCONTINUANCE EXEMPTION--IN HARNETT COUNTY, NC

Decided: July 1, 1999

By petition filed March 15, 1999,¹ Aberdeen & Rockfish Railroad Company d/b/a Dunn-Erwin Railway (DER) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a line of railroad that it owns and discontinue service over a line of railroad that it leases from CSX Transportation, Inc. (CSXT), in Harnett County, NC. The line to be abandoned is approximately 5.488 miles long and extends from milepost SDS 53.00 near Erwin to milepost SDS 56.66 at Dunn, and from milepost SDE 0.00 near Erwin to milepost SDE 2.02 at Erwin.² The line over which DER's service is to be discontinued is approximately 3,093 feet long and consists of approximately 1,700 feet of track between milepost SDS 56.66 and milepost SDS 57.01.³ A request for issuance of a notice of interim trail use (NITU) and for imposition of a public use condition was filed by the Sandhills Area Land Trust (SALT). We will grant the exemption, subject to public use, trail use, environmental, and standard employee protective conditions.

BACKGROUND

DER states that the lines were originally constructed by the Cape Fear & Northern Railroad (Cape Fear), which began operating them on June 30, 1904. Cape Fear was reorganized as the Durham & Southern Railroad Company on January 13, 1906. In 1981, the lines were purchased by the Seaboard Airline Railway, and through a series of mergers with predecessor entities of CSXT, the lines were eventually owned and operated by CSXT. In 1987, CSXT sold the line to be abandoned and leased the line over which DER's service is to be discontinued to the Dunn-Erwin

¹ Notice of the filing was served and published in the Federal Register on April 2, 1999 (64 FR 16022).

² According to the milepost designations the line should be 5.68 miles long. It is actually slightly shorter because, according to DER, the mileposts are not accurately placed.

³ Included in the discontinuance are two adjoining spur tracks, D&S No. 3 and No. 11, which are 600 and 793 feet long, respectively.

Railway Corporation (DERC), a wholly owned subsidiary of Aberdeen & Rockfish Railroad Company (AR). In 1990, the Dunn-Erwin Railway Corporation was merged into AR, and DER has owned the line to be abandoned and leased the line over which it seeks to discontinue service since that date.

According to DER, the only shipper located on the line to be abandoned, Swift Denim, received 340 carloads of coal in 1996, 274 carloads in 1997, and 13 carloads in the first two months of 1998. After that, Swift Denim ceased operation of its coal fired boiler and no longer required rail service. Accordingly, since February 1998, there has been no traffic on the line to be abandoned. By letter dated December 10, 1998, Swift Denim informed DER that it will not contest the abandonment. DER states that abandonment of the line will eliminate 21 grade crossings (18 public crossings and 3 private crossings), thereby improving the flow of traffic and reducing the possibility of accidents at those points.

Under the terms of its lease, DER provides service to three customers, General Utilities, Ready Mix Concrete and Mark Johnson, who receive transload service on the leased line using spur tracks, D&S No. 3 and No. 11.⁴ Over the last three years their annual carloads were as follows:

<u>Shipper</u>	<u>Product</u>	<u>1996</u>	<u>1997</u>	<u>1998</u>
General Utilities	Grain	64 carloads	28 carloads	3 carloads
Ready Mix Concrete	Mix Cement	13 carloads	28 carloads	38 carloads
Mark Johnson	Pipe	<u>18 carloads</u>	<u>0 carloads</u>	<u>0 carloads</u>
Totals		95 carloads	56 carloads	41 carloads

DER submits that its continued service to these customers is uneconomical because the revenues generated are insufficient to cover its costs. DER asserts that CSXT retains the underlying obligation to perform common carrier service, and due to CSXT's ownership and operation of connecting lines in the immediate vicinity of the leased line, there are no barriers to CSXT's ability to perform such service. In addition, DER asserts that motor carrier service is available to handle the limited traffic of these customers.

⁴ On November 9, 1998, DER informed CSXT that it was terminating their Track Lease Agreement. By letter dated November 24, 1998, CSXT accepted DER's termination of the lease, effective December 9, 1998. Although CSXT agreed to terminate the lease, DER recognizes that it has an obligation to perform common carrier service on the leased line until the subject exemption request is granted. DER is unaware of any plans by CSXT to abandon its line.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned and service may not be discontinued 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 DER of the costs of owning and maintaining its line and of operating over the leased line and allowing it 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 affected adversely.

Regulation of the transaction is not necessary to protect shippers from the abuse of market power because Swift Denim, the sole shipper on the line to be abandoned no longer requires rail service and does not object, and the shippers on the leased line have adequate transportation alternatives available from CSXT and motor carriers.⁵ Nevertheless, to ensure that these shippers are informed of our decision, we will require DER to serve a copy of this decision on them within 5 days of the service date and certify to us that it has done so.

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 granting this exemption, we will impose the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979).

DER 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 abandonment. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified its data, and analyzed the probable effects of the proposed action on the quality of the human environment. SEA served an environmental assessment (EA) on May 19, 1999.

In the EA, SEA indicated that the National Geodetic Survey (NGS) has identified nine station markers that may be affected by the proposed abandonment. Therefore, SEA recommends

⁵ Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

that a condition be imposed requiring DER to consult with NGS at least 90 days prior to salvage activities in order to plan for the relocation of any marker that will be disturbed or destroyed by abandonment activities.

No comments to the EA were filed by the June 14, 1999 due date. We will impose the recommended condition and 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 April 22, 1999, SALT filed a request for interim trail use/rail banking under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), for the line to be abandoned and the line over which DER's service is to be discontinued.⁶ It has submitted a statement of willingness to assume financial responsibility for the right-of-way, and has acknowledged that use of the right-of-way is subject to possible future reconstruction and reactivation for rail service as required under 49 CFR 1152.29. By letter filed April 27, 1999, DER states that it is only agreeable to negotiating with SALT for trail use for the line that it owns. SALT's request, insofar as it pertains to DER's line, complies with the requirements of 49 CFR 1152.29 and DER is willing to enter into negotiations concerning that line. Therefore, we will issue a NITU for the line to be abandoned and 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, DER 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. As noted above, SALT has also requested that a 180-day public use condition be imposed.⁷ SALT requests that: (1) DER be precluded from disposing of the rail corridor, other than the tracks, ties and signal equipment, except for public use on reasonable terms; and (2) DER be barred from removing or destroying potential trail-related structures such as bridges, trestles, and culverts. SALT submits that the conversion of this corridor to an alternate transportation use is in accordance with the stated policy position of the Harnett County Board of Commissioners and Dunn Area Travel and Tourism Authority. It states that the corridor provides habitat for wildlife in the rural section and greenways in the urban sections. SALT indicates that the 180-day time period is needed to complete negotiations with DER.

⁶ Interim trail use/rail banking only applies to a line following abandonment. Accordingly, a NITU can only be issued for DER's line.

⁷ SALT's request for a public use condition is also not applicable to the leased line and will not be imposed.

We have 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 our policy to impose them concurrently, subject to the execution of a trail use agreement. SALT 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 also will be imposed on the line to be abandoned commencing from the effective date of this decision and notice. If a trail use agreement is reached on a portion of the right-of-way, DER must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, 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 the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, DER is not required to deal exclusively with SALT, 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 exemption, as it relates to the abandonment only, 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.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt the above-described abandonment and discontinuance of service from the prior approval requirements of 49 U.S.C. 10903, subject to the employee protective conditions set forth in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979), and the conditions that DER shall: (1) consult with NGS at least 90 days prior to salvage activities in order to plan for the relocation of any station marker that will be disturbed or destroyed by abandonment activities; (2) leave intact all of the right-of-way, including bridges, trestles, and culverts (but not track, 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 any other interested person to negotiate the acquisition for public use of the line to be abandoned; and (3) comply with the interim trail use/rail banking procedures set forth below.

2. DER is directed to serve a copy of this decision on Swift Denim, General Utilities, Ready Mix Concrete and Mark Johnson within 5 days after 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 for the line to be abandoned, 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 service of this decision and notice, interim trail use may be implemented. If no agreement is reached by that time, DER may fully abandon its 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 July 12, 1999, 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 a \$1,000 filing fee. 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 August 1, 1999. Petitions to stay must be filed by July 19, 1999, and petitions to reopen must be filed by July 27, 1999.

10. Pursuant to the provisions of 49 CFR 1152.29(e)(2), DER shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned its line. If consummation has not been effected by DER's filing of a notice of consummation by July 2, 2000, 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

STB Docket No. AB-560 (Sub-No. 1X)

exists at the end of the 1-year period, the notice of consummation must be filed not later than 60 days after satisfaction, expiration or removal of the legal or regulatory barrier.

By the Board, Chairman Morgan, Vice Chairman Clyburn and Commissioner Burkes.

Vernon A. Williams
Secretary