

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-290 (Sub-No. 260X)

TENNESSEE RAILWAY COMPANY—ABANDONMENT EXEMPTION—
IN SCOTT COUNTY, TN

STB Docket No. AB-290 (Sub-No. 259X)

TENNESSEE RAILWAY COMPANY—ABANDONMENT EXEMPTION—
IN ANDERSON AND CAMPBELL COUNTIES, TN

Decided: June 16, 2005

By petition filed on February 28, 2005, in STB Docket No. AB-290 (Sub-No. 260X), Tennessee Railway Company (TNR) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon an approximately 27.01-mile line of railroad between milepost TE-0.95 near Oneida, and milepost TE-27.96 near Nick's Creek, in Scott County, TN.¹ Notice of the filing was served and published in the Federal Register on March 18, 2005 (70 FR 13231). On April 7, 2005, National Coal Corporation (NCC) filed a reply in opposition. A request for issuance of a notice of interim trail use (NITU) and for imposition of a public use condition was filed on May 31, 2005, by Cumberland Trail Conference (CTC).² The petition for exemption will be granted, subject to environmental, public use, trail use, and standard employee protective conditions.

¹ The line involved in STB Docket No. AB-290 (Sub-No. 260X) is part of a 42-mile railroad line that extends from Oneida to Devonia, TN. On December 30, 2004, in STB Docket No. AB-290 (Sub-No. 259X), TNR filed a notice of exemption to abandon the line between Nick's Creek (milepost TE-27.96) and Devonia (milepost TE-42.00). Notice of the exemption was served and published in the Federal Register on January 19, 2005. On May 20, 2005, National Coal Corporation (NCC) timely filed an offer of financial assistance (OFA) to purchase the 14.04-mile line segment. By decision served on May 25, 2005, NCC was found to be financially responsible and the effective date of the abandonment exemption was postponed pending resolution of the OFA process.

² The May 31 filing embraced STB Docket No. AB-290 (Sub-No. 259X), in which CTC is also requesting issuance of a NITU and imposition of a public use condition.

BACKGROUND

TNR, a wholly owned subsidiary of Norfolk Southern Railway Company (NSR), states that the line proposed for abandonment is the northern portion of a dead-end branch line located in a sparsely populated, mountainous area. The southern segment of the branch line—known as the Nick’s Creek-Devonia segment—has already been authorized for abandonment and is the subject of ongoing negotiations under the OFA provisions.

According to TNR, no shipments have moved over the line since March 2004, at which time the only active shipper on the line, United States Coal, Inc. (U.S. Coal), sold its coal mining operation and facilities at Smoky Junction, TN (near milepost TE-26.25), to NCC. TNR states that NCC, the potential shipper on the line, has asked that the line be retained for possible future use for shipments of coal from Smoky Junction, and that NCC has expressed some interest in purchasing the line. TNR indicates that, since NCC acquired the Smoky Junction operation, NCC has moved coal exclusively by truck from Smoky Junction to NCC’s larger loading facility on another NSR line at Turley, TN, which is approximately 20.5 miles from Smoky Junction via main highways.

TNR states that it experienced substantial avoidable losses and opportunity costs to retain, maintain and operate the line for several years prior to March 2004. According to petitioner, its parent NSR has anticipated for several years that the revenue from providing service over the line would not cover TNR’s costs of more extensive repair, rehabilitation and periodic program maintenance of the line. Petitioner adds that NSR negotiated with U.S. Coal as early as 2001 on plans to keep the line in service. These plans included revenue increases, revenue guarantees or sale of the line to U.S. Coal, sale to a shortline operator, or a combination of these actions. TNR says that NCC was also advised of these proposals prior to its purchasing the Smoky Junction facility. According to petitioner, NSR could not reach agreement with either U.S. Coal or NCC to either keep the line in operation at least at a break-even level or sell it at an agreed-upon price.

TNR asserts that revenues similar to those earned prior to March 2004, or even at levels 10% higher, would make no contribution to the recovery of its costs at current levels of rehabilitation and maintenance. TNR says that NCC cannot provide it with enough traffic or revenue to cover the costs to rehabilitate, maintain and operate the line, and adds that it has no guarantee from NCC that any rail traffic at all will move over the line in the future.

TNR claims that it suffered an avoidable loss of \$233,069 in the base year and \$214,344 in the forecast year. The loss would rise to \$359,652 during the forecast year if opportunity costs were considered. Due to significant deterioration of the line, petitioner estimates rehabilitation costs in excess of \$2 million just to bring the line up to minimum track safety standards. Also, according to TNR, certain additional rehabilitation expense for bridge work, totaling \$786,300, can be deferred only for about one additional year. Petitioner states that it can salvage or use the

rail and other material on the line more profitably elsewhere on its system. According to petitioner, it is currently bearing opportunity costs of \$237,623 on this line which has an estimated net liquidation value of \$1,815,820.

In reply, NCC states that the Board cannot and should not act on the petition without first directing NSR, on behalf of TNR, to submit additional information in accordance with 49 CFR 1121.4(c)(1)(i). Specifically, NCC states that NSR should be directed to submit further evidence concerning the future economic viability of the subject line. This evidence, NCC argues, should be based upon more accurate and reasonable projections of near-term coal traffic and service demands and the inadequacy of alternative modes of transport to meet those demands. NCC claims that TNR has dramatically understated its coal production volumes that prospectively could move over the line. That is especially true, NCC argues, if it or another entity acquires the Nick's Creek-Devonia segment pursuant to an OFA. NCC states that it has five new area mine permits that are either already approved or are in the late stages of approval. According to NCC, the substitution of "more realistic" coal traffic projections, potentially 4-5 times current levels, would completely change the avoidable loss and rehabilitation cost coverage calculations submitted by petitioner and could show that the segment is indeed sustainable.

NCC also asks that the Board, in any ruling on the petition for exemption, clarify that the net salvage value and rehabilitation cost estimates included in the petition shall have no presumptive effect for purposes of any future proceedings, including an OFA proceeding under 49 U.S.C. 10904. We must reject this request. As subsequently discussed, petitioner's calculations appear supported and reasonable. Consequently, they will have presumptive value in any future proceedings. However, should NCC file an OFA, it will have an opportunity at that time to rebut that presumption by challenging TNR's figures and offering its own.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without the Board's prior approval. Under 49 U.S.C. 10502, however, the Board must exempt a transaction or service from regulation 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.

In this case, detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy, and NCC's arguments to the contrary are without merit. Although asserting that TNR's revenue and cost calculations are unsupported and unreasonable, NCC provides no concrete evidence or calculations of its own to refute TNR's figures. Conversely, TNR has provided the methods and assumptions used to calculate the various data and has

disclosed the input sources used.³ We conclude that the potential for future traffic is more in line with TNR's estimates than NCC's. NCC speculates about the possibility of future mining activity, but does not provide substantive evidence that future coal production will significantly increase, or guarantee that it would even use TNR to haul coal over the line. NCC is not now using the line and has not requested rail service thereover, but seeks to have the line available for service in the event of future rail traffic. Under Board precedent, mere speculation about future traffic is not a sound basis upon which to deny an abandonment. See, e.g., Idaho Northern & Pacific Railroad Company—Abandonment Exemption—In Wallowa and Union Counties, OR, STB Docket No. AB-433X (STB served Dec. 13, 2001).

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 TNR of the costs of owning, rehabilitating, and maintaining the line [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 because there are no active rail shippers on the line. No shipments have moved over the line since March 2004 because, since that date, NCC has relied exclusively on trucks to move its coal to Turley, TN. Nevertheless, to ensure that NCC is informed of our action, TNR will be required to serve a copy of this decision and notice on shipper within 5 days of its service date and to certify to the Board that it has done so. Given the market power finding, it is not necessary to determine whether the proposed transaction is limited in scope.

As discussed, we believe that TNR has justified an exemption to abandon this segment of line between Oneida and Nick's Creek. However, we are also cognizant of the fact that, should TNR consummate the abandonment, the Nick's Creek-Devonia trackage, which deadends at Devonia, would become an island cut off from the interstate rail network. We also are aware that the Nick's Creek-Devonia trackage is the subject of an abandonment filed on December 30, 2004, and an OFA filed by NCC in STB Docket No. AB-290 (Sub-No. 259X), and that the parties are currently negotiating for the purchase by NCC of that segment. Should NCC in fact purchase that trackage, it could be cut off from the rail system by our actions here.

We are concerned about NCC possibly purchasing a line that could be isolated from the rail network. However, rather than force TNR to continue operating the northern segment, a line that is clearly losing money, we will grant the abandonment exemption and encourage NCC to file an OFA to purchase the segment, as it has suggested it might do. Moreover, we will hold the OFA process in STB Docket No. AB-290 (Sub-No. 259X) in abeyance to afford NCC (or any other interested party) the opportunity to file an OFA to acquire the northern segment. If an

³ On April 27, 2005, TNR filed, under seal, a copy of the land appraisal for both segments of line and other information that had been provided to NCC on April 19, 2005.

OFA is filed, we will provide that the OFA process proceeds concurrently for the purchase of both segments. NCC's interest is in keeping the entire 42-mile line active so that NCC may move traffic from Devonia north through Nick's Creek and Oneida. Purchase by the shipper of both segments will accomplish that goal and remedy the potential problem of traffic on the southern segment being isolated – a problem clearly within NCC's power to remedy. Consequently, we encourage NCC to file a new OFA, as outlined here.

Under 49 U.S.C. 10502(g), the Board may not use its 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, the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), will be imposed.

TNR 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. 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.

An environmental assessment (EA) was served on April 29, 2005, requesting comments by May 30, 2005.⁴ In the EA, SEA recommended that seven conditions be imposed on any decision granting abandonment authority.

SEA stated that by letter dated December 16, 2004, the U.S. Department of Commerce, National Geodetic Survey (NGS) identified three geodetic station markers on the line that may be affected by the proposed abandonment. Therefore, SEA recommended that a condition be imposed requiring TNR to consult with NGS prior to undertaking any salvage operations and, if salvage operations are expected to destroy or disturb any of the station markers, further requiring TNR to notify NGS not less than 90 days prior to commencement of such operations.

SEA also stated that, by letter dated January 20, 2005, the U.S. Fish and Wildlife Service (FWS) requested that, if any bridges are to be removed, Best Management Practices should be employed and silt barriers should be installed when working adjacent to streams to prevent runoff of sediment. SEA further stated that FWS has also requested that streambanks be reshaped to the original contour and reseeded with native vegetation beneficial to wildlife immediately following completion of bridge removal. Therefore, SEA recommended a condition that TNR be prohibited from salvaging or disposing of the right-of-way until consultation with FWS has been completed.

⁴ The due date set forth in the EA for the submission of comments (May 30) was a Federal Holiday. Comments, if any, were due by May 31, 2005.

SEA reported that the National Park Service, Southeast Regional Office (NPS), the Tennessee Department of Environment and Conservation, Division of Solid and Hazardous Waste (TDEC-S&HW), the Tennessee Wildlife Resources Agency (TN-WRA), and the Tennessee Department of Environment and Conservation, Division of Water Pollution and Control (TDEC-WPC) have not completed their review of the proposed abandonment. Therefore, SEA recommended that conditions be imposed prohibiting TNR from salvaging or disposing of the right-of-way until it completes consultations with these various agencies.

Finally, SEA stated that the Eastern Band of Cherokee Indians, Tribal Historic Preservation Office (THPO) asked that TNR first consult with it if the railroad anticipates any new earth disturbance activities stemming from salvage operations. SEA therefore initially recommended such a consultation condition.

Comments in response to the EA, and the proposed tribal historic condition in particular, were received from three native American tribes: the Mississippi Band of Choctaw Indians, the Eastern Shawnee Tribe of Oklahoma, and the Cherokee Nation of Oklahoma. SEA states that all three tribes indicated that they did not have any concerns regarding the proposed abandonment's potential effect on sites of religious or cultural importance. However, the Eastern Shawnee Tribe of Oklahoma did note that, if any human skeletal remains and/or any objects falling under the Native American Graves Protection and Repatriation Act (NAGPRA) are discovered, all salvage activities should stop immediately and appropriate persons, including state and tribal NAGPRA representatives, be contacted.

Based on the information provided, SEA recommends that the following condition be substituted for the previously recommended environmental condition relating to native American tribal concerns: In the event that any archaeological sites, human remains, funerary items or associated artifacts are discovered during TNR's salvage activities, TNR shall immediately cease all work and notify SEA, potentially affected Federally recognized tribes (the tribes), and the Tennessee Historical Commission (THC). SEA, the tribes, THC, and TNR shall then consult to determine whether any mitigation measures are necessary.

Therefore, the conditions recommended by SEA in the EA, as amended above, will be imposed. The proposed abandonment, as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

CTC submitted a late-filed request for the issuance of a NITU under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act) and for imposition of a public use condition under 49 U.S.C. 10905.⁵ CTC has submitted a statement of willingness to assume financial responsibility

⁵ The March 18, 2005 notice provided that trail use/rail banking requests were to be filed by April 7, 2005. However, in Aban. and Discon. of R. Lines and Transp. Under 49 U.S.C. 10903, 1 S.T.B. 894, 900 (1996) and 2 S.T.B. 311 (1997), the Board retained the policy of

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for the right-of-way, and has acknowledged that use of the right-of-way would be 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 June 6, 2005, TNR states that it is willing to negotiate with CTC for interim trail use. Because CTC's request complies with the requirements of 49 CFR 1152.29, and TNR is willing to enter into trail use negotiations, we will issue a NITU for the subject 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 (and if the line is not purchased or subsidized pursuant to an OFA), TNR 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 indicated in its EA that, following abandonment and salvage of the line, the right-of-way may be suitable for other public uses. CTC requests imposition of a 180-day public use condition. CTC states that the corridor runs largely along a scenic river in Scott, Campbell and Anderson Counties, TN, and passes directly across the newly formed Cumberland Trail State Scenic Trail of Tennessee. According to CTC, the corridor would extend the Cumberland Trail northward and southward along the New River and beyond, and in so doing, connect a public park to Oneida and provide trail proximity to the Big South Fork National River and Recreation Area. It adds that the corridor would make an excellent recreational trail and provides important wildlife habitat and open space, and that the conversion of the property to trail use is in accordance with local plans. CTC explains that the length of the requested condition, 180 days, would allow it to assemble and review title information, complete negotiations with the carrier, develop a trail plan, and gain necessary board approvals.

Persons who request a Trails Act condition may also request a public use condition 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 both conditions are appropriate, it is our policy to impose them concurrently, subject to the execution of a trail use agreement. CTC 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 and notice, will be imposed on the rail 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. If a trail use agreement is reached on a portion of the right-of-way, TNR must keep the remaining right-of-way intact for

(. . . continuation)

accepting filings after the due date when good cause is shown. Because there is no indication that CTC's late-filed request will prejudice any party, it will be accepted. See Wheeling & Lake Erie Railway Company—Abandonment Exemption—in Starke County, OH, STB Docket No. AB-227 (Sub-No. 10X), slip op. at 1 n.1 (STB served Nov. 7, 1997).

the remainder of the 180-day period to permit public use negotiations. 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, including trail use. Therefore, with respect to the public use condition, TNR is not required to deal exclusively with CTC, 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 OFA process under 49 U.S.C. 10904. As stated in Trails, 2 I.C.C.2d at 608, OFAs 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.

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 from the prior approval requirements of 49 U.S.C. 10903 the abandonment 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 the conditions that TNR shall: (1) consult with NGS prior to undertaking any salvage operations and, if salvage operations are expected to destroy or disturb any geodetic station markers, notify NGS not less than 90 days prior to commencement of such operations; (2) be prohibited from salvaging or disposing of the right-of-way until consultation with FWS has been completed; (3) in the event that any archaeological sites, human remains, funerary items or associated artifacts are discovered during TNR's salvage activities, immediately cease all work and notify SEA, the tribes, and THC; SEA, the tribes, THC, and TNR shall then consult to determine whether any mitigation measures are necessary; (4) be prohibited from salvaging or disposing of the right-of-way until it completes consultation with NPS; (5) be prohibited from salvaging or disposing of the right-of-way until it completes consultation with TDEC-S&HW; (6) be prohibited from salvaging or disposing of the right-of-way until it completes consultation with TN-WRA; and (7) be prohibited from salvaging or disposing of the right-of-way until it completes consultation with TDEC-WPC.

2. TNR is directed to serve a copy of this decision and notice on NCC within 5 days after the service date of this decision and notice 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 the 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. In the absence of an OFA that leads to the purchase or subsidy of the line under 49 U.S.C. 10904, 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, and if no trail use agreement is reached by that time, TNR may fully abandon the line, provided the conditions imposed above are met.

7. The OFA process in STB Docket No. AB-290 (Sub-No. 259X) will be held in abeyance to give NCC the opportunity to file an OFA for the line involved in this proceeding. If an OFA for the line involved in this proceeding is filed, the OFA process will proceed concurrently for the purchase of both segments.

8. 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 June 27, 2005, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10504 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).

9. 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.”**

10. Provided no OFA has been received, this exemption will be effective on July 17, 2005. Petitions to stay must be filed by July 5, 2005, and petitions to reopen must be filed by July 12, 2005.

11. Pursuant to the provisions of 49 CFR 1152.29(e)(2), TNR 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 TNR's filing of a notice of consummation by June 17, 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 not 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