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SERVICE DATE - OCTOBER 25, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34191

CHARLES M. SOTELO-PETITION FOR DECLARATORY ORDER-LINE
RELOCATION IN COCHISE COUNTY, AZ

Decided: October 24, 2002

On April 23, 2002, Mr. Charles Sotelo, a real estate broker and owner of Valle Realty & Development of Bisbee, AZ, asked that the Board issue an order declaring that the construction of a 1,775-foot rail line from a point on the Douglas Branch, about a mile east of the city of Naco, in Cochise County, AZ, to the international border with Mexico is a line relocation and as such does not require prior Board approval under 49 U.S.C. 10901. For the reasons discussed below, the request for a declaratory order will be denied.

BACKGROUND

SWKR Operating Co., Inc. (SWKR), d/b/a San Pedro & Southwestern Railway Co. (San Pedro) purchased the Douglas Branch from Southern Pacific Transportation Company (SPT) in 1994. See SWKR Operating Co., Inc.-Acquisition and Operation Exemption-Southern Pacific Transportation Co., Finance Docket No. 32620 (ICC served Dec. 23, 1994) (SWKR Acquisition).¹ At that time, the Douglas Branch extended 84.90 miles in a southeasterly direction from milepost 1032.84 at Benson to the end of the line at milepost 1107.96 at Douglas

¹ SWKR was formed by Kyle Railways, Inc. (Kyle), to purchase and operate the Douglas Branch. See SWKR Acquisition, and Kyle Railways, Inc.-Continuance in Control Exemption-SWKR, Finance Docket No. 32621 (ICC served Dec. 23, 1994). Prior to the purchase, SPT leased the Douglas Branch to San Pedro, see San Pedro & Southwestern Railway Co.-Acquisition and Operation Exemption-Southern Pacific Transportation Co., Finance Docket No. 32084 (ICC served June 30, 1992), and SWKR operated it under contract to San Pedro, see SWKR Operating Co.-Abandonment Exemption-in Cochise County, AZ, STB Docket No. AB-441 (Sub-No. 2X) (STB served Feb. 14, 1997) at 3 n.5 (SWKR Abandonment). San Pedro's lease was assigned to SWKR when San Pedro was unable to acquire the Douglas Branch. SWKR Acquisition at 1 n.2.

in Cochise County, AZ.² As a result of two abandonments, the Douglas Branch now extends from milepost 1032.84 at Benson to milepost 1055.90 at Charleston.³

Mr. Sotelo seeks to relocate a 2,090-foot line that originated on the Douglas Branch in Naco, passed through the center of Naco, and terminated at the Mexican border where it connected with Ferrocarriles Nacionales de Mexico. This line is no longer in place, and the portion of the Douglas Branch that accessed it is no longer in operation as a result of the exemption granted in SWKR Abandonment.

According to Mr. Sotelo, the 2,090-foot line had been removed before SWKR was acquired by RailAmerica, Inc. (RailAmerica), in 2001, see RailAmerica, Inc.–Control Exemption–StatesRail Acquisition Corp. and StatesRail, Inc., STB Finance Docket No. 34129 (STB served Dec. 28, 2001),⁴ but had not been abandoned based on SWKR, SPT, and Board records.⁵ He also contends that the 41.5-mile portion of the Douglas Branch that ran through Naco and accessed the 2,090-foot line was never abandoned. Instead, he states that the 41.5-mile segment was rail banked by San Pedro Trails, Inc. (SP Trails), an SWKR affiliate, see SWKR Abandonment (STB served July 7, 1998), that SP Trails has continuously managed the

² The milepost designation changed at Fairbank from milepost 1050.57 to milepost 1046.39. Included in the purchase was the Bisbee Branch which extended 5.6 miles from Bisbee Junction, milepost 1085.00 on the Douglas Branch, to the end of the line at Bisbee, milepost 1090.60.

³ In SWKR Operating Co., Inc.–Abandonment Exemption–in Cochise County, AZ, Docket No. AB-441 (Sub-No. 1X) (ICC served Oct. 12, 1995), SWKR was granted an exemption to abandon 17.26 miles of rail line including: (1) the entire Bisbee Branch; (2) a segment of the Douglas Branch between milepost 1097.30 near Paul Spur and milepost 1107.96 near Douglas; and (3) a 1-mile line from milepost 1107.00 to the Mexican Border at Agua Prieta. In SWKR Abandonment, SWKR was granted an exemption to abandon a 41.5-mile segment of the Douglas Branch between milepost 1055.8 near Charleston and milepost 1097.30 near Paul Spur.

⁴ Before the acquisition by RailAmerica, Kyle and its rail subsidiaries, including SWKR, were acquired by StatesRail, Inc. See StatesRail, Inc.–Acquisition of Control Exemption–Kyle Railways, Inc., STB Finance Docket No. 33340 et al. (STB served Apr. 17, 1997).

⁵ SWKR filed a virtually identical petition for declaratory order on August 27, 1999. That petition was withdrawn at SWKR's request, and the proceeding was discontinued in a decision served on November 30, 1999. In that petition, SWKR stated that the 2,090 feet of track had already been removed when it acquired the Douglas Branch in 1994 and that it could find no record of abandonment in SPT's or the Board's records.

right-of-way as trail operator, and that the track had not been removed and remains available for the resumption of rail service.

SWKR and SP Trails (Respondents) filed a reply on May 13, 2002, and, Mr. Sotelo filed a reply to their reply on June 6, 2002. Respondents filed a motion to reject or strike on June 26, 2002. They claim that Mr. Sotelo failed to serve them with a copy of his reply or give them notice that it had been filed, see 49 CFR 1104.12(a), and that Mr. Sotelo's reply violated the rule against replies to replies, see 49 CFR 1104.13(c). Mr. Sotelo filed a further reply on July 16, 2002. Because a proceeding is not being instituted, Respondents' motion need not be considered.

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. 554(e) and 49 U.S.C. 721, this agency has discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty. A review of Mr. Sotelo's petition indicates that there is no reason to institute a declaratory order proceeding.

Under 49 U.S.C.10901(a), a person must obtain Board authority to construct an extension to any of its railroad lines or an additional rail line. But Mr. Sotelo claims that the proposed construction "is nothing more than the relocation of a railroad line never authorized for abandonment" and as such is not subject to the Board's jurisdiction under 49 U.S.C. 10901(a). He claims that the proposed line will not invade new territory within the meaning of City of Detroit v. Canadian National Ry. Co., et al, 9 I.C.C.2d 1208 (1993) (City of Detroit), aff'd sub nom. Detroit/Wayne County Port Authority v. ICC, 59 F.3d 1314 (D.C. Cir. 1995), and comes within the Board's holding in Union Pacific RR Co.–Petition–Rehabilitation of MO-KS-TX RR, 3 S.T.B. 646 (1998) (UP Rehabilitation).

Mr. Sotelo does not own the line he proposes to relocate and SWKR is not interested in participating in such a project at this time.⁶ As a result, his proposed construction cannot be considered a line relocation, and his citations to City of Detroit and UP Rehabilitation are not on point because those cases involved lines owned by the rail carrier entities seeking to construct a line in a new location. The line Mr. Sotelo seeks to construct is an entirely new rail line. Persons seeking to construct new rail lines, which by definition would extend into new territory, must apply for authority under 49 U.S.C. 10901 or petition for an exemption under 49 U.S.C.

⁶ While it is not altogether clear who owns the 2,090-foot line through Naco, there is no indication that any possible rail carrier owner is interested in the project.

10502.⁷ Thus, if he wishes to construct a 1,775-foot rail line, Mr. Sotelo would need to obtain Board authorization under section 10901.

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

It is ordered:

1. The petition for a declaratory order is denied.
2. This decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary

⁷ See, e.g., Alameda Corridor Construction Application, Finance Docket No. 32830 (STB served May 13, 1996) (municipalities granted authority to construct a 20-mile rail corridor to serve their ports); and Public Service Company of Colorado—Construction Exemption—Pueblo County, CO, STB Finance Docket No. 33862 (STB served Aug. 23, 2000, and Jan. 8, 2001) (utility granted an exemption to construct 1,500-foot rail line to serve one of its power plants), appeal dismissed sub nom. Burlington Northern and Santa Fe Railway Co. v. STB, No. 00-1115 (D.C. Cir. 2001).