

ENTERED
Office of Proceedings
October 9, 2012
Part of
Public Record

BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS
2401 PENNSYLVANIA AVENUE, NW
SUITE 300
WASHINGTON, DC 20037

TELEPHONE: (202) 663-7820
FACSIMILE: (202) 663-7849

ROBERT A. WIMBISH

(202) 663-7824 (Direct Dial)
E-Mail: rwimbish@bakerandmiller.com

October 9, 2012

VIA E-FILING

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: *Norfolk Southern Railway Company – Abandonment and Discontinuance
of Service Exemption – In Lake County, Indiana, and Cook County,
Illinois, STB Docket No. AB-290 (Sub-No. 336X)*

Dear Ms. Brown:

I am writing on behalf of Norfolk Southern Railway Company (“NSR”) in response to a letter filing dated September 28, 2012, and received by the Board on October 1, 2012, submitted by Openlands on behalf of itself and several other entities.¹ Openlands requests Board issuance of a notice of interim trails use (“NITU”) and a public use condition (“PUC”), both of which would apply to the entire length of the NSR-owned rail line extending between milepost JH 12.80 and milepost JH 19.10.² Openlands intends to use the NITU and/or PUC processes to secure the Eastern Line Segment’s right-of-way for recreational trail purposes.

NSR is not willing to negotiate an interim trails use arrangement for the Eastern Line Segment, and, accordingly, the Board may not issue the requested NITU. Similarly, NSR is not amenable to Openlands’ PUC request, and would rather it be denied, but NSR would accept the imposition of a PUC if the Board were to make clear, consistent with agency precedent, that the condition shall not interfere with or preclude the use of all or any portion of the NSR right-of-

¹ Openlands says it is advancing the interests of 13 separate entities in Illinois and Indiana, none of which has filed separately in support of Openlands’ filing. NSR understands that Openlands is acting in harmony with these other entities, but that, in accordance with 49 C.F.R. §§ 1103.2 and 1103.3, it is not acting as the legal representative of the 13 listed entities.

² This roughly 6.3-mile line was referred to in NSR’s abandonment notice of exemption filing (the “NSR Abandonment Notice”), and will be referred to herein, as the “Eastern Line Segment.”

BAKER & MILLER PLLC

Cynthia T. Brown

October 9, 2012

Page 2

way for public purposes *other than* a rail trail, in particular the construction upon NSR right-of-way of new highway infrastructure associated with a rail-highway grade separation, which was the primary purpose for NS seeking abandonment authority in the first place.

As explained in its Abandonment Notice, NSR sought to abandon the Eastern Line Segment to facilitate construction by the Illinois Department of Transportation (“IDOT”) of a grade separation for U.S. Route 30 in Lynwood, Illinois – a project included among the conditions imposed by the Board on its approval of Canadian National Railway Company’s (“CN”) acquisition of control of Elgin, Joliet & Eastern Railway (“EJ&E”).³ The construction costs associated with this grade separation will be apportioned between CN/EJ&E and the State of Illinois through IDOT. CN/EJ&E, IDOT and NSR agree that the most cost-effective and practicable grade separation design would entail the use of a portion of NSR’s parallel-running and currently inactive Hartsdale Industrial Track (the “Hartsdale IT”).⁴ Accordingly, NSR has entered into an agreement with CN/EJ&E pursuant to which NSR would abandon the Eastern Line Segment of the Hartsdale IT and convey to CN/EJ&E (or its designee – most likely, IDOT) a portion of the underlying right-of-way between roughly milepost JH 15.80 and milepost JH 15.90 (the “Pier Segment”) for the installation of overpass bridge piers.

NSR is concerned that imposition of the PUC sought by Openlands could interfere with plans to utilize a portion of the abandoned Hartsdale IT for the U.S. Route 30 grade separation project. In order to avoid delaying the project or creating uncertainty regarding use of the more efficient configuration for that project, it is important that any PUC imposed clearly permit use of the Hartsdale IT for the overpass project. Without use of that right-of-way, the costs of the grade separation would increase considerably and the project could be delayed. As IDOT is sharing in those costs, this would place a greater burden on taxpayers as well as CN/EJ&E.

Under 49 U.S.C. § 10905 and 49 C.F.R. § 1152.28, the Board has considerable latitude to choose whether or not to impose a PUC depending upon whether the agency finds that the condition would promote public purposes. Here, Openlands has advanced the idea of a recreational rail trail that, while promoting one type of public purpose, potentially conflicts with another public purpose – namely, the cost-effective and timely delivery of a rail-highway grade separation project that the Board has ordered to protect the public interest. NSR was very clear in the Abandonment Notice that the subject rail line abandonment was intended to facilitate a particular public purpose – “to serve as land upon which . . . infrastructure may be placed as part of the STB-mandated U.S. Route 30 grade separation that CN/EJ&E [and IDOT are] planning to

³ Canadian Nat’l Ry. and Grand Trunk Corp.—Control—EJ&E W. Co., FD 35087 (STB served Dec. 24, 2008).

⁴ IDOT has developed an alternative grade separation plan out of a concern that NSR might be unable to abandon its rail line in time for IDOT to meet pre-set funding deadlines. The alternative IDOT plan avoids the use of NSR-owned property, but it would entail substantially increased construction and maintenance costs.

BAKER & MILLER PLLC

Cynthia T. Brown
October 9, 2012
Page 3

build in Lynwood, Illinois.”⁵ Practically speaking, a PUC for the Pier Segment could be unnecessary, because NSR already has reached an agreement with CN/EJ&E committing that portion of the Eastern Line Segment right-of-way for a specific public purpose (the overpass).

Although it would prefer that there be no PUC imposed (or that it exclude the Pier Segment), NSR would not object to Board issuance of a PUC applicable to the entire Eastern Line Segment, *provided* that such a PUC – (1) does not endorse one public purpose over another or bar public re-purposing of on any portion of the Eastern Line Segment’s right-of-way during the 180-day negotiating period; and (2) does not result in postponing NSR-CN/EJ&E-IDOT efforts toward overpass planning and construction.⁶ Statements of agency neutrality concerning overlapping or potentially competing alternative public purposes are commonly articulated when a PUC is granted, with the Board often employing the following language:

[A] public use condition is not imposed for the benefit of any one potential purchaser, but rather to provide an opportunity for any interested person to acquire the ROW that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, [the abandoning carrier] is not required to deal exclusively with [entity seeking the PUC], but may engage in negotiations with other interested persons.⁷

The above-quoted language is especially appropriate here. Moreover, to ensure that Openlands’ requested PUC for the entire Eastern Line Segment does not block or delay the use of the Pier Segment right-of-way for highway overpass purposes, NSR requests that, should the Board grant the PUC request, it should also specifically provide that the condition is not intended to interfere with or preclude the possible near-term deployment of any portion of the right-of-way for the installation of the U.S. Route 30 overpass.⁸

⁵ NSR Abandonment Notice at 7.

⁶ On balance, however, NSR respectfully submits that the public purpose is best served by the timely and cost-effective delivery of the grade separation that makes use of the Pier Segment.

⁷ Jackson, Gordonville and Delta Railroad Company – Abandonment Exemption – In Cape Girardeau County, MO., STB Docket No. AB 1088X, slip op. at 5 (STB served Jul. 2, 2012); See also, e.g., Union Pacific Railroad Company – Abandonment Exemption – In Polk County, Iowa, STB Docket No. AB 33 (Sub-No. 310X), slip op. at 3 (STB served Sep. 24, 2012); South Carolina Central Railroad Company, LLC – Abandonment Exemption – In Chesterfield and Darlington Counties, S.C., STB Docket No. AB 312 (Sub-No. 3X), slip op. at 2 (STB served Jun. 21, 2012); Central Railroad Company of Indianapolis – Abandonment Exemption – In Howard County, Ind., STB Docket No. AB 511 (Sub-No. 6X), slip op. at 3 (STB served Jun. 15, 2012).

⁸ Under a typical PUC, the Board directs the abandoning carrier to keep the right-of-way (or the portion for which the PUC is sought) intact. That provision arguably could, absent the requested clarification, delay or otherwise interfere with CN’s and IDOT’s near-term plans for highway overpass construction upon the Pier Segment right-of-way by precluding public disposition of

BAKER & MILLER PLLC

Cynthia T. Brown
October 9, 2012
Page 4

For the foregoing reasons, Openlands' request for issuance of an NITU must be denied. Similarly, while NSR would prefer that the Board not grant Openlands' PUC request or at least exclude the Pier Segment as already dedicated to a chosen alternative public purpose, NSR is nevertheless willing to accept the imposition of the PUC Openlands seeks, provided that the PUC does not endorse one particular public purpose over another and include language making clear that the PUC is consistent with and is not intended to interfere with or delay plans to use a portion of the Eastern Line Segment's right-of-way for the rail-highway grade separation project.

Sincerely,



Robert A. Wimbish
Attorney for Norfolk Southern
Railway Company

cc: Maquiling Parkerson (Norfolk Southern)
Marc Kirchner (Norfolk Southern)
Kearston St. Dennis (Norfolk Southern)
David Hirsh (Canadian National)
Gerald W. Adelman (Openlands)
All parties of record

any portion of the right-of-way for 180 days. NSR believes that the PUC process should not be used to impede the delivery of a project promoting a public purpose that has prompted NSR to invoke the STB's abandonment processes in the first place. On the other hand, as currently planned, the portion of the NSR right-of-way targeted for overpass pier installation lacks any "trail-related" structures such as (bridges, trestles, tunnels, or culverts), so pier installation would not necessarily conflict with standard PUC conditioning language in that specific regard.