

SERVICE DATE – MARCH 20, 2020

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 290 (Sub-No. 406X)

NORFOLK SOUTHERN RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN
THE CITY OF FORT WAYNE, IND.

Digest:¹ This decision allows Norfolk Southern Railway Company to abandon an approximately 2.29-mile rail line in the City of Fort Wayne, Ind., subject to standard employee protective conditions.

Decided: March 19, 2020

On December 6, 2019, Norfolk Southern Railway Company (NSR) filed a petition under 49 U.S.C. § 10502 for exemption from the prior approval requirements of 49 U.S.C. § 10903 to abandon approximately 2.29 miles of rail line, a part of what was previously known as the Fourth Street Industrial Track, extending from milepost GI 0.0 to milepost GI 2.29 in the City of Fort Wayne, Allen County, Ind. (the Line). Notice of the petition was served and published in the Federal Register on December 26, 2019 (84 Fed. Reg. 71,066).²

No comments concerning the proposed abandonment were filed. The Board will grant the exemption from 49 U.S.C. § 10903, subject to standard employee protective conditions.

BACKGROUND

According to the petition, the Line has been dormant for nearly two decades. (NSR Pet. 11.) NSR claims that a portion of the Line is needed by the City of Fort Wayne (the City) for a road improvement project. (Id. at 13, 15.) In addition, NSR states that portions of the Line have been salvaged and parts of the right-of-way have been sold.³ (Id. at 10 n.13.) According to

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² A corrected notice was served on January 2, 2020.

³ NSR states that all tracks from milepost GI 0.0 to milepost GI 2.04 have been removed. (NSR Pet. 10 n.13.) NSR indicates that it also sold a segment of the right-of-way between milepost GI 0.44 and milepost GI 0.92 in October 2001. (Id. at 10 n.11.) Additionally, portions of the right-of-way between milepost GI 1.73 and milepost GI 1.85 were sold in April 2008 and June 2008. (Id. at 10.) Another segment of the right-of-way between milepost GI 0.92 and milepost GI 1.04 was sold in October 2005. (Id. at 11.)

NSR, it salvaged and sold portions of the Line without seeking abandonment authority from the Board because it had determined that the Line was excepted track governed by 49 U.S.C. § 10906, for which abandonment authority is not required.⁴ (*Id.* at 10.) NSR states that this determination was made in 2004 but that its records contain no explanation of the basis for its determination. (*Id.*)

NSR states that further research into the history of the Line conducted in 2017, in contemplation of selling additional portions of the Line, caused NSR to question whether the Line was railroad line governed by 49 U.S.C. § 10901 (rather than excepted track). (*Id.* at 4.) NSR states that it now believes that, on balance, the facts suggest that the Line is governed by § 10901 and that abandonment authority is therefore required to terminate its service obligation with respect to the Line. (NSR Pet. 11.) NSR recognizes that the name of the track and its use since 1995, when NSR's predecessor Norfolk and Western Railway Company (N&W) purchased the track, suggest that the track is excepted track. (*Id.* at 4, 11.) However, NSR states, the history of the Line shows that it was originally part of an old Fort Wayne and Jackson and Saginaw Railroad Company mainline between Jackson, Mich., and Fort Wayne, Ind., and therefore remains railroad line subject to § 10901 until appropriate abandonment authority is obtained. (*Id.* at 4.) Moreover, NSR asserts that the following additional factors weigh in favor of finding that the Line is regulated railroad line, rather than excepted track: (1) in 1995, N&W sought and obtained regulatory authority to acquire the Line from Consolidated Rail Corporation (Conrail), (*id.* at 5-7);⁵ (2) the purchase and sale agreement associated with that acquisition indicates that the parties viewed the Line as railroad line, (*id.* at 7-8); (3) Conrail previously sought abandonment authority for other portions of the Fourth Street Industrial Track immediately to the north and to the south of the Line, (*id.* at 8-9);⁶ and (4) in 2000, when a shipper expressed interest in purchasing a portion of the Line from NSR, the parties drafted an agreement that assumed NSR would seek abandonment authority and granted an easement to NSR over the Line so that NSR could continue providing service until it obtained abandonment authority from the Board, (*id.* at 9-10).⁷

⁴ On October 23, 2019, the Board rejected a verified notice of exemption filed by NSR to abandon the Line, finding that the class exemption procedure was inappropriate given the factual and legal issues raised, including that various portions of the Line had been sold without Board authority and that the notice reflects uncertainty as to whether the Line was railroad line governed by 49 U.S.C. § 10901 or excepted track governed by 49 U.S.C. § 10906. Norfolk S. Ry.—Aban. Exemption—in the City of Fort Wayne, Ind., AB 290 (Sub-No. 403X) (STB served Oct. 23, 2019).

⁵ Norfolk & W. Ry.—Purchase & Operation Exemption—Consol. Rail Corp. Line Between Fort Wayne and Warsaw, Ind., FD 32736 (ICC served Aug. 29, 1995).

⁶ Consol. Rail Corp.—Aban.—Fourth Street Indus. Track in Fort Wayne, Ind., AB 167 (Sub-No. 756N) (ICC served Jan. 10, 1992); Conrail Aban. in Allen Cty., Ind., AB 167 (Sub-No. 927N) (ICC served Jan. 16, 1986).

⁷ That transaction was never completed.

NSR asserts that granting the petition is appropriate because no shippers have sought service on the Line in nearly two decades and abandonment will help facilitate both the completion of a planned road improvement project by the City at the northern end of the Line and pending transactions with other parties involving other portions of the Line. (*Id.* at 11-13.)

DISCUSSION AND CONCLUSIONS

Abandonment of a railroad line governed by § 10901 requires the Board's prior authorization (either approval under 49 U.S.C. § 10903 or an exemption under 49 U.S.C. § 10502), while abandonment of § 10906 excepted track does not. Here, the Board agrees with NSR that the weight of evidence indicates that the Line is railroad line governed by § 10901.

The Line was originally part of the Fort Wayne and Jackson and Saginaw Railroad Company's mainline (i.e., a railroad line under § 10901). (NSR Pet. 4, 12.) Because the Line was originally a railroad line under § 10901, it remains so until abandonment authority is obtained and exercised, regardless of a railroad's subsequent use of the track or other actions with respect to the track. See Atchison, Topeka & Santa Fe Ry.—Aban. Exemption—in Lyon Cty., Kan., AB 52 (Sub-No. 71X), slip op. at 5 (ICC served June 17, 1991); see also Chelsea Prop. Owners—Aban.—Portion of the Consol. Rail Corp.'s W. 30th St. Secondary Track in New York, N.Y., 8 I.C.C.2d 773, 790-91 (1992), aff'd sub nom. Consol. Rail Corp. v. ICC, 29 F.3d 706 (D.C. Cir. 1994). In this case, there is no indication that the Line was abandoned⁸ and therefore no indication that the Line ever ceased to be a railroad line. The Board and its predecessor, the Interstate Commerce Commission, have also consistently considered the Fourth Street Industrial Track a railroad line in previous decisions.⁹

The remainder of the evidence consists of the treatment of the Line by railroads at various points in time as either railroad line or excepted track. However, as noted above, where the track was previously part of a § 10901 railroad line, the Board does not consider the subsequent unilateral actions of a railroad to be determinative of the status of a track. Even if the Board did consider such evidence relevant, in this case, the evidence would still weigh in favor of the conclusion that the Line is railroad line rather than excepted track. Specifically, both Conrail and N&W viewed the Line as railroad line,¹⁰ and although NSR in the past has sold parts

⁸ NSR states that it believes that the Line was not part of the Final System Plan (FSP) designating the rail properties to be transferred pursuant to the Regional Rail Reorganization Act of 1973 (3R Act). (NSR Pet. 8-9.) Because no party has challenged this assertion, the Board need not address that issue and, as a result, retains jurisdiction to determine the current status of the Line. Cf. Consol. Rail Corp. v. STB, 571 F.3d 13, 20 (D.C. Cir. 2009) (finding that only the Special Court designated under the 3R Act has jurisdiction to decide controversies requiring an interpretation of the FSP).

⁹ See supra notes 5-6.

¹⁰ As noted above, Conrail sought agency authority to abandon parts of the Fourth Street Industrial Track immediately to the north of the Line and immediately to the south of the Line in 1986 and 1992, respectively, and in 1995, N&W sought authority to acquire the Line from Conrail. See Norfolk & W. Ry., FD 32736; Consol. Rail Corp., AB 167 (Sub-No. 756N);

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of the Line under the assumption that it was excepted track, it recently undertook a thorough review of the Line's history and ultimately concluded that it was and remains a railroad line. (NSR Pet. 10-11.)

Because the record supports the conclusion that the Line is railroad line governed by § 10901, NSR must obtain Board authority before the Line may be abandoned. For the reasons explained below, the Board will grant NSR's petition, but NSR should take appropriate steps to avoid unauthorized dispositions of railroad lines in the future.

Exemption from 49 U.S.C. § 10903. Under 49 U.S.C. § 10502, 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 (RTP) of 49 U.S.C. § 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not needed to protect shippers from the abuse of market power.

Detailed scrutiny of the proposed abandonment under 49 U.S.C. § 10903 is not necessary to carry out the RTP in this case. The record indicates that the Line has not been used for nearly two decades and there are no prospects for new shippers on the Line. (NSR Pet. 11, 13.) Under these circumstances, granting an exemption would expedite regulatory decisions, foster sound economic conditions in transportation, reduce regulatory barriers to exit, and provide for the expeditious handling of this proceeding. 49 U.S.C. § 10101(2), (5), (7), (15). Other aspects of the RTP will not be adversely affected by the use of the exemption process.

Similarly, regulation of the proposed abandonment is not necessary to protect shippers from the abuse of market power because, as discussed above, there have been no active shippers on the Line for nearly two decades and there is no known potential for future rail activity on the Line.¹¹ (NSR Pet. 13.) Further, no party has filed in opposition to the proposed abandonment.

Employee Protection. 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 Board will impose upon NSR the employee protective conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979).

Environmental and Historic Review. NSR submitted a combined environmental and historic report with its petition and has notified the appropriate federal, state, and local agencies

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Conrail Aban. in Allen Cty., Ind., AB 167 (Sub-No. 927N). The purchase and sale agreement associated with N&W's acquisition of the Line also indicates that N&W and Conrail viewed the Line as railroad line governed by § 10901. (See NSR Pet. 7.)

¹¹ Because this decision finds that regulation is not needed to protect shippers from the abuse of market power, the Board need not determine whether the transaction is limited in scope. See 49 U.S.C. § 10502(a)(2).

of the opportunity to submit information concerning the environmental impacts of the proposed abandonment. See 49 C.F.R. §§ 1105.7, 1105.8, 1105.11. The Board's Office of Environmental Analysis (OEA) has examined the report, verified the data it contains, and analyzed the potential effects of the proposed action on the quality of the human environment.

In a Draft Environmental Assessment (Draft EA) served on February 4, 2020, OEA concluded that, as proposed, the abandonment of the Line would not significantly affect the quality of the human environment. Comments on the Draft EA were due by March 6, 2020. The Indiana Department of Natural Resources, Division of Historic Preservation and Archaeology (State Historic Preservation Office or SHPO) submitted a comment stating that it concurred with OEA's determination that the proposed abandonment would have no adverse effect on any historic resources listed in or eligible for inclusion in the National Register of Historic Places. The SHPO also noted that it would need to assess any future land disturbance activities for potential historic deposits and any prehistoric or historic archaeological artifacts or human remains. No other comments were received.

In the Final Environmental Assessment, issued March 10, 2020, OEA noted that there would be no salvage or other land disturbance activities as a result of the proposed abandonment and therefore recommended no environmental or historic preservation conditions. Based upon OEA's assessment, the Board concludes that the proposed abandonment would not significantly affect either the quality of the human environment or the conservation of energy resources.

Offers of Financial Assistance. Because no formal expressions of intent to file an offer of financial assistance (OFA) to acquire the Line or subsidize continued rail service were filed by the January 6, 2020 deadline, the Board will not consider OFAs in this case.

It is ordered:

1. Under 49 U.S.C. § 10502, the Board exempts from the prior approval requirements of 49 U.S.C. § 10903 the abandonment of the Line, as described above, subject to the employee protective conditions in Oregon Short Line.

2. Petitions to stay and petitions to reopen must be filed by April 6, 2020.

3. This exemption will be effective on April 19, 2020.

4. Pursuant to 49 C.F.R. § 1152.29(e)(2), NSR 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 NSR's filing of a notice of consummation by March 20, 2021, 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 one-year period, the notice of consummation must be filed no later than 60 days after the satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Board Members Begeman, Fuchs, and Oberman.