

SERVICE DATE – JANUARY 22, 2021

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 1303X

SOMERSET RAILROAD CORPORATION—ABANDONMENT EXEMPTION—IN
NIAGARA COUNTY, N.Y.

Digest:¹ This decision permits the abandonment of approximately 13.39 miles of rail line in Niagara County, N.Y., subject to trail use, public use, environmental, and standard employee protective conditions.

Decided: January 21, 2021

On October 7, 2020, Somerset Railroad Corporation (SRC), a Class III rail carrier, filed a petition under 49 U.S.C. § 10502 for exemption from the prior approval requirements of 49 U.S.C. § 10903 to abandon an approximately 13.39-mile rail line, extending from milepost 2.2 to a power plant located at the end of the line, in Niagara County, N.Y. (the Line). Notice of the petition was served and published in the Federal Register on October 27, 2020 (85 Fed. Reg. 68,115). As discussed below, the Board will grant the exemption, subject to trail use, public use, environmental, and standard employee protective conditions.

BACKGROUND

According to SRC, the Line was constructed to provide rail service to the Somerset power generation station, which was decommissioned as of March 31, 2020, and had been the sole shipper on the Line. (Pet. 1-2.) SRC states that it last provided rail service to the power plant in December 2019 and that the Line cannot be used for overhead traffic because it is stub-ended. (Id. at 2-3.)² Riesling Power LLC, which owns both SRC and the decommissioned power plant, states that it no longer needs rail service and that it supports the proposed abandonment. (Id. at Ex. D.)

On November 16, 2020, the Town of Newfane, N.Y. (the Town), requested issuance of a notice of interim trail use or abandonment (NITU) to negotiate with SRC to establish interim

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 Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

² SRC states that it has been using the Line to move the power plant’s coal hopper cars to be scrapped, and that SRC anticipates salvaging the track, rail ties, and other track materials following abandonment but intends to leave the bridges in place. (Pet. 2.)

trail use and railbanking on the Line under the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d), and imposition of a public use condition under 49 U.S.C. § 10905 for the right-of-way. The New York State Office of Parks, Recreation and Historic Preservation (OPRHP) also filed a request for imposition of a public use condition on November 16, 2020. In a response filed on November 25, 2020, SRC notified the Board that it is willing to negotiate an agreement for interim trail use with the Town and stated that, although it does not believe that a public use condition is necessary, it takes no position on the requests for a public use condition.

DISCUSSION AND CONCLUSIONS

Exemption from 49 U.S.C. § 10903. Pursuant to 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 (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 rail service was last provided on the Line in December 2019, that the sole shipper on the Line no longer needs rail service and supports the proposed abandonment, and that the Line cannot be used for overhead traffic. (Pet. 1-3; *id.* at Ex. D.) 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. *See* 49 U.S.C. § 10101(2), (5), (7), (15). Other aspects of the RTP would not be adversely affected by use of the exemption process.

Regulation of the proposed abandonment is also not needed to protect shippers from the abuse of market power. As discussed above, the sole shipper on the Line no longer needs rail service and supports the proposed abandonment, (Pet. 2-3; *id.* at Ex. D), and the Line cannot be used for overhead traffic, (Pet. 3).³

Employee Protection. Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a rail 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 SRC 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. SRC submitted a combined environmental and historic report with its petition and has notified the appropriate federal, state, and local agencies of the opportunity to submit information concerning the environmental impacts of the proposed

³ Because regulation of the proposed abandonment is not needed to protect shippers from the abuse of market power, the Board need not determine whether the proposed abandonment is limited in scope. *See* 49 U.S.C. § 10502(a)(2).

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 December 4, 2020, OEA recommended that the Board impose two conditions on any decision granting abandonment authority. First, to address a concern of the U.S. Environmental Protection Agency, Region 2 (EPA), about the potential impact of salvage activities on impaired streams and wetlands in the vicinity of the proposed abandonment, OEA recommended that SRC be required to consult with EPA regarding the scope of proposed abandonment-related salvage activities and appropriate best management practices that may need to be implemented. Second, because the National Geodetic Survey (NGS) indicated that two geodetic survey markers are present in the right-of-way, OEA recommended that SRC be required to notify NGS at least 90 days before beginning abandonment-related salvage activities.

Comments on the Draft EA were due by January 4, 2021, and no comments were received. In its Final Environmental Assessment (Final EA), issued on January 8, 2021, OEA continues to recommend the two conditions discussed above and concludes that, if those two conditions are imposed, the proposed action would not significantly affect the quality of the human environment. Accordingly, based on OEA's recommendations, the Board will impose the conditions proposed in the Final EA.

Offers of Financial Assistance. The Board will not consider offers of financial assistance (OFA) in this case because no formal expressions of intent to file an OFA were filed by the November 6, 2020 deadline. See 49 C.F.R. § 1152.27(c)(1)(i).

Interim Trail Use. As noted above, the Town has filed a request for the issuance of a NITU for the right-of-way. The Town has submitted a statement of willingness to assume full responsibility for the management of the right-of-way, for any legal liability arising out of the transfer or use of the right-of-way, and for the payment of any and all taxes that may be levied or assessed against the right-of-way, as required by 49 C.F.R. § 1152.29. The Town has also provided a map and acknowledged that the use of the right-of-way for trail purposes is subject to the user's continuing to meet its responsibilities described above and subject to possible future reconstruction and reactivation of the right-of-way for rail service. As noted above, SRC has agreed to negotiate an interim trail use agreement with the Town.

Because the Town's request complies with the requirements of 49 C.F.R. § 1152.29 and because SRC agrees to negotiate, the Board will issue a NITU for the Line. The parties may negotiate an interim trail use/rail banking agreement during the one-year period prescribed below. If an interim trail use/rail banking agreement is reached (and thus interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. See 49 C.F.R. § 1152.29(d)(2), (h). If no agreement is reached within one year, SRC may fully abandon the Line, subject to any outstanding conditions. See 49 C.F.R. § 1152.29(d)(1)(i). Use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service and to the trail sponsor's continuing to meet its responsibilities for the right-of-way.

Public Use. The Town and OPRHP each request imposition of a public use condition under 49 U.S.C. § 10905 for the right-of-way. In their requests, they ask that SRC be prohibited from disposing of the corridor, other than tracks, ties, and signal equipment, except for public use on reasonable terms, and that SRC be barred from removing or destroying potential trail-related structures such as bridges, trestles, culverts, and tunnels for 180 days from the effective date of the abandonment. In support of their requests, the Town and OPRHP each state that the corridor would make an excellent recreational trail and that conversion of the property to trail use is widely supported; they each also state that the 180-day period is needed to begin negotiations with the carrier.

As an alternative to interim trail use under the Trails Act, the right-of-way may be acquired for public use as a trail under 49 U.S.C. § 10905. See Rail Abans.—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986). Under § 10905, the Board may prohibit the disposal of rail properties that are proposed to be abandoned and are appropriate for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment.

To justify a public use condition, a party must set forth: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be effective; and (iv) justification for the imposition of the period of time requested. 49 C.F.R. § 1152.28(a)(2). Because the Town and OPRHP have satisfied these requirements, a 180-day public use condition will be imposed, requiring SRC to keep intact the right-of-way (including trail-related structures such as bridges, trestles, culverts, and tunnels) and to refrain from disposing of the corridor (other than tracks, ties, and signal equipment), commencing from the effective date of the exemption.

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 right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, SRC is not required to deal exclusively with the Town and OPRHP but may engage in negotiations with other interested persons.

This action, as conditioned, will not significantly impact the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Under 49 U.S.C. § 10502, the Board exempts from the prior approval requirements of 49 U.S.C. § 10903 SRC's abandonment of the Line, subject to the employee protective conditions set forth in Oregon Short Line and the conditions set forth in the Final EA.⁴

⁴ If an interim trail use/railbanking agreement under 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29 is reached for the Line (or a portion thereof), compliance with the conditions set forth

2. The Town is permitted to negotiate with SRC for trail use for the Line, for a period of one year from the service date of this decision and notice, until January 22, 2022. Public use negotiations are permitted as set forth below, for a period of 180 days commencing from the effective date of the exemption, until August 20, 2021.

3. SRC shall keep intact the right-of-way (other than track, ties, and signal equipment), including potential trail-related structures such as bridges, trestles, culverts, and tunnels, for a period of 180 days from the effective date of the exemption, until August 20, 2021, to enable any state or local government agency, or other interested person, to negotiate the acquisition of the right-of-way for public use. If an interim trail use/rail banking agreement is executed before expiration of the 180-day public use condition period, the public use condition will expire to the extent the trail use/rail banking agreement covers the same portion of the right-of-way.

4. If an interim trail use/rail banking agreement is reached, it must require the trail sponsor to assume, for the term of the agreement, full responsibility for: (i) managing the right-of-way; (ii) any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability); and (iii) the payment of any and all taxes that may be levied or assessed against the right-of-way.

5. Interim trail use/rail banking is subject to possible future reconstruction and reactivation of the right-of-way for rail service and to the trail sponsor's continuing to meet its responsibilities for the right-of-way described in paragraph 4, above.

6. If an interim trail use/rail banking agreement is reached (and thus, interim trail use/rail banking is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached.

7. If interim trail use/rail banking is implemented, and subsequently the trail sponsor intends to terminate trail use on all or any portion of the right-of-way covered by the interim trail use/rail banking agreement, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

8. If an agreement for interim trail use/rail banking is reached by January 22, 2022, interim trail use/rail banking may be implemented. If no agreement is reached, the Line may be fully abandoned, subject to any outstanding conditions.

9. The exemption will be effective on February 21, 2021.

10. Petitions to reopen and petitions to stay must be filed by February 8, 2021.

11. Pursuant to 49 C.F.R. § 1152.29(e)(2), SRC shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the Line. If

in the Final EA is not required with respect to any portion of the Line covered by the interim trail use agreement for the duration of the agreement.

consummation has not been effected by SRC's filing of a notice of consummation by January 22, 2022, 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 satisfaction, expiration, or removal of the legal or regulatory barrier.

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