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SERVICE DATE – DECEMBER 7, 2005

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-290 (Sub-No. 262)

NORFOLK SOUTHERN RAILWAY COMPANY–ABANDONMENT–
IN BEAUFORT COUNTY, NC

Decided: December 6, 2005

On November 17, 2005, Norfolk Southern Railway Company (NSR) filed with the Board an application under 49 U.S.C. 10903 for permission to abandon a line of railroad extending from milepost WL-26.7, near Aurora, to milepost WL-31.3, near Lee Creek, a distance of 4.6-miles, in Beaufort County, NC. The application indicates that the line is located on property that is owned by the only shipper using this line: PCS Phosphate Company, Inc. (PCS), which operates one of the world's largest phosphate mines at Aurora.

The line was built in 1965 by NSR's predecessor under authority granted in Norfolk S. Ry. Co. Construction and Operation, 324 I.C.C. 371 (1965). PCS's predecessor evidently negotiated several agreements with the carrier that included five easements granting rights to the carrier to build the line. The easements also contained provisions that allegedly obligated the carrier to relocate the right-of-way and rail line at its expense, should PCS subsequently determine that the line interfered with mining or processing operations at its facility.

The application indicates that PCS has notified NSR that the track and right-of-way needs to be relocated by mid-2007 to accommodate its mining operations. In the application, NSR asserts that it is seeking abandonment authority because it cannot financially justify acceding to PCS's demand to reconstruct the line at NSR's sole expense.

Under 49 CFR 1152.24(e)(2), the Board must reject an application if we determine that the application is substantially incomplete or that its filing is otherwise defective. Pursuant to that provision, we must reject the application filed in this proceeding.¹

¹ On November 22, 2005, PCS filed a motion to dismiss or reject the application, and NSR filed a letter in response on December 2, 2005. Given our action here, PCS's motion is now moot.

The application is premature and incomplete. NSR's application is based on the assumption that it would be obligated to expend approximately \$12.2 million to relocate the line. NSR includes that reconstruction cost in its forecast-year projection. However, NSR's obligation for this expenditure is uncertain at this time. On May 6, 2005, PCS filed suit in the United States District Court for the Eastern District of North Carolina, contending that NSR has breached a contractual obligation to relocate the line. NSR is actively contesting the court action. In view of the pending court litigation, NSR should not claim relocation costs as a burden on continued operation unless the court determines that it is obligated to pay to relocate the line. Because PCS does not need the line relocated until mid-2007, there is ample time for the court to resolve the contractual dispute.

In its application, NSR requests that the Board find that the pending court action is preempted by 49 U.S.C. 10501(b), which gives the Board plenary and exclusive jurisdiction over railroad transportation and abandonments, and that the provisions in the easements regarding relocation of the line are void as against public policy. But at this point it is not clear that the court action would interfere with our exclusive jurisdiction over rail transportation, given NSR's alleged consent to the parties' purported contractual arrangement. See The Township of Woodbridge, NJ, et al. v. Consolidated Rail Corporation, Inc., STB Docket No. 42053 (STB served Dec. 1, 2000, and Mar. 23, 2001). Moreover the appropriate means for seeking a preemption determination by the Board is to file a petition for a declaratory order prior to filing for abandonment. See Union Pacific Railroad Company–Petition for Declaratory Order, STB Finance Docket No. 34090 (STB served Nov. 9, 2001).

The application indicates that 62% of PCS's traffic is moved by CSX Transportation, Inc. (CSXT) under trackage rights over the line that were approved in Carolina and Northwestern Railway Company–Norfolk Southern Railway Company, and Southern Railway Company Control, Finance Docket No. 27078 (ICC served Nov. 23, 1978). But CSXT has not joined in the abandonment application, and it is well settled that NSR could not eject CSXT from the line without Board approval. Assuming that CSXT wants to continue providing this service, the application does not explain how CSXT could continue operations if NSR were permitted to abandon the line.

Finally, the Board's Section of Environmental Analysis (SEA) has reviewed the Environmental and Historic Reports submitted by NSR as part of its application and has identified several deficiencies in the Environmental Report. Specifically, the Board's environmental rules require that the Environmental Report include an estimate of the amount of rail traffic that could be diverted to other rail lines or other transportation modes as a result of the proposed abandonment (see 49 CFR 1105.7(e)(2)). While NSR has estimated the amount of rail traffic that could be diverted to truck, barge, barge-truck or barge-rail movements in the Environmental Report, this estimate does not appear to include the rail traffic currently transported by CSXT. As a result, the Environmental Report does not address all of the traffic that is currently on the line.

NSR's discussion in the Environmental Report of energy, air, and noise, as required by 49 CFR 1105.7(e)(4)-(6), estimates that approximately 4% of the rail traffic NSR currently moves over the line would be diverted to truck and that the rest of the traffic would be diverted to barge, barge-truck or barge-rail. NSR states that the basis for its estimate is the assumption "that stoker coal and commodities moving to and from the PCS facility in low volumes via NSR rail would be diverted to truck and those commodities shipped or received in higher volumes, which are known to be shipped via barge, would move via barge, barge-truck or possibly even barge-rail to and from the barge slip on PCS property" (see NSR Application, Volume III, p. 7). NSR does not provide supporting data or information for this assumption. Thus, SEA cannot independently verify the accuracy of NSR's calculations. Given the amount of rail traffic currently moving over the line, SEA is concerned that, should NSR's assumption and associated calculations of diversions to truck traffic be incorrect, the proposed action could exceed the Board's thresholds for conducting the detailed air and noise analysis required by 49 CFR 1105.7(e)(5) and (6).²

In addition, NSR's application indicates that hazardous materials are currently transported over the line. However, the Environmental Report, while including a general discussion of potential impacts on public health and safety, as required by 49 CFR 1105.7(e)(7), does not specifically discuss potential impacts to public health and safety that could result from a diversion of the transportation of hazardous materials to other modes. See 49 CFR 1105.7(e)(7)(ii).

Due to these deficiencies in the Environmental Report, the Federal, state, and local agencies with whom NSR consulted during preparation of the Environmental and Historic Reports were not given complete information regarding the proposed abandonment. Thus, SEA cannot adequately assess the appropriateness of the comments received from those agencies, or determine whether the agencies' comments would have differed had the agencies had more detailed information.

In view of all of these deficiencies, we find that NSR's application is substantially incomplete and defective. Accordingly, the application must be rejected.

This action will not significantly affect the quality of the human environment or the conservation of energy sources.

² The North Carolina Department of Transportation has submitted a letter, included in Appendix C of NSR's Environmental Report, indicating that the abandonment of the rail line could lead to 30,000 truck trips per year, which is far beyond the Board's 50-truck-per-day threshold.

It is ordered:

1. NSR's application is rejected.
2. This decision is effective on the service date.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary