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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-290 (Sub-No. 293X)

NORFOLK SOUTHERN RAILWAY COMPANY— ABANDONMENT EXEMPTION—IN NORFOLK AND VIRGINIA BEACH, VA

Decided: November 6, 2007

By petition filed on July 19, 2007, Norfolk Southern Railway Company (NSR) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon an approximately 15.34-mile line of railroad, extending between milepost VB-0.12 in Norfolk, VA, and milepost VB-15.46 in Virginia Beach, VA. Notice of the filing was served and published in the Federal Register on August 8, 2007 (72 FR 44608-09). The Board will grant the exemption, subject to environmental conditions, and standard employee protective conditions.

BACKGROUND

According to NSR, the subject line has been out of service for approximately 5 years, except for the movement of about one car per month on the segment of the line between milepost VB-0.12 and milepost VB-1.75. Service on this portion of the line was discontinued effective August 6, 2006, pursuant to the decision in Norfolk Southern Railway Company—Discontinuance of Service Exemption—in Norfolk, VA, STB Docket No. AB-290 (Sub-No. 269X) (STB served July 7, 2006). Service on the remaining portion of the line, between milepost VB-1.75 and milepost VB-15.46, was discontinued effective December 30, 2004, pursuant to a notice of exemption in Norfolk Southern Railway Company—Discontinuance of Service Exemption—in Norfolk and Virginia Beach, VA, STB Docket No. AB-290 (Sub-No. 258X) (STB served Nov. 30, 2004). Accordingly, there are no active shippers on the line. Moreover, NSR asserts that previous shippers have shifted their traffic to motor or transload service.

NSR states that it has entered into a Purchase and Sale Agreement with the City of Norfolk (City) to sell the right-of-way, track, and materials located within the City (between the line's western terminus at milepost VB 0.12 and milepost VB 4.8, approximately 7.4 miles) to the City for use as a public transit corridor after NSR is authorized to abandon that segment and the abandonment is consummated. The City plans to use the corridor for light rail commuter passenger service and expects the project to be up and running as early as 2009. No salvage would occur on the Norfolk segment, because the City plans to acquire that segment of the line with track, bridges and other improvements intact. Immediate salvage of the track and materials

on the remainder of the line (between milepost VB-4.8 and milepost VB-15.46) could be deferred until more definite plans for future use of the property are made.

NSR points out that Norfolk and Virginia Beach are part of a major metropolitan area (including Portsmouth, Chesapeake, and Suffolk, VA) with an extensive transportation network of roads and highways, terminals, overseas and coastwise shipping and railroads. The area is served by numerous general and specialized motor carriers, as well as transload and various port facilities.

On August 17, 2007, Mr. James Riffin filed a protest in this proceeding. Also on August 17, 2007, Mr. Riffin filed a formal expression of his intent to file an offer of financial assistance (OFA) in order to purchase the line. Mr. Riffin requests that NSR provide him with financial data and information prescribed under 49 U.S.C. 10904 and 49 CFR 1152.27(a), including NSR's most recent reports on the physical condition of the line; traffic, revenue, and other data necessary to determine the amount of annual financial assistance that would be required to continue rail transportation over the line; any information that relates to NSR's present or prior use of the line; a copy of all valuation maps for the line, and if not depicted on the valuation map(s), a listing of all deed references showing NSR's legal interests in the line.

A letter in support of the proposed abandonment was filed on August 31, 2007, by the Virginia Department of Rail and Public Transportation.

PRELIMINARY ISSUES

On September 6, 2007, NSR filed a pleading containing: (1) a motion to strike Mr. Riffin's protest and notice of intent to file an OFA; and (2) a motion to file a reply to Mr. Riffin's comments.¹ On October 1, 2007, Mr. Riffin filed a request to late-file his response to NSR's September 6 pleading along with the response itself (October 1 response). NSR then filed a request for leave to file a reply, along with a reply. Both Mr. Riffin's late-filed response and NSR's reply will be accepted to provide a complete record.

Motion to Strike.

In support of its motion to strike Mr. Riffin's comment and notice of intent to file an OFA, NSR asserts that Mr. Riffin has no legitimate interest in the line and is participating in this proceeding simply to harass NSR. In support of its assertion, NSR provides a transcript of a voicemail message left by Mr. Riffin for NSR's counsel. In the voicemail, Mr. Riffin states "... if you were to abandon the Cockeysville Industrial Track Line, and I were to acquire it, I

¹ In the September 6 pleading, NSR also requested leave: (1) to amend the June 19 filing to include a request for an exemption from the OFA provisions of 49 U.S.C. 10904 and 49 CFR 1152.27; and (2) to file a motion for sanctions against Mr. Riffin. These requests will be discussed below.

wouldn't have time or motivation to look at all your other filings." NSR interprets this statement to mean that Mr. Riffin's purpose for appearing in this proceeding is to pressure NSR to convey the freight operating rights to the Cockeysville Industrial Track Line (Cockeysville Line), which runs between Baltimore, MD, and Cockeysville, MD, to him.²

Additionally, NSR provides a verified statement from Stanley A. Stein, Assistant City Manager for the City of Norfolk. According to the verified statement, Mr. Riffin indicated that he would consider a settlement to withdraw his participation and not cause delay in this proceeding. The verified statement also states that Mr. Riffin admitted that his efforts to impede this proceeding, and the sale of the property at issue here from NSR to the City, had more to do with his campaign to acquire the Cockeysville Line than the line involved in this proceeding.

Based on the evidence provided, NSR has made a strong showing that Mr. Riffin's interest lies in the Cockeysville Line, not the line involved in this particular proceeding. Nevertheless, NSR's motion to strike the comment and notice of intent to file an OFA will be denied, so that we may fully address the issues raised.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without our prior approval. Under 49 U.S.C. 10502, however, we must exempt a proposed abandonment from regulation under 49 U.S.C. 10903 when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny of this transaction under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of an abandonment application, an exemption will expedite regulatory decisions and reduce regulatory barriers to exit [49 U.S.C. 10101(2) and (7)]. An exemption will also foster sound economic conditions and encourage efficient management by relieving NSR from the cost of owning and maintaining this line [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be affected adversely.

Regulation of the proposed transaction under 49 U.S.C. 10903 is not necessary to protect shippers from an abuse of market power because there are no current railroad customers to be affected by the abandonment. Apparently, previous railroad customers have shifted their traffic to motor or rail-motor transload service. Nevertheless, to ensure that any potential shipper is informed of our action, we will require NSR to serve a copy of this decision on all shippers located on the line within 5 days of the service date and to certify to us that it has done so. Given

² The Cockeysville Line is otherwise unrelated to this proceeding.

our market power finding, we need not determine whether the proposed abandonment is limited in scope.

Under 49 U.S.C. 10502(g), we may not use our 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, we will impose the employee protective conditions in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

As required by our environmental regulations, NSR submitted environmental and historic reports with its petition and notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the potential environmental impacts of the proposed action. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental and historic reports, verified NSR's data, analyzed the probable effects of the proposed action on the quality of the human environment, and issued an Environmental Assessment (EA) for public review and comment. The EA was served on August 17, 2007. Comments to the EA were due by October 17, 2007.

In the EA, SEA notes that the line proposed for abandonment is within the Commonwealth of Virginia's coastal zone, and that NSR contacted the Commonwealth of Virginia's Department of Environmental Quality (DEQ) regarding any potential issues involving the Coastal Zone Management Act, 16 U.S.C. 1451 *et seq.* Based on that consultation with DEQ, there were no concerns regarding the Norfolk portion of the line. However, DEQ expressed concern regarding potential erosion and control of storm waters on the Virginia Beach portion of the line. Therefore, the EA recommends that we impose a condition providing that, prior to beginning any salvage activities, NSR shall consult with DEQ's Coastal Zone Management Program staff to determine whether state coastal management consistency certification is required. If consistency certification is required, NSR would be prohibited from performing any salvage activities until it obtains consistency certification and notifies SEA.

Also, the EA notes that the line passes through 100-year floodplains. Therefore, SEA recommends a condition requiring NSR to consult with the Virginia Department of Conservation and Recreation's Floodplain Management Program staff (FMP) regarding potential impacts to the 100-year floodplains and comply with the reasonable requirements of FMP.

In the EA, SEA further notes that the City of Virginia Beach submitted comments stating that city planning documents support future use of the corridor for public transit purposes. Because various utility facilities exist within or near the right-of-way, the City of Virginia Beach requests appropriate consultation with NSR to prevent potential damage to water and sewage lines. Therefore, SEA recommends that, prior to commencement of any salvage activities, NSR should be required to consult with the City of Virginia Beach regarding its concerns about utility facilities.

Finally, the EA notes that SEA had not heard from the Commonwealth of Virginia's Department of Historic Resources (SHPO) regarding the line's potential eligibility for listing on the National Register of Historic Places. Therefore, SEA initially recommended a condition requiring NSR to retain its interest in and take no steps to alter the historic integrity of all historic properties within the project right-of-way until the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470(f) (NHPA), has been completed. However, by letter dated August 23, 2007, the SHPO indicated that no historic properties would be affected. Accordingly, a section 106 condition is no longer necessary in this proceeding.

In response to the EA, by letter dated September 27, 2007, NSR requested that the Board clarify that Conditions 1, 2, and 3 in the EA, which relate to salvage activities, would not apply to the portion of the line located in the City of Norfolk and would not prevent consummation of the abandonment of that segment, provided that NSR did not perform any salvage activities and conveyed that segment to the City of Norfolk intact. In a Post Environmental Assessment, SEA agreed with NSR regarding conditions 1 and 3, and therefore, recommended appropriate modifications to Conditions 1 and 3.

However, regarding Condition 2, the Post EA explained that, because it appears that 100-year floodplains are located in the vicinity of both the Norfolk and Virginia Beach portions of the line,³ Condition 2 should remain unchanged.

On October 22, 2007, DEQ's Office of Environmental Impact Review submitted late-filed comments pointing to a number of potential environmental concerns about the proposed abandonment, and seeking assurances that NSR would secure relevant state permits and approvals prior to conducting any salvage activities. In an October 24, 2007 phone conversation with SEA, a representative of NSR stated that it would obtain appropriate state permits and approvals. Therefore, in supplemental environmental documentation, SEA developed an appropriate condition that would accomplish this.

The final conditions recommended by SEA will be imposed with minor clarifying changes. Based on SEA's recommendations, we conclude that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

Although SEA indicated in its EA that the right-of-way may be suitable for other public use under 49 U.S.C. 10905, no one has sought a public use condition, and none will be imposed.

³ On October 17, 2007, NSR provided SEA with a map of High Risk Flood Zones in the area of the proposed abandonment indicating that the floodplains are located at both portions of the line.

ADDITIONAL ISSUES

NSR's OFA Exemption Request.

As previously noted, NSR has requested that the Board allow it to amend its June 18 filing to include a request for an exemption from the OFA process. Given the unique circumstances presented in this proceeding, we will grant NSR's request to amend its June 18 filing and grant NSR's late-filed request to protect the Board's processes.

The OFA provisions are intended to permit a party genuinely interested in providing continued rail service on a line that would otherwise be abandoned to acquire that line for continued rail service. Exemptions from 49 U.S.C. 10904 have been granted, however, when the record shows that a right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service.⁴

Here, no shipper has expressed interest in continued common carrier service. Indeed, no shipper has used the line segment between milepost VB-1.75 and milepost VB-15.46 for approximately 5 years. Moreover, the record shows that the City intends to acquire line segment between milepost VB-0.12 and milepost VB-4.8 to create a light rail commuter passenger line. The City states that its light rail line will enhance the continued redevelopment of the City, improve local transportation systems, protect and preserve the environment, and create a transit corridor linking residential, educational, medical services, and employment areas of the City. As a result, automobile use within the City will be reduced.

On the other hand, Mr. Riffin has provided no evidence to show a public need for continued freight rail service on this line. While Mr. Riffin notes that he is aware of a shipper "who has a desire to utilize the line for freight rail services," he does not provides any details. Indeed, Mr. Riffin does not name the shipper or state whether the shipper is located on the line in question.

In these circumstances, the evidence of record supports NSR's request for an exemption from 49 U.S.C. 10904. Allowing the OFA provisions to be applied in this instance is not necessary to carry out the rail transportation policy because there is nothing in the record to show any potential for continued rail service on this line. Allowing the abandonment exemption to become effective expeditiously, without first being subject to the OFA provisions, will minimize the need for Federal regulatory control over the rail transportation system, reduce unnecessary

⁴ See CSX Transportation, Inc.—Abandonment—in Barbour, Randolph, Pocahontas, and Webster Counties, WV, STB Docket No. AB-55 (Sub-No. 500) (STB served Jan. 9, 1997) and Southern Pacific Transportation Company—Discontinuance of Service Exemption—In Los Angeles County, CA, Docket No. AB-12 (Sub-No. 172X) (ICC served Dec. 23, 1994) (exemption from OFA requirement granted where owner planned to use the rail corridor for mass transit purposes).

delay, and reduce regulatory barriers to exit [49 U.S.C. 10101(2) and (7)]. There are currently no shippers using rail service, nor have any potential shippers objected to the exemption from the OFA process.

Therefore, NSR's request for exemption from the OFA requirements will be granted. As a result, Mr. Riffin's notice of intent to file an OFA is moot.

Delay of the Effective Date of the Abandonment Because of the Railroad's Failure to Provide Necessary Information.

Mr. Riffin asserts that NSR's statement in its petition for exemption that the line was not listed on NSR's system diagram map because NSR did not contemplate filing an abandonment application with the Board is contradicted by NSR's historic and environmental reports filed in this proceeding, which state that NSR "anticipate[d] an abandonment filing covering the ... line." June 19 filing at 5. Mr. Riffin asserts that NSR should be allowed to correct this alleged contradiction, but that the effective date of any abandonment authority in this proceeding should be delayed because of this alleged error. There is, however, no contradiction or false or misleading statement in the June 19 filing. While Mr. Riffin is correct that a line of railroad must be listed on a railroad's system diagram map for at least 60 days before it can be the subject of an abandonment application under 49 U.S.C. 10903, the system diagram map requirement does not apply to lines that are the subject of a petition for exemption from the requirements of 49 U.S.C. 10903 pursuant to 49 U.S.C. 10502. See Aban. and Discon. of R. Lines and Transp. under 49 U.S.C. 10903, 1 S.T.B. 894 (1996) and 2 S.T.B. 311 (1997). NSR's statements accurately reflect its decision to seek exemption authority to abandon this line. Thus, Mr. Riffin has shown no basis for delaying the effective date of this abandonment authority.

Motion for Sanctions.

Finally, NSR has asked the Board to: (1) impose sanctions on Mr. Riffin including requiring Mr. Riffin to pay NSR's costs in responding to his filings in this proceeding; (2) bar Mr. Riffin from further participation in this proceeding; and (3) bar Mr. Riffin from appearing in any Board proceeding in which NSR is a party or has an interest or at least from appearing pro se and without leave of the Board after the Board pre-screens Mr. Riffin's filings to see if they merit summary rejection.

Mr. Riffin, in his reply to NSR's motions, has asked that the Board admonish NSR's counsel for allegedly unprofessional behavior in this proceeding.

As a general matter, the Board's Rules of Practice direct "*all persons* appearing in proceedings before it to conform, as nearly as possible, to the standards of ethical conduct required of practice before the courts of the United States." 49 CFR 1103.11 (emphasis supplied). By presenting a pleading to a federal court (and by extension, to the Board), "an attorney or unrepresented party is certifying that to the best of the person's knowledge,

information, and belief, formed after an inquiry reasonable under the circumstances,” the document “is not being presented for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” Fed. R. Civ. P. 11(b)(1).

The evidence presented by NSR raises serious concern that Mr. Riffin’s phone call to NSR’s counsel may have been for an improper purpose, that Mr. Riffin’s real interest is in the Cockeysville Line, and that his filing of comments and an intent to file an OFA in this proceeding were for the purpose of harassing NSR into conveying the freight operating rights of the Cockeysville Line to Mr. Riffin.⁵ Accordingly, we will closely scrutinize any future filings by Mr. Riffin in this or any other proceeding before the Board, and we strongly admonish Mr. Riffin that abuse of the Board’s processes will not be tolerated.

Beyond that, allowing this abandonment proceeding to be completed expeditiously by granting NSR’s request for an exemption from the OFA process should protect the integrity of the Board’s processes here. Therefore, Mr. Riffin will not be barred at this time from appearing pro se before the Board in this proceeding or any other proceeding. Nor will Mr. Riffin be required to obtain outside legal counsel with experience before the Board at this time. NSR’s request for monetary damages also will be denied. At the same time, based on the circumstances presented here, there is also no need to admonish NSR’s counsel for its filings and vigorous defense of NSR’s rights, as Mr. Riffin has requested.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt NSR from the prior approval requirements of 49 U.S.C. 10903 for the abandonment of the above-described line, subject to the employee protective conditions in Oregon Short Line R. Co.–Abandonment–Goshen, 360 I.C.C. 91 (1979), and subject to the conditions that prior to beginning any salvage activities, NSR shall: (1) consult with the Virginia Department of Environmental Quality’s Coastal Zone Management Program staff to determine whether state coastal management consistency certification is required for the portion of the line located in Virginia Beach. If consistency certification is required, NSR shall be prohibited from performing any salvage activities until it obtains consistency certification and notifies SEA that it has obtained the necessary certification, pursuant to the Coastal Zone Management Act and the Board’s environmental regulations at 49 CFR 1105.9; (2) consult with the Virginia Department of Conservation and Recreation’s Floodplain Management Staff (FMP) regarding potential impacts to the 100-year floodplains and comply with the reasonable requirements of FMP; (3) consult with the City of Virginia Beach regarding the portion of the line located in Virginia Beach and the City’s concerns about utility facilities; and (4) consult with the Virginia Department of Environmental Quality’s Office of Environmental Impact Review and other appropriate agencies concerning any removal and salvage methods to be used by NSR; the final disposition of any salvaged materials; and

⁵ NSR cites to several other proceedings previously or currently pending before the Board in which it claims Mr. Riffin has filed merely to harass NSR.

potential impacts from any salvage activities on water quality, wetlands, subaqueous lands, Chesapeake Bay preservation areas, or endangered or threatened state species; as well as plans to mitigate soil erosion, sediment, stormwater runoff, and air quality impacts.

2. NSR must serve a copy of this decision on all shippers located on the line within 5 days after the service date of this decision and certify to the Board that it has done so.

3. NSR's motions to strike Mr. Riffin's comments and notice of intent to file an OFA are denied.

4. Mr. Riffin's request to file comments in response to NSR's motions is granted.

5. NSR's motion to reply to Mr. Riffin's comments is granted.

6. NSR's motion for exemption from the OFA process is granted.

7. Mr. Riffin's request to late file a reply is granted.

8. NSR's request for sanctions is denied.

9. Mr. Riffin's request to admonish NSR's counsel is denied.

10. Pursuant to the provisions of 49 CFR 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 November 6, 2008, 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 1-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, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey. Commissioner Mulvey did not participate.

Vernon A. Williams
Secretary