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SERVICE DATE - FEBRUARY 25, 1998

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-477 (Sub-No. 3X)¹

OWENSVILLE TERMINAL COMPANY, INC.--ABANDONMENT EXEMPTION--
IN EDWARDS AND WHITE COUNTIES, IL AND GIBSON AND POSEY COUNTIES, IN

Decided: February 23, 1998

On November 7, 1997, Owensville Terminal Company, Inc. (OTC) filed a petition for an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a line of railroad known as the Browns-Poseyville line, between milepost 205.0 at or near Browns, IL, and milepost 227.5 near Poseyville, IN, a distance of 22.5 miles in Edwards and White Counties, IL, and Gibson and Posey Counties, IN. Pursuant to 49 U.S.C. 10502(b), the Board published a notice in the Federal Register (62 FR 63418-19) on November 28, 1997, instituting an exemption proceeding. A request for issuance of a notice of interim trail use (NITU) and for imposition of a public use condition was filed by Indiana Trails Fund, Inc. (Indiana Trails), on December 5, 1997. A request for imposition of a public use condition was also filed by the Indiana Department of Transportation, through approval of the Indiana Transportation Corridor Planning Board (INDOT), on December 30, 1997.² We will grant the exemption, subject to trail use, public use, an historic preservation condition, environmental conditions, and standard employee protective conditions.

BACKGROUND

Rail lines extend in three directions from Poseyville. The line involved in this proceeding, formerly owned by Evansville Terminal Company, Inc. (ETC), extends southeasterly from a point near Browns to a point near Poseyville, and connects with Norfolk Southern Railroad Company (NS). A second rail line, currently owned by ETC, extends approximately 19 miles southeasterly from Poseyville to Evansville, IN (Poseyville-Evansville line), and connects with CSX Transportation, Inc. (CSXT), and with NS, via an intermediate switch over CSXT at Evansville. The third line extends approximately 12 miles northeasterly from Poseyville to Owensville, IN (Poseyville-Owensville line), and is owned by OTC.

¹ This petition is a refiling of petitioner's April 15, 1997 submission in STB Docket No. AB-477 (Sub-No. 1X), which was denied in a decision served August 1, 1997.

² The November 28 notice provided that requests for a public use condition under 49 CFR 1152.28 were due by December 18, 1997. INDOT's request was not filed until December 31, 1997. Because INDOT's late-filed request has not delayed the proceeding, we will accept INDOT's submission.

OTC and ETC acquired the above-described lines in 1996. After the acquisition, shippers on the Poseyville-Owensville line began to route their shipments over ETC's Poseyville-Evansville line instead of over the Browns-Poseyville line, including shipments to be interchanged with NS at Evansville. On September 12, 1996, assertedly due to poor track conditions, ETC embargoed rail service on the Browns-Poseyville line. Because OTC had financed ETC's acquisition, OTC agreed to acquire the line from ETC in early 1997 with the intent to seek the abandonment at issue.³

OTC states that no traffic has originated or terminated on this line for approximately 6 years, and that there are no reasonable prospects for traffic on the line. OTC describes the communities along the rail line as small, and avers that the surrounding area is dominated by grain producers whose product has long been transported by truck. According to OTC, there are no indications that anyone desires to transport grain using the line.⁴ OTC states that all overhead traffic was rerouted from the line over a year ago.

OTC estimates the line's net liquidation value at \$1,301,000 and claims that OTC would incur an opportunity cost of \$98,941 per year if it were to continue to own the line. OTC further claims that it would cost \$521,964 to rehabilitate the line to Federal Railroad Administration Class 1 safety standards, and that that amount could not be recovered from rail line operating revenues.

OTC argues that abandonment of the Browns-Poseyville line is justified in that: (1) there is no public need for the involved rail service and no reasonable prospect of such need in the foreseeable future; (2) continued ownership of the line would cause OTC to incur a substantial opportunity cost; (3) reinstitution of rail service would not be possible without a very substantial expenditure for track rehabilitation, which could not be recovered from operating revenues; and (4) abandonment of the line would not significantly harm shippers or communities.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without prior approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation 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.

³ OTC acquired the Browns-Poseyville line in Owensville Terminal Company, Inc.--Acquisition and Operation Exemption--Evansville Terminal Company, Inc., STB Finance Docket No. 33339 (STB served Feb. 10, 1997).

⁴ Specifically, OTC asserts that the interests of Continental Grain Company (CGC), which opposed OTC's earlier attempt to abandon this line in STB Docket No. AB-477 (Sub-No. 1X), have now been satisfied. OTC says that CGC has agreed not to oppose this abandonment. OTC also asserts that all of CGC's grain has been moving by truck in recent years.

Detailed scrutiny 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 reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will also foster sound economic conditions and encourage efficient management by relieving OTC of the costs of owning and maintaining the line and allowing OTC's assets to be used more productively elsewhere on its system. [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 is not necessary to protect shippers from the abuse of market power because shippers no longer use the line. No one has protested the proposed abandonment. Nevertheless, to ensure that the shippers are aware of our action, we will require OTC to serve a copy of this decision on them within 5 days of the service date of this decision and to certify to us that it has done so. Given our market power finding, we need not determine whether the proposed transaction 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).

OTC has submitted an environmental report with its petition and has notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed abandonment. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, analyzed the probable effects of the proposed action on the quality of the human environment, and served an environmental assessment (EA) on January 13, 1998.

In the EA, SEA indicated that: (1) the U.S. Fish and Wildlife Service (FWS) in Marion, IL, has stated that the abandonment is not likely to adversely affect any known threatened or endangered species; however, since FWS is implementing conservation agreements to protect the copperbelly watersnake, it recommends that the killing of any snakes encountered during salvage operations be prohibited; (2) FWS in Bloomington, IN, has recommended nine specific mitigation measures to minimize adverse impacts on fish and wildlife resources; (3) the National Geodetic Survey (NGS) has identified one geodetic station marker along the rail line and requests 90 days' notice to plan relocation of any markers that may be disturbed or destroyed; (4) the Indiana SHPO has identified Bridge Nos. 215.67 and 221.4 as eligible for listing in the National Register of Historic Places; (5) the Indiana Department of Environmental Management (IDEM) has raised concerns about impacts on ambient air quality in the project area, specifically, disposal of organic debris from land clearing and fugitive dust; IDEM has also expressed concern regarding disposal of contaminated soils; and (6) the Illinois Department of Natural Resources (ILDNR) has noted that the federally endangered Clubshell mussel is located in White County, IL; consequently, while the abandonment is not likely to result in adverse impacts to this species, if the rail line, including ties, bridges, and other structures

were to be removed, ILDNR states that further coordination would be necessary with both it and FWS.

SEA, therefore, recommends that the following conditions be imposed on any decision granting abandonment authority: (1) OTC shall consult with the FWS in Marion, IL, concerning measures that OTC may take to protect the copperbelly watersnake during salvage operations; (2) OTC shall, prior to salvaging or disposing of the entire right-of-way, consult with the FWS office in Bloomington, IN, to implement specific mitigation measures to minimize adverse impacts on fish and wildlife resources; (3) OTC shall consult with NGS and provide it with 90 days' notice prior to disturbing or destroying any geodetic markers; (4) OTC shall retain its interest in and take no steps to alter the historic integrity of Bridge Nos. 215.67 and 221.4 until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f; (5) OTC shall, prior to salvaging or disposing of the entire right-of-way, consult with IDEM to implement mitigation measures to minimize adverse impacts on air quality and to address disposal of contaminated soils; and (6) if OTC intends to remove the rail line (including ties, bridges, and other structures), it shall consult with ILDNR and FWS to further assess potential impacts on the Clubshell mussel.

No comments to the EA were filed by the February 6, 1998 due date. We will impose the conditions recommended by SEA. 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.

Indiana Trails requests that interim trail use/rail banking be imposed under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act). Indiana Trails has submitted a statement of willingness to assume financial responsibility for the right-of-way, and acknowledged that use of the right-of-way is subject to possible future reconstruction and reactivation of the right-of-way for rail service as required under 49 CFR 11542.29. By letter filed December 30, 1997, OTC states that it is agreeable to negotiating with Indiana Trails for interim trail use.⁵ Indiana Trails' request complies with the requirements of 49 CFR 1152.29 and OTC is willing to enter into negotiations. Therefore, we will issue a NITU for the described line. The parties may negotiate an agreement during the 180-day period prescribed below. If an agreement is executed, no further Board action is necessary. If no agreement is reached within 180 days, OTC may fully abandon the line, subject to the conditions imposed below. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

The parties should note that operation of the trail use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in Rail Abandonments--Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 608 (1986) (Trails), offers of financial assistance (OFA) to acquire rail lines for continued rail service or to subsidize rail

⁵ OTC also states that it and Indiana Trails have signed a contract for purchase of the right-of-way in the event of approval of the abandonment.

operations take priority over interim trail use/rail banking and public use. Accordingly, if an OFA is timely filed under 49 U.S.C. 1152.27(c)(1), the effective date of this decision and notice will be postponed beyond the effective date indicated here. See 49 CFR 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. See 49 CFR 1152.27(f). Finally, if the line is sold under the OFA procedures, the petition for abandonment exemption will be dismissed and trail use precluded. Alternatively, if a sale under the OFA procedures does not occur, trail use may proceed.

SEA has indicated in its EA that the right-of-way may be suitable for other public use after abandonment. As noted, Indiana Trails has also requested that a 180-day public use condition be imposed. Indiana Trails requests that OTC be precluded from: (1) disposing of the rail corridor, other than the tracks, ties and signal equipment, except for public use on reasonable terms; and (2) removing or destroying trail-related structures such as bridges, culverts, and tunnels. Indiana Trails states that the corridor traverses some of Indiana's most scenic topography, for which trail use would afford an excellent chance to increase the local tourism economy, and that the right-of-way provides a necessary transportation role as a bridge connection over the Wabash River linking both Indiana and Illinois. Indiana Trails also states that the bridges, culverts and tunnels have considerable value for, and would certainly enhance the use of, recreational trails. Indiana Trails indicates that the 180-day period is needed in order for it to coordinate efforts with local interest groups and to commence negotiations with the railroad. Also as noted, INDOT has requested imposition of a public use condition for a portion of the right-of-way between the Indiana State line, including the Wabash River Bridge, at approximately milepost 216.5 and milepost 227.5. INDOT indicates that the 180-day time period is needed to review opportunities for state action related to the proposed abandonment and to reach an agreement with the railroad.

We have determined that persons who file under the Trails Act may also file for public use under 49 U.S.C. 10905. See Trails, 2 I.C.C.2d at 609. When the need for both conditions is established, it is our policy to impose them concurrently, subject to the execution of a trail use agreement. The public use criteria prescribed at 49 CFR 1152.28(a)(2) have been met by Indiana Trails and INDOT specifying: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) justification for the period of time requested. Accordingly, a 180-day public use condition also will be imposed, commencing with the effective date of this decision and notice. If a trail use agreement is reached on a portion of the right-of-way, OTC must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, we note that a public use condition is not imposed for the benefit of any one potential purchaser. Rather, it provides an opportunity for any interested person to acquire a right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, OTC is not required to deal exclusively with Indiana Trails and INDOT, but may engage in negotiations with other interested persons.

On February 3, 1998, OTC filed a request that this decision be made effective on 15 days' notice rather than the customary 30 days. In anticipation that the Board would grant this unopposed petition, OTC states that it would like to commence salvage operations promptly in order to

complete them before the spring thaw, when local roads are “posted against significant truck weights.” In support of its petition, OTC cites what it represents to be situations where abandonment exemptions were made effective on 15 days’ notice under similar circumstances involving weather conditions in STB Docket No. AB-497 (Sub-No. 2X), Minnesota Northern Railroad, Inc.--Abandonment Exemption--Between Redland Junction and Fertile, In Polk County, MN (STB served Nov. 14, 1997), and STB Docket No. AB-497 (Sub-No. 1X), Minnesota Northern Railroad, Inc.--Abandonment Exemption--in Red Lake and Polk Counties, MN (STB served Nov. 14, 1997). Because the petition is unopposed and because OTC has provided a sufficient justification to support the request, we will make this decision effective in 15 days.

It is ordered:

1. INDOT’s late-filed request for a public use condition under 49 U.S.C. 10905 is accepted.
2. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903 the abandonment by OTC of the above-described line, subject to the employee protective conditions set forth in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979), and the conditions that: (1) OTC shall leave intact all of the right-of-way, including bridges, trestles, culverts and tunnels (but not track and track materials) for a period of 180 days from the effective date of this decision and notice, to enable any state or local government agency or any other interested person to negotiate the acquisition of the line for public use; (2) OTC shall comply with the interim trail use/rail banking procedures set forth below; (3) OTC shall consult with the U.S. Fish and Wildlife Service in Marion, IL, concerning measures that OTC may take to protect the copperbelly watersnake during salvage operations; (4) OTC shall, prior to salvaging or disposing of the entire right-of-way, consult with the U.S. Fish and Wildlife Service in Bloomington, IN, to implement specific mitigation measures to minimize adverse impacts on fish and wildlife resources; (5) OTC shall consult with the National Geodetic Survey and provide it with 90 days’ notice prior to disturbing or destroying any geodetic markers; (6) OTC shall retain its interest in and take no steps to alter the historic integrity of Bridge Nos. 215.67 and 221.4 until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f; (7) OTC shall, prior to salvaging or disposing of the entire right-of-way, consult with the Indiana Department of Environmental Management to implement mitigation measures to minimize adverse impacts on air quality and to address disposal of contaminated soils; and (8) if OTC intends to remove the rail line (including ties, bridges, and other structures), it shall consult with the Illinois Department of Natural Resources and the U.S. Fish and Wildlife Service to further assess potential impacts on the Clubshell mussel.
3. OTC is directed to serve a copy of this decision on the shippers on the line within 5 days after the service date of this decision and to certify to the Board that it has done so.
4. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it

need only indemnify the railroad against any potential liability), and for 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 the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.

6. If interim trail use is implemented and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

7. If an agreement for interim trail use/rail banking is reached by the 180th day after service of this decision and notice, interim trail use may be implemented. If no agreement is reached by that time, OTC may fully abandon the line, provided the conditions imposed above are met.

8. An OFA under 49 CFR 1152.27(c)(l) to allow rail service to continue must be received by the railroad and the Board by March 6, 1998, subject to time extensions authorized under 49 CFR 1152.27(c)(l)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(l). Each OFA must be accompanied by a \$900 filing fee. See 49 CFR 1002.2(f)(25).

9. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **"Office of Proceedings, AB-OFA."**

10. Provided no OFA has been received, this exemption will be effective March 12, 1998. Petitions to stay must be filed by March 9, 1998, and petitions to reopen must be filed by March 23, 1998.

11. Pursuant to the provisions of 49 CFR 1152.29(e)(2), OTC shall file 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 OTC's filing of a notice of consummation by February 25, 1999, 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 not later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary