

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 290 (Sub-No. 408X)

NORFOLK SOUTHERN RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN
HUDSON AND ESSEX COUNTIES, N.J.

Digest:¹ This decision permits the abandonment of approximately 8.6 miles of rail line in Hudson and Essex Counties, N.J., subject to trail use, historic preservation, environmental, and standard employee protective conditions.

Decided: September 28, 2020

On June 19, 2020, Norfolk Southern Railway Company (NSR), a Class I 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 8.6-mile rail line, extending from milepost WD 2.9 in the City of Jersey City, to milepost WD 11.5 in the Township of Montclair, in Hudson and Essex Counties, N.J. (the Line). In its petition, NSR also seeks exemption from the offer of financial assistance (OFA) process under 49 U.S.C. § 10904. Notice of the petition was served and published in the Federal Register on July 9, 2020 (85 Fed. Reg. 41,266). As discussed below, the Board will grant the exemption from 49 U.S.C. § 10903 for the Line, subject to trail use, historic preservation, environmental, and standard employee protective conditions, and deny as moot NSR's petition for exemption from § 10904.

BACKGROUND

NSR states that the Line has been dormant for more than a decade, and that NSR has served no customers on the Line since it acquired the property from the Consolidated Rail Corporation in 1999. (Pet. 4-5, 11.)² According to NSR, it plans to convey the Line's right-of-

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 According to NSR, in 2005, it discontinued service over a 6.2-mile segment between milepost WD 2.2 in Jersey City and milepost WD 8.4 in Newark, N.J. (Pet. 4, 11.) See Norfolk S. Ry.—Discontinuance of Serv. Exemption—Between Newark & Kearney, N.J., in Essex & Hudson Cntys., N.J., AB 290 (Sub-No. 242X) (STB served Jan. 18, 2005). NSR states that New Jersey Transit operated commuter rail passenger service over the Line until 2002, (Pet. 10-11), and the 6.2-mile segment served as an overhead route to serve one customer located on the Newark Industrial Track, (id. at 4-5). NSR further states that no freight traffic has moved over

way pursuant to an interim trail use/rail banking agreement under the National Trails System Act (Trails Act), 49 U.S.C. § 1247(d), and 49 C.F.R. § 1152.29, to Open Space Institute Land Trust, Inc. (OSI), with the Line's rail, track materials, and bridges intact. (Pet. 3, 5.) NSR states that OSI, in partnership with Hudson and Essex Counties, plans to redevelop the Line, create greenways, and provide for alternative modal access to various sites located along the Line, which would promote economic growth in the region. (*Id.* at 3, 5, 15.) According to NSR, the redevelopment plans will develop the surrounding area to improve safety and mobility for the approximately 1.5 million people living in the immediate region. (*Id.* at 12.)

In light of those plans, NSR also seeks an exemption from the OFA procedures of 49 U.S.C. § 10904. In support, NSR states that the Line is needed for a valid public purpose, i.e., the redevelopment project, and there is no overriding public need for continued freight rail service along the Line. (Pet. 17-18.) According to NSR, the reinstatement of freight rail service under § 10904 would be incompatible with the intended use of the Line by OSI and Hudson and Essex Counties. (*Id.* at 17.)

On July 28, 2020, the City of Jersey City, Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition, and Rails-to-Trails Conservancy (collectively, Trail Commenters) jointly replied in support of NSR's petition. In addition, on July 28 and July 29, 2020, the East Coast Greenway Alliance (ECG Alliance) and Bergen Arches Preservation Coalition (BAPC), respectively, filed letters in a support of NSR's petition. Trail Commenters and ECG Alliance state that the Line is on the recommended off-road route of the East Coast Greenway (ECG), (Trail Commenters Reply 3; ECG Alliance Letter 1), which, according ECG Alliance and BAPC, is a 3,000-mile walking and bike trail being assembled from Maine to Florida, (ECG Alliance Letter 1; BAPC Letter 1).³

On July 29, 2020, as corrected on September 16, 2020,⁴ OSI filed a request for issuance of a notice of interim trail use or abandonment (NITU) under the Trails Act, to which NSR consented by letter filed August 7, 2020. According to OSI, it has entered into an agreement with NSR to acquire the Line's right-of-way for the development of a trail. (OSI Trail Use Request 1, July 29, 2020.)

the remaining segment of the Line from milepost WD 8.4 to milepost WD 11.5 since 2009, before which the segment served as an overhead route to access one customer located on the since-abandoned Orange Industrial Track. (*Id.* at 4, 11.) According to NSR, it filed a petition for exemption (rather than a notice under the two-year out-of-service class exemption) because it is also seeking exemption from the OFA process under 49 U.S.C. § 10904.

³ Trail Commenters also note that, since 2006, they have participated in proceedings before the Board in Consolidated Rail Corp.—Abandonment Exemption—in Hudson County, N.J., Docket No. AB 167 (Sub-No. 1189X) et al., involving a line of railroad known as the Harsimus Branch. (Trail Commenters Reply 3.) They state that the Harsimus Branch can be readily connected to the Bergen Arches/Erie Cut, which in turn lies close to the Jersey City endpoint of the Line. (*Id.*) According to Trail Commenters, the Harsimus Branch and the Bergen Arches/Erie Cut are also on the recommended off-road route of the ECG. (*Id.*)

⁴ On September 16, 2020, OSI filed a corrected statement of willingness because its original statement of willingness contained typographical errors.

On July 30, 2020, the Town of Kearny (Kearny) filed a comment, noting that it has had maintenance and security concerns in the past with the inactive Line. (Kearny Comment 1.) Kearny states that abandonment of the Line could exacerbate those concerns, particularly if the Line is sold to a party who does not agree to maintain the area and provide security that protects the residential neighborhoods. (*Id.*) Kearny therefore “conditionally objects” to abandonment of the Line and requests that “arrangements . . . regarding maintenance and security” be put in place before final action is taken with respect to the abandonment and sale of the Line. (*Id.*)

On August 17, 2020, NSR replied to Kearny’s comment, stating that it takes Kearny’s concerns seriously and has reached out to the town and completed a number of maintenance and clean-up projects in response to those concerns. (NSR Reply 1, Aug. 17, 2020.) NSR also asserts, however, that the concerns Kearny raises fall outside of the statutory standards for granting or denying the abandonment exemption. (*Id.* at 2.)

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, and no one disputes, that the Line has been dormant for more than a decade and NSR has served no customers on the Line since it acquired the property in 1999. (Pet. 4, 11.) Under these circumstances, granting an exemption would expedite regulatory decisions, foster sound economic conditions in transportation, reduce regulatory barriers to exit, encourage honest and efficient management, and provide for the expeditious handling of this proceeding. See 49 U.S.C. § 10101(2), (5), (7), (9), (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, there are no shippers on the Line, and the Line has been dormant for more than decade. (See Pet. 4, 5, 11.)⁵

With respect to Kearny’s maintenance and security concerns, the record indicates that NSR has been working to address the concerns raised by Kearny, and the Board encourages NSR to continue to do so. However, as NSR points out, Kearny’s concerns appear to relate to what may happen should the Line be sold following abandonment. The Board notes that, according to NSR, the public redevelopment project will improve safety and mobility in the surrounding area,

⁵ 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).

(see Pet. 3, 5, 12, 16), and that Hudson and Essex Counties, which will assume responsibility for the Line, have robust patrol divisions with responsibility for patrolling and ensuring the safety and security of parklands, (NSR Reply 2, Aug. 17, 2020).

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 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 August 18, 2020, OEA recommended that the Board impose two conditions on any decision granting abandonment authority. First, OEA determined that the proposed abandonment is in the New Jersey coastal zone management area and therefore recommended that NSR be required to consult with the New Jersey Department of Environmental Protection, Coastal Management Program and obtain state coastal management consistency certification under the Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1465, if necessary. The proposed condition would also prohibit NSR from filing its consummation notice or initiating salvage activities related to abandonment (including removal of tracks and ties) until it reports the results of these consultations in writing to OEA and the Board has removed the condition.

Second, according to OEA, the New Jersey Department of Environmental Protection, Historic Preservation Office (State Historic Preservation Office or SHPO) stated in a July 16, 2020 email to NSR that three bridges and several miles of the Line have been identified as potentially eligible for listing on the National Register of Historic Places. OEA stated, however, that the SHPO had not indicated whether the proposed abandonment would constitute an adverse effect on these potentially eligible properties. Accordingly, OEA recommended that the Board impose a condition requiring NSR to retain its interest in and take no steps to alter the historic integrity of all historic properties, including sites, buildings, structures, and objects within the project right-of-way (the Area of Potential Effect) that are eligible for listing or listed in the National Register of Historic Places until the Section 106 process of the National Historic Preservation Act (NHPA), 54 U.S.C. § 306108, has been completed. The recommended condition would also prohibit NSR from filing its consummation notice or initiating salvage activities related to abandonment (including removal of tracks and ties) until the Section 106 process has been completed and the Board has removed the condition.

Comments on the Draft EA were due by September 16, 2020. In its Final EA, issued on September 22, 2020, OEA states that it received one comment from the SHPO, indicating that if

interim trail use/rail banking were to be established on the Line, there would be no undertaking as defined under Section 106 of the NHPA, and therefore, no Section 106 condition would be required. OEA continues to recommend that the Board impose the Section 106 condition described in the Draft EA should an interim trail use/rail banking agreement not be reached, or, if such an agreement is reached, the agreement subsequently ends. OEA also continues to recommend that the Board impose the condition related to the coastal zone management area consultation process described in the Draft EA. OEA believes 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. NSR also petitions the Board to exempt it from the OFA requirements of 49 U.S.C. § 10904. Because no formal expressions of intent to file an OFA to acquire the Line or subsidize continued rail service were filed by the July 20, 2020 deadline, the Board will not consider OFAs in this case, and NSR's petition for exemption from § 10904 will be denied as moot.

Interim Trail Use. As indicated above, OSI filed a request for the issuance of a NITU for the Line's right-of-way. OSI 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. OSI has also provided a map and acknowledged that its use of the right-of-way for trail purposes is subject to its 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 previously, NSR has agreed to negotiate for interim trail use/rail banking with OSI.

Because OSI's request complies with the requirements of 49 C.F.R. § 1152.29 and because NSR 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, NSR 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.

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 NSR'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.⁶

2. 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.

3. 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 2, above.

4. 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.

5. 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.

6. If an agreement for interim trail use/rail banking is reached by September 29, 2021, interim trail use/rail banking may be implemented. If no agreement is reached, the Line may be fully abandoned, subject to any outstanding conditions.

7. The exemption will be effective on October 29, 2020.

8. NSR's request for exemption from the OFA procedures is denied as moot.

9. Petitions to reopen and petitions to stay must be filed by October 14, 2020.

10. 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 September 29, 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

⁶ If an interim trail use 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 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.

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, and Oberman.