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SERVICE DATE - JULY 26, 2004

## SURFACE TRANSPORTATION BOARD

### DECISION

STB Docket No. AB-290 (Sub-No. 248X)

#### NORFOLK SOUTHERN RAILWAY COMPANY—ABANDONMENT EXEMPTION— IN WASHINGTON COUNTY, NC

Decided: July 23, 2004

By petition filed on April 7, 2004, 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 a 7.3-mile line of railroad between milepost NS-82.7 at Mackeys, and milepost NS-90.0 at Plymouth, in Washington County, NC. NSR also seeks to be exempted from the offer of financial assistance (OFA) provisions of 49 U.S.C. 10904 and the public use provisions of 49 U.S.C. 10905. Pursuant to 49 U.S.C. 10502(b), the Board served and published a notice in the Federal Register on April 27, 2004 (69 FR 22902), instituting an exemption proceeding. The exemptions will be granted, subject to environmental and standard employee protective conditions.

### BACKGROUND

NSR, a wholly owned subsidiary of noncarrier Norfolk Southern Corporation, states that the segment of rail line proposed for abandonment is a dead-end branch line terminating at Mackeys. There is one shipper on the line, Royster Clark Resources, LLC (Royster Clark), located at Mackeys. Royster Clark has begun shipping and receiving all of its rail freight at its Plymouth facility pursuant to a letter agreement with NSR, which will continue to provide rail service there.

According to NSR, it is operating the line at a loss and cannot justify the costs of continued maintenance, rehabilitation, and operation of the line. Petitioner asserts that the line was operated at an avoidable loss of \$127,767 for the base year ending on September 30, 2003, and it estimates an avoidable loss from operations of \$109,487 for the forecast year. NSR states that storm damages resulting from Hurricane Isabel in September 2003 caused or exacerbated the need for immediate rehabilitation or repair of the line. NSR claims that continued operation of the line would cause it to incur \$270,000 in additional unrecoverable costs for tie replacement and other rehabilitation or maintenance work to keep the line operating.

NSR states further that, since the line was already operated at an avoidable loss, the additional investment now required to keep the line in operation cannot be recovered from revenue from current or reasonably forecast traffic levels on the line. NSR asserts that there is no

prospect that the line can be operated and maintained at a break-even level, much less a profit in the future, and that it cannot justify the continuing avoidable losses and additional maintenance and rehabilitation expenditures needed to keep the line operating. NSR indicates that it needs to invest its limited resources in lines that have a greater traffic density, can be operated profitably, and do not require cross-subsidization.

In addition, NSR states that it has conveyed the right-of-way to Dominion Virginia Power (Dominion Resources), subject to a temporary easement for the railroad line, in order for that company to better serve the public by improving and more easily accessing and maintaining its electric power transmission facilities along the right-of-way. NSR indicates that Dominion Resources' facilities were also damaged by Hurricane Isabel and require substantial repair, rehabilitation, or upgrading.

## DISCUSSION AND CONCLUSIONS

Under 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 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 under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of the application process, 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 NSR of the costs of owning, rehabilitating, and maintaining the line while preserving service to the only shipper on the line [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be adversely affected.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. The only active shipper on the line, Royster Clark, will continue to receive rail service from NSR at the shipper's Plymouth facility. However, to ensure that Royster Clark is informed of the Board's action, NSR will be required to serve a copy of this decision on Royster Clark within 5 days of the service date of this decision and to certify to the Board that it has done so. Given the market power finding, the Board need not determine whether the proposed abandonment is limited in scope.

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 employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), will be imposed.

NSR 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. The Board's Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment.

An environmental assessment (EA) was served on June 4, 2004, requesting comments by July 5, 2004.<sup>1</sup> In the EA, SEA recommended that eight conditions be imposed on any decision granting abandonment authority.

SEA stated that the U.S. Department of Commerce, National Geodetic Survey (NGS), the U.S. Environmental Protection Agency, Region 4 (U.S. EPA), the U.S. Army Corps of Engineers, Wilmington District (ACOE), the U.S. Department of Agriculture, Natural Resources Conservation Service (NRCS), and the North Carolina Wildlife Resources Commission (NC-WRC) have not completed their review of the proposed abandonment. Therefore, SEA recommended that a condition be imposed requiring NSR to consult with NGS prior to undertaking salvage operations and, if salvage operations are expected to destroy or disturb any geodetic station markers, further requiring NSR to notify NGS not less than 90 days prior to commencement of such operations. SEA also recommended that conditions be imposed prohibiting NSR from salvaging or disposing of the right-of-way until it completes consultations with U.S. EPA, ACOE, NRCS, and NC-WRC.

SEA also stated that the U.S. Fish and Wildlife Service (U.S. FWS) has not completed its review of the proposed abandonment, but has identified the following species of concern on its website: Bald Eagle (*Haliaeetus leucocephalus*), Rafinesque's Big-eared Bat (*Corynorhinus rafinesquii*), Red wolf (*Canis rufus*), and the Waccamaw killfish (*Fundulus waccamawensis*). SEA therefore recommended that a condition be imposed prohibiting NSR from salvaging or disposing of the right-of-way until consultation with U.S. FWS has been completed.

SEA further stated that the North Carolina Department of Environment and Natural Resources, Division of Parks and Recreation (NC-DENR) has not completed its review of the proposed abandonment, but has identified the following species of concern on its website: the Bald Eagle (*Haliaeetus leucocephalus*), Rafinesque's Big-eared Bat (*Corynorhinus rafinesquii*), Red wolf (*Canis rufus*), Waccamaw killfish (*Fundulus waccamawensis*), American Alligator (*Alligator mississippiensis*), Timber Rattlesnake (*Crotalus horridus*), Star-nosed Mole - Coastal Plain Population (*Condylura cristata* pop I), Alewife Floater (*Anodonta implicata*), Tidewater Mucket (*Leptodea ochracea*), Eastern Pondmussel (*Ligumia nasuta*), and the Carolina Grasswort

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<sup>1</sup> The due date set forth in the EA for the submittal of comments (July 5) was a Federal Holiday. Comments, if any, were due by July 6, 2004.

(*Lilaeopsis carolinensis*). SEA therefore recommended that a condition be imposed prohibiting NSR from salvaging or disposing of the right-of-way until consultation with NC-DENR has been completed.

Finally, SEA initially stated that Washington County, NC, had not completed its review of the proposed abandonment, and that the City of Gastonia, NC, Engineering Department, had requested that all rails, crossing materials, railroad signalization, and signage be removed from all highway/rail intersections with appropriate repairs along the right-of-way. SEA recommended that a condition be imposed prohibiting NSR from salvaging or disposing of the right-of-way until consultation with Washington County, NC, has been completed. SEA now states that after independent consultation, its previous recommendation should be modified to read only that Washington County, NC, has not completed its review of the proposed abandonment and that the previously recommended condition remains the same.

No comments to the EA were submitted. Therefore, the conditions recommended by SEA will be imposed. Based on SEA's recommendations, the Board concludes that the proposed abandonment, as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

As previously noted, NSR has requested that the abandonment be exempted from the OFA provisions of 49 U.S.C. 10904 and the public use provisions of 49 U.S.C. 10905. Exemptions from these provisions have been granted from time to time, when the right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service. See, e.g., Central Michigan Railway Company—Abandonment Exemption—In Saginaw County, MI, STB Docket No. AB-308 (Sub-No. 3X) (STB served Oct. 31, 2003); Central Kansas Railway, L.L.C.—Abandonment Exemption—In Sedgwick County, KS, STB Docket No. AB-406 (Sub-No. 14X) (STB served Apr. 10, 2001); and Norfolk and W. Ry. Co.—Aban. Exem. Cinn., Hamilton County, OH, 3 S.T.B. 110 (1998). Here, NSR has transferred the right-of-way to Dominion Resources for a valid public purpose, and the sole shipper on the line will continue to have access to rail service from NSR. Imposition of OFA procedures could delay or add uncertainty to Dominion Resources' work. Likewise, there is no need for a public use condition because a public use for the right-of-way has already been established between NSR and Dominion Resources.

The evidence of record establishes that the proposed exemptions from 49 U.S.C. 10904-05 meet the criteria of 49 U.S.C. 10502. Applying OFA or public use provisions in this instance is not necessary to carry out the rail transportation policy. Allowing the abandonment exemption to become effective expeditiously, without first being subject to these provisions, would minimize the need for Federal regulatory control over the rail transportation system, expedite the regulatory decision, and reduce regulatory barriers to exit [49 U.S.C. 10101(2) and (7)]. It has already been determined that regulation is not necessary to protect shippers from an

abuse of market power. Accordingly, an exemption from the OFA and public use provisions of 49 U.S.C. 10904-05 will be granted.

We will also not provide any further opportunity for interested persons to file trail use/rail banking requests. Trail use/rail banking is voluntary and can be implemented only if an abandoning railroad agrees to negotiate an agreement. See section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d). Here, NSR has already transferred the right-of-way to Dominion Resources and has stated that it will not negotiate with any other potential trail user.

This action will not significantly affect either 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. 10903-05 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 NSR shall: (1) consult with NGS prior to undertaking salvage operations; if salvage operations are expected to destroy or disturb any geodetic station markers, NSR shall notify NGS not less than 90 days prior to commencement of such operations; (2) be prohibited from salvaging or disposing of the right-of-way until consultation with U.S. EPA has been completed; (3) be prohibited from salvaging or disposing of the right-of-way until consultation with ACOE has been completed; (4) be prohibited from salvaging or disposing of the right-of-way until consultation with NRCS has been completed; (5) be prohibited from salvaging or disposing of the right-of-way until consultation with NC-WRC has been completed; (6) be prohibited from salvaging or disposing of the right-of-way until consultation with U.S. FWS has been completed; (7) be prohibited from salvaging or disposing of the right-of-way until consultation with NC-DENR has been completed; and (8) be prohibited from salvaging or disposing of the right-of-way until consultation with Washington County, NC, has been completed.

2. NSR must serve a copy of this decision on Royster Clark within 5 days of the service date and certify to us that it has done so.

3. These exemptions will be effective on August 25, 2004. Petitions to stay must be filed by August 10, 2004, and petitions to reopen must be filed by August 20, 2004.

4. 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 July 26, 2005, 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 Nober, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A. Williams  
Secretary