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SERVICE DATE - APRIL 4, 1997

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-3 (Sub-No. 140X)

MISSOURI PACIFIC RAILROAD COMPANY--ABANDONMENT EXEMPTION--
IN CLOUD AND JEWELL COUNTIES, KS

STB Docket No. AB-486 (Sub-No. 1X)

KYLE RAILROAD COMPANY--DISCONTINUANCE EXEMPTION--
IN CLOUD AND JEWELL COUNTIES, KS

Decided: April 1, 1997

By petition filed December 16, 1996, Missouri Pacific Railroad Company (MP) and Kyle Railroad Company (Kyle) (collectively, petitioners) seek exemptions under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 for MP to abandon, and Kyle to discontinue service over, the 33.4-mile Burr Oak Branch line located between milepost 496.3 at Jamestown and the end of the line at milepost 529.7 at Burr Oak, in Cloud and Jewell Counties, KS. The United Transportation Union (UTU) requests imposition of labor protective conditions. We will grant the petition, subject to labor protective conditions and an environmental condition.

BACKGROUND

Since 1991 Kyle has leased and operated MP's Burr Oak Branch line.¹ Due to damage caused by local flooding, the line was embargoed in July 1993. Petitioners initially estimated the cost to restore the line at \$350,000 and sought financial assistance from the Kansas Department of Transportation (KSDOT). According to petitioners, KSDOT denied the request because the volume of traffic on the line did not justify the expenditure. In the meantime, petitioners state that the line has suffered additional washouts and the condition of the line has further deteriorated. Petitioners now estimate it would cost \$750,000 to restore the line to FRA class 1 standards.

Prior to the embargo, three shippers used the line. Randall Coop, Koch Agri Services at Jewell, and Koch Agri Services at Burr Oak shipped or received 120, 54, and 77 carloads in 1992 and 30, 4, and 2 carloads in the first 6 months of 1993, respectively. Petitioners argue that these carloadings average 5 carloads per mile per year and produce earnings that only cover Kyle's operating costs, leaving nothing for track reconstruction. After making an effort to secure additional traffic for the line, Kyle maintains that there is no reasonable prospect that traffic will increase in the future. Petitioners maintain that there is no alternative other than abandonment and discontinuance of service over the line.

¹ See Kyle Railroad Company--Lease and Trackage Rights--Missouri Pacific Railroad Company and Union Pacific Railroad Company Northern Kansas Rail Lines, Finance Docket No. 31754 (ICC served Apr. 5, 1991).

Following the abandonment and discontinuance, petitioners assert that the shippers will continue to have rail service via Kyle at the nearby Jamestown, Beloit, and Mankato stations, as well as access to numerous motor carriers serving the area. Petitioners have certified that a copy of the petition was served on the shippers. No shipper has protested the proposed abandonment and discontinuance of service.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned, nor service discontinued, 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.

Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of abandoning and discontinuing service on this line, exemptions will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. By allowing petitioners to avoid the cost of restoring the line to service where the level of traffic and revenues derived therefrom do not justify its continued operation, exemptions will promote safe and efficient rail transportation, foster sound economic conditions, and encourage efficient management [49 U.S.C. 10101(3), (5), and (9)]. Other aspects of the rail transportation policy are not affected adversely. For example, competition and the continuation of a sound rail transportation system are not affected [49 U.S.C. 10101(4)].

Regulation of this transaction is not necessary to protect shippers from an abuse of market power. Shippers on the line have not objected to the proposed abandonment and discontinuance and appear to have adequate transportation alternatives available. Nevertheless, to ensure that the shippers are aware of the status of this line, we will require petitioners 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 they have done so. Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

UTU requests imposition of labor protective conditions. Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a carrier of a statutory obligation to protect the interests of its employees. Accordingly, we will impose the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979), as a condition to granting this exemption.

MP and Kyle have submitted an environmental report with their petition and have notified the appropriate Federal, state, and local agencies of the opportunity to file comments concerning the energy and environmental effects of the proposed abandonment. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified its data, and

analyzed the probable effect of the proposed abandonment on environmental and historic resources. SEA served an environmental assessment (EA) on February 18, 1997, indicating that the Kansas Department of Health and Environment (KSDHE) expressed concern about the potential water quality impacts of the abandonment and stated that MP may be required to obtain a water quality certification from KSDHE. KSDHE further recommended that MP prepare a Nonpoint Source Pollution Control Plan. Therefore, SEA recommended that an appropriate compliance condition be imposed on any decision granting abandonment authority.

No comments were received in response to the EA. Based upon SEA's recommendation, which we adopt, we conclude that the proposed abandonment, if implemented subject to SEA's recommended condition set forth below, will not significantly affect either the quality of the human environment or conservation of energy resources.

SEA has indicated that the right-of-way may be suitable for other public use under 49 U.S.C. 10905. We note that no one has requested a public use condition, and we will not impose one here. Nevertheless, we will provide a period of 20 days after Federal Register publication for interested persons to request a public use condition.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903 the abandonment by MP, and the discontinuance of service by Kyle, of the above-described 33.4-mile rail line, subject to: (1) the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979); and (2) the condition that MP consult with the KSDHE, and, if necessary, comply with KSDHE requirements regarding a water quality certification and a Nonpoint Source Pollution Control Plan.

2. Notice will be published in the Federal Register on April 4, 1997.

3. Petitioners must serve a copy of this decision on the line's three shippers within 5 days of the service date of this decision and certify to us that they have done so.

4. Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on May 4, 1997.

5. Formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2)² and requests for interim trail use/rail banking

² See Exempt. of Rail Abandonment--Offers of Finan. Assist., 4 I.C.C.2d 164 (1987), for regulations in effect at the time of filing of the exemption petition. We note that the ICC Termination Act of 1995 has made changes and additions to the previous law regarding the processing of abandonments and OFAs.

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under 49 CFR 1152.29 must be filed by April 14, 1997. Petitions to stay must be filed by April 21, 1997. Requests for a public use condition in conformity with 49 CFR 1152.28(a)(2) must be filed by April 24, 1997. Petitions to reopen must be filed by April 29, 1997.

6. If a formal expression of intent to file an OFA has been timely submitted, an OFA to allow rail service to continue must be received by the railroad and the Board within 30 days after publication, subject to time extensions authorized under 49 CFR 1152.27(c)(2)(ii)(C) and (D). Each OFA must be accompanied by the filing fee, which currently is set at \$900. See 49 CFR 1002.2(f)(25). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(2).

7. 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."**

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

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To implement these changes, we have issued final rules in Abandonment and Discontinuance of Rail Lines and Rail Transportation under 49 U.S.C. 10903, STB Ex Parte No. 537 (STB served Dec. 24, 1996), that became effective on January 23, 1997. Because we have processed the exemption petition under the former regulations, we will continue to use the former regulations in this proceeding to process an OFA, if one is filed.