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November 11, 2010

Justin Cook
History Reviews Manager
Ohio Historic Preservation Office
1982 Velma Avenue
Columbus, OH 43211-2497

RE: *Norfolk Southern Railway Company – Abandonment Exemption – in Lucas County, OH*, STB Docket No. AB-290 (Sub-No. 290X)

Dear Mr. Cook:

I am writing on behalf of Norfolk Southern Railway Company (“NSR”) to re-institute discussions concerning the disposition of 2.82 miles of track (the “Line”) which is the subject of the above-docketed rail line abandonment proceeding before the U.S. Surface Transportation Board (“STB”), and, through such discussion, to complete the Section 106 process associated with this abandonment. As you may recall, the proposed abandonment contemplates the removal of three railroad bridges located, respectively, at mileposts TW 0.54, TW 0.62, and TW 0.99. Before NSR may consummate the proposed abandonment and commence bridge removal, the Ohio Historic Preservation Office (“OHPO”) must complete its review under Section 106 of the National Historic Preservation Act, and either OHPO or NSR (or both) must report back to the STB concerning mitigation. In connection with the Section 106 process, I would like to confer with you regarding the basis for OHPO’s adverse impact finding, the scope of any such impact, and appropriate mitigation, if any.

As OHPO’s records should reflect, NSR sought and obtained authority to abandon the Line pursuant to an STB-issued notice of exemption dated June 27, 2008. The abandonment notice took effect on July 29, 2008, subject to completion of the STB’s then-ongoing environmental and historic impacts review. On July 3, 2008, the STB’s Section of Environmental Analysis (now the STB’s Office of Environmental Analysis – “OEA”) recommended that NSR keep potentially historic resources in place until the completion of the Section 106 process, and that NSR report back to the STB concerning that process. The STB endorsed OEA’s recommendations in a decision served on July 28, 2008, stating that NSR was “prohibited from filing a consummation notice [of abandonment] or initiating any salvage activities until the Section 106 process [had] been completed.” The STB also directed NSR to

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consult with OHPO on the Section 106 process, and to report back on the progress of such consultations. The STB decisions in this proceeding are appended to this letter.

NSR records show that OHPO provided initial feedback on the proposed abandonment in a June 26, 2008 letter expressing interest in the three bridges and in the Line itself. Additional written dialogue among OHPO and NSR occurred in October and December of 2009 (evidently related to in person and/or over-the-telephone conversations between NS representatives and OHPO), and it appears that the latest communication on this matter was a letter dated December 24, 2009, from OHPO's Mark J. Epstein to NSR's Richard Dietz, who, at that time NSR had designated to serve as NSR's point of contact. Mr. Epstein's letter reiterates OHPO's interest in the potential preservation of the bridges at mileposts TW 0.54, TW 0.62, and TW 0.99, and it suggests somewhat vaguely that OHPO also may have an interest in the Line's right-of-way.

As NSR has noted, the TW 0.54, TW 0.62, and TW 0.99 bridges are attractive nuisances; the targets of vandals and graffiti "artists." Future retention of the bridges would subject NSR to considerable potential liability and cost. In addition, the milepost TW 0.99 bridge spans NSR's busy Chicago Line, constraining clearances, and, due to the bridge's deteriorating condition, threatening the safe operation of trains running below. Moreover, although NSR acknowledges that the three bridges may be 50 years old or older – making them nominally eligible for listing in the National Register of Historic Places ("NRHP") – NSR believes that none of the bridges possesses architectural or historic significance actually qualifying it for NRHP listing. Also, much of the track along the Line has been removed by third parties without NSR authorization, such that the Line's right-of-way has lost much of its past character as a rail line.

Mr. Epstein's December 24, 2009 letter mentions Toledo Metropolitan Area Council of Governments' ("TMACOG") desire to negotiate interim trails use for the Line, and the letter seems be designed to steer NSR in that direction. NSR, however, has declined to negotiate trails use (a decision that as a matter of law and STB practice is entirely at NSR's discretion and is now settled). Along with its trails use request, TMACOG sought and obtained a public use condition under which TMACOG was afforded 180 days to negotiate with NSR over the disposition of the Line (including its bridges). The public use condition has long since expired without an agreement, and NSR intends to proceed with conveying its interest in the Line's right-of-way to adjacent land owners.

My review of the discussions between OHPO and NSR indicates that the Section 106 process has not yet been completed, and it appears that the main obstacles to the completion of that process are the Line's three bridges. NSR doubts that the three structures possesses genuine historical value, but NSR nevertheless has advised me that it would be willing to convey title to all three bridges to a third party, including, for example, TMACOG or OHPO. As indicated above, the bridge at milepost TW 0.99 is a transportation hazard and an impediment to ongoing interstate commerce on the Chicago Line passing beneath it. NSR would be willing to transfer ownership of this bridge to OHPO or another interested party free of charge, provided that the acquiring entity agreed to relocate the bridge away from NSR's Chicago Line. NSR cannot agree to an arrangement under which the milepost TW 0.99 would be raised to provide for better

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clearance over the Chicago Line, and I believe that the STB would not mandate such an arrangement if OHPO insisted upon it.

On the other hand, NSR is willing to donate the two bridges at TW 0.54 and TW 0.62 to an interested third party, and, under such a conveyance, those two bridges could be preserved in place. NSR is unaware of any entity that would be interested or willing to take title to the bridges, and it doubts very much that anyone would be interested in tackling the cost and logistics associated with relocating the milepost TW 0.99 bridge. OHPO has suggested that NSR solicit other trail users in the region to see if any of them might be interested in acquiring the bridge spans for use elsewhere. In response, I would note that the STB's abandonment process, including decisions pertaining to environmental and historic impacts, is a matter of public record. Furthermore, I have found that rail trail organizations are quite familiar with, and often monitor, the Board's abandonment proceedings. I therefore have no reason to think that potential users of the bridge spans are unaware of the historic mitigation issues at play here, or of the availability of the subject bridge components for acquisition and re-deployment.

Nevertheless, if OHPO is aware of anyone interested in taking possession of the bridges as discrete assets and assuming the liability for them, NSR would be willing to discuss the terms and conditions of a donation. Again, NSR would be willing to entertain proposals for such transfer(s) if indeed there were any interested parties.

NSR has carefully considered alternatives to bridge demolition, weighing its options in light of – (1) its primary responsibility as a freight common carrier to provide safe, reliable, and cost-effective transportation to its customers, and (2) the fact that the bridges are of no use to the railroad. In fact, the bridges are less than useless to NSR. If NSR were forced to keep the bridges, then NSR would be subjected to otherwise avoidable potential liability and, possibly, costs associated with future upkeep. Moreover, retaining in place the milepost TW 0.99 bridge imposes clearance restrictions and transportation hazards on NSR's Chicago Line. Raising this bridge, as OHPO has suggested (a proposal that NSR rejects), would require NSR to incur costs without any chance for a return on the "investment."

As you may know, the STB is mindful in abandonment cases that it must not effect an unlawful taking of a rail carrier's property without compensation when it orders historic and/or environmental mitigation. This consideration is reflected in several decisions of the STB and its predecessor, the Interstate Commerce Commission. In my opinion, OHPO's most recent mitigation proposal as set forth in your agency's December 24, 2009 letter runs afoul of the STB's constitutional mandate against unlawful takings, and, based upon my experience before the STB, I suspect that the agency would agree if asked to resolve this matter.

There is still a pathway for the amicable resolution of the Section 106 process here. If OHPO can identify a party willing to acquire the bridges under the basic terms set forth above within a mutually acceptable time period, then OHPO's concerns would be addressed. Alternatively NSR could provide OHPO with certain agreed-upon documentation on the targeted structures (such as archival photographs and/or a narrative description of the structure(s), along

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with whatever additional archival and/or engineering data that the railroad may have in its possession regarding the structure – if such information has not already been provided), which the STB customarily deems to be appropriate documentary mitigation. As you may know, the STB favors such mitigation because insisting upon mitigation that would prohibit a rail carrier from disposing of its assets exposes the agency to liability for unlawful taking.

I encourage you to consider NSR's proposals, particularly in light of the mitigation that the STB would most likely impose in the event of an impasse. As you are aware, the current Section 106 process is somewhat stale due to the interval in contact between the parties. With NSR directing me to assist it in the completion of the abandonment process, I intend to conclude the historic impacts review process as expeditiously as possible in order to allow my client to move forward with abandonment. As noted above, the STB has directed NSR to report back to it concerning the status of NSR's Section 106 consultations, and I plan to make such a report as soon as possible following further discussion with you.

It would be quite useful for you and I to discuss NSR's proposed abandonment by telephone, and, as may be appropriate, to involve the STB in such discussions. I hope that, in an effort to accommodate the interests of all concerned, we can discuss this matter soon. My contact information is listed atop this letter.

Sincerely,



Robert A. Wimbish

Counsel for Norfolk Southern Railway Company

Attachments

cc: Marc Kirchner (NSR)
Kathy Headrick (NSR)
Dan Kruger, Esq. (NSR)
Victoria Rutson (STB)
Kenneth Blodgett (STB)
Mark J. Epstein (OHPO)