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SERVICE DATE – OCTOBER 23, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 290 (Sub-No. 403X)

NORFOLK SOUTHERN RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN
THE CITY OF FORT WAYNE, IND.

Decided: October 22, 2019

On September 5, 2019, Norfolk Southern Railway Company (NSR) filed a verified notice of exemption under 49 C.F.R. part 1152 subpart F—Exempt Abandonments to abandon an approximately 2.29-mile rail line segment extending between milepost GI 0.0 and milepost GI 2.29 in the City of Fort Wayne, Ind. (the Line).

In 1995, NSR’s predecessor, Norfolk and Western Railway Company (N&W), sought regulatory approval to acquire from Consolidated Rail Corporation (Conrail) and operate three rail lines. Norfolk & W. Ry.—Purchase & Operation Exemption—Consol. Rail Corp. Line, Fort Wayne to Warsaw, Ind., FD 32736 (ICC served Aug. 29, 1995). NSR states that one of those rail lines—the “Fourth Street industrial track,” which at the time was described as extending from milepost -0.9 to milepost 0.95—is the Line. (Verified Notice 3.) NSR claims that it is unclear from the 1995 regulatory filings and decision whether N&W intended the Line to be railroad line under 49 U.S.C. § 10901 or excepted track under 49 U.S.C. § 10906. (Id.)

NSR states that in 2000, OmniSource, the only shipper on the Line, decided to cease rail operations over the Line and expressed an interest in purchasing a portion of the Line adjacent to its facility. (Id.) According to NSR, due to the uncertainty of the track’s classification, NSR decided internally to seek abandonment authority out of an abundance of caution before selling any portion of the Line. (Id. at 3-4.) However, NSR states that it never followed through on its decision to seek abandonment authority. Rather, NSR states that in 2001, it determined that the Line was § 10906 excepted track under the Final System Plan (FSP) and proceeded to retire the Line without abandonment authority. (Id. at 4.) NSR explains that it subsequently sold certain segments of the Line, did not retain a rail easement for those segments, and salvaged portions of the Line. (Id.)

According to NSR, it filed its notice of exemption in this proceeding because, during a recent review of its records, NSR discovered that it may have been required to seek abandonment authority for the Line. (Id.) NSR states that, while no definitive conclusion has been reached as to whether the Line is railroad line under § 10901 or excepted track under § 10906, NSR is seeking abandonment authority out of an abundance of caution. (Id.)

NSR also states that, while it seeks to abandon the entire Line, it plans to convert the portion of Line from milepost GI 1.85 to milepost GI 2.29 to § 10906 track to support current and future operation needs on NSR's nearby mainline. (*Id.* at 5.) NSR claims that no shippers have been served by the Line for nearly two decades and that the sole shipper located on the Line in 2000 supported abandonment. (*Id.*)

The Board's class exemption procedures provide an expedited means of obtaining Board authority for certain classes of transactions involving routine matters. A notice that raises unresolved issues or questions that require considerable scrutiny may be rejected. *E.g.*, Tri-City R.R.—Lease & Operation Exemption—N. Pac. Dev., LLC, FD 36170, slip op. at 1 (STB served Mar. 21, 2018); FPN—USA, Inc.—Operation Exemption—Tijuana-Tecate Shortline, FD 35155, slip op. at 3 (STB served Aug. 8, 2008).

NSR's notice of exemption will be rejected. The notice raises factual and legal issues that require a more detailed examination than the expedited notice of exemption process is designed to provide. For example, NSR's notice reflects significant uncertainty regarding whether the Line is railroad line governed by § 10901, in which case Board abandonment authority is required, *see* § 49 U.S.C. § 10903(a)(1), or excepted track governed by § 10906, in which case the Board lacks authority to authorize abandonment, *see* 49 U.S.C. § 10906. NSR states that it decided to seek abandonment authority in 2000 but before doing so, in 2001, it determined the Line was § 10906 track under the FSP. (Verified Notice 3-4.) However, NSR goes on to explain that, after a recent review of its records, it has discovered that it "failed to seek abandonment authority for the Line when it appears it may have been required to do so" while also stating that it has not reached a definitive conclusion with respect to the nature of the track. (*Id.* at 4.) NSR does not explain what information it relied on in reaching its previous conclusions in 2000 or 2001 or in making its recent determination to seek abandonment authority.¹

Moreover, NSR states that various segments of the Line already have been sold to other parties and that these sales were completed without NSR having retained a rail easement or without the acquiror having obtained Board acquisition authority. (Verified Notice 4.) Insofar as some or all of those segments may be § 10901 railroad line, the sale of these segments without Board authority raises substantial legal questions that require more thorough consideration than is appropriate under the notice of exemption process.

For the reasons explained above, the class exemption procedure is not appropriate in this case, and NSR's notice will be rejected.²

¹ Further adding to this uncertainty is the fact that NSR indicates that the Line is the same line referred to as the Fourth Street industrial track but also states that the Line extends from milepost GI 0.0 to milepost GI 2.29, while the Fourth Street industrial track extended from, what was at that time, Conrail's milepost -0.9 to milepost 0.95. (*Id.* at 3.)

² If NSR believes there is substantial evidence indicating that the Line was railroad line governed by § 10901, NSR may seek abandonment authority through a petition for exemption or an abandonment application. In any such application or petition, NSR should clearly set forth all
(continued...)

It is ordered:

1. NSR's verified notice of exemption is rejected.
2. This decision is effective on its date of service.

By the Board, Allison C. Davis, Director, Office of Proceedings.

(...continued)

evidence that it believes supports the conclusion that the Line was railroad line governed by § 10901.