

MEMORANDUM

TO: Kirk Trost
FROM: Kevin Sheys
DATE: October 13, 2005
SUBJECT: Santa Cruz Branch Abandonment

I. INTRODUCTION

The Santa Cruz County Regional Transportation Commission ("SCCRTC") is contemplating the acquisition of the Santa Cruz Branch¹ from Union Pacific Railroad Company ("UP"). The appraised value of the Santa Cruz Branch is a net liquidation value ("NLV") of \$19,255,000, under certain stated assumptions.² Surface Transportation Board ("STB") authorization for abandonment of common carrier service on the Santa Cruz Branch would be a prerequisite to liquidation. 49 U.S.C. § 10903.

II. SUMMARY

In light of the foregoing facts, you have asked us to outline the legal standard and procedural rules under which abandonment of the Santa Cruz Branch could be accomplished. As discussed below, the legal standard governing an abandonment of service on any rail line is whether the present or future public convenience and necessity permit the proposed abandonment. In implementing this standard, the STB balances the potential harm to affected shippers and communities against the present

¹ Defined herein to include the Santa Cruz Branch Line and the Davenport Branch Line, the rail line generally located between Watsonville, CA and Davenport, CA, a distance of approximately 31 route miles.

² Draft Appraisal Report, at p. 94, Arthur Gimmy International, December 1, 2004.

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and future burden that continued operations could impose on the railroad and on interstate commerce.

A common carrier has several procedural avenues to accomplish an abandonment of service. As discussed below, the two most likely procedures in the case of the Santa Cruz Branch are (i) filing an abandonment application with the STB, and (ii) filing a petition for exemption. Assuming that on-line shippers do not oppose the abandonment, and further assuming that no party files an offer of financial assistance, the STB would decide the abandonment case within approximately three to six months of its submission. If on-line shippers oppose the abandonment, or a party files an offer of financial assistance, the STB's decision could take up to twelve months and possibly longer.

III. ABANDONMENT OF RAILROAD LINES SUBJECT TO STB JURISDICTION

A. The Statutory Standard

Pursuant to 49 U.S.C. § 10903, a common carrier who intends to abandon any part of its railroad lines must obtain authority from the STB before abandoning such railroad lines. The statutory standard governing an abandonment of service is whether the present or future public convenience and necessity permit the proposed abandonment. 49 U.S.C. § 10903(d). In implementing this standard, the STB balances the potential harm to affected shippers and communities against the present and future burden that continued operations could impose on the railroad and on interstate commerce. See Wisconsin Central, Ltd. – Abandonment – In Ozaukee, Sheboygan and

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Manitowoc Counties, WI, STB Docket No. AB-303 (Sub-No. 27) (STB served Oct. 18, 2004) (citing *Colorado v. United States*, 271 U.S. 153 (1926)); see also Camas Prairie Railnet, Inc. - Abandonment - in Lewis, Nez Perce, and Idaho Counties, ID, STB Docket No. AB-564 (STB served Sept. 13, 2000) (citation omitted)).

B. Procedural Requirements for Seeking Abandonment Authority

A common carrier would have two options for seeking STB approval to abandon rail service over the Santa Cruz Branch: (1) file an abandonment application; or (2) file a petition for exemption.³ A summary of both of these options is provided below.

1. Abandonment Application

A common carrier may seek abandonment authority from the STB by filing an abandonment application. An abandonment application is the most onerous of the abandonment filing options. Generally speaking, a common carrier must present a comprehensive case for abandonment of the subject rail lines, including financial evidence regarding revenue costs and return on investment.

³ As an alternative to filing an abandonment application, or a petition for exemption, a common carrier may, under certain circumstances, elect to pursue the expedited procedure of filing a notice of exemption ("NOE"). An NOE would become effective within 30 days after publication in the Federal Register, unless stayed, or a third party files a formal expression of intent to file an offer of financial assistance ("OFA"). However, a common carrier may not file an NOE unless it meets the specific requirements for exempt abandonment proceedings set forth in 49 C.F.R. § 1152.50(b), *including the absence of rail traffic for at least two years*. Given the present rail service in the Santa Cruz Branch, this expedited procedure would not be available, absent a significant change in circumstances.

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An abandonment application must include all of the information required by 49 C.F.R. § 1152.22.⁴ Although the regulations state that the STB will serve a decision on the merits of the abandonment application within 110 days after the application is filed, in some cases, the STB may take more time to issue a decision. See 49 C.F.R. § 1152.26.

2. Petition for Exemption

A common carrier also may seek abandonment authority from the STB by filing a petition for exemption. Usually, a common carrier will prefer to file a petition for exemption (assuming a NOE is inapplicable, as discussed in Footnote 4) because it is considerably less burdensome than a full-blown abandonment application.

Although 49 U.S.C. § 10903 requires a common carrier to obtain STB authority before abandoning a line of railroad, 49 U.S.C. § 10502 requires the STB to exempt a person, transaction or service from the statutory and regulatory requirements otherwise applicable to a common carrier when the STB determines: (1) application of those requirements is not necessary to carry out the rail transportation policy of 49 U.S.C. §

⁴ Among other things, an abandonment application must include (i) a map of the subject line, (ii) a statement of reasons for filing the application, (iii) a description of the present physical condition of the line, including any operating restrictions and an estimate of deferred maintenance and rehabilitation costs, (iv) a description of the service performed on the line, (v) revenue and cost data, (vi) a discussion of rural and community impacts, and (vii) information regarding the environmental impact of the proposed abandonment in compliance with 49 CFR §§ 1105.7 and 1105.8. (40 CFR § 1152.22.) The application also must comply with the requirements concerning the form of notice in 49 C.F.R. § 1152.21 and the filing and service requirements in 49 C.F.R. § 1152.24.

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10101; and (2) either (a) the transaction is of limited scope or (b) regulation is not needed to protect shippers from an abuse of market power. A petition for exemption generally includes a description of the rail line proposed for abandonment and arguments regarding why the STB should exempt the common carrier from the requirements of 49 U.S.C. § 10903 (and the accompanying regulations).⁵ Although a petition for exemption permits a common carrier to seek abandonment pursuant to a much more streamlined process, the STB still often takes three to six months to issue a decision and sometimes even longer. However, a party may petition the STB for expedited consideration of the petition for exemption.

C. Filings by Interested Third Parties in Conjunction with Abandonment and Exemption Proceedings.

Apart from opposition filings, other filings by interested third parties, such as rail customers, other common carriers, or public agencies, may delay or affect the outcome of abandonment applications or petitions for exemption. Such filings include offers of financial assistance, requests for public use condition, or requests for interim trail use. These filings are discussed below.

⁵ A petition for exemption also must comply with the environmental/historic reporting and notice requirements of 49 CFR 1105, to the extent applicable. Generally speaking, 49 CFR 1105 requires the preparation and service of an environmental/historic report.

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1. Offers of Financial Assistance

Of the three types of potential filings by interested third parties, discussed above, an offer of financial assistance ("OFA") (assuming an OFA were even practical in this case) probably has the most potential to delay an abandonment.

A person may submit an OFA to continue existing rail service on a line of railroad proposed for abandonment within 120 days of the filing of an application for abandonment or petition for exemption, or 10 days after service of an STB decision granting the abandonment or exemption, whichever occurs sooner. See 49 C.F.R. § 1152.27(b)(1)&(2). If the STB determines that a financially responsible person has offered assistance, it will postpone the effective date of its decision granting an application for abandonment or petition for exemption and, in the case of a petition for exemption, partially revoke the exemption (or, if no decision has been issued, postpone the issuance of a decision). See 49 C.F.R. § 1152.27(e)(1)&(2). Once the STB postpones the abandonment, or postpones and revokes the exemption, the parties are permitted to negotiate a subsidy agreement for continued rail service. If the parties reach an agreement, the STB will postpone the effective date of the decision granting the application for abandonment, or petition for exemption, for as long as the subsidy agreement is in effect. See 49 C.F.R. § 1152.27(f)(1). If the parties fail to reach agreement, either party may petition the STB to establish the conditions and set the terms of compensation, within thirty (30) days after the OFA is made. See 49 C.F.R. § 1152.27(g)(1). The STB will issue a decision within thirty (30) days after the request is

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due. See 49 C.F.R. § 1152.27(h)(1). If the parties fail to reach agreement within thirty (30) days after the offer is made, and neither party requests the STB to set the conditions and terms of compensation, the STB will serve a decision vacating the prior decision postponing the effective date of the decision granting the application for abandonment, or petition for exemption. The STB will issue the decision to vacate within ten (10) days of the due date for requesting the STB to set the conditions and amount of compensation. See 49 C.F.R. § 1152.27(g)(2).

2. Requests for Public Use Condition

A party may file a request for a public use condition within 45 days after the filing of the application for abandonment, or 20 days after publication of notice of the filing of the petition for exemption, as applicable. See 49 U.S.C. § 10905; see also 49 C.F.R. § 1152.28(a)(3). If the STB finds in favor of the abandonment or exemption, the Board will determine if the subject rail properties are appropriate for other public uses. See 49 C.F.R. § 1152.28(a). If the Board determines that the subject rail properties are appropriate for other public uses, the Board may impose conditions on the sale, lease, exchange, or other disposal, of such properties. The conditions may include a prohibition on any such disposal for not more than 180 days, unless the properties have first been offered for sale, on reasonable terms, for public purposes. See 49 U.S.C. § 10905; 49 C.F.R. § 1152.28(a)(2)(iii).

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3. Requests for Interim Trail Use (Railbanking)

A state, political subdivision, or qualified private organization, may file a request for interim trail use (railbanking) pursuant to 49 C.F.R. § 1152.29. As with requests for public use condition, a request for interim trail use must be filed within 45 days after the filing of the application for abandonment, or 20 days after publication of notice of the filing of the petition for exemption, as applicable. See 49 CFR § 1152.29(b)(1)&(2). However, interim trail use is voluntary on the part of the abandoning common carrier and thus it would not be required to negotiate an interim trail use agreement with an interested party.