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SERVICE DATE - JULY 26, 2004

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-868X

MISSISSIPPI TENNESSEE HOLDINGS, LLC—ABANDONMENT EXEMPTION—  
IN UNION, PONTOTOC AND CHICKASAW COUNTIES, MS

STB Docket No. AB-869X

MISSISSIPPI TENNESSEE RAILROAD, LLC—DISCONTINUANCE OF  
SERVICE EXEMPTION—IN UNION, PONTOTOC AND CHICKASAW COUNTIES, MS

Decided: July 23, 2004

By petition filed on April 7, 2004, Mississippi Tennessee Holdings, LLC (MTH) and Mississippi Tennessee Railroad LLC (MTR)<sup>1</sup> (jointly, petitioners) seek an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 for MTH to abandon, and MTR to discontinue service over, a 43.2-mile line of railroad in Union, Pontotoc and Chickasaw Counties, MS.<sup>2</sup> The line extends from milepost 324.2 near New Albany to the end of the line at milepost 281.0 near Houston, MS. A request for issuance of a notice of interim trail use (NITU) and imposition of a public use condition was filed by the County of Pontotoc, MS (Pontotoc County). We will grant the exemption subject to trail use, public use, environmental and standard employee protective conditions.

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<sup>1</sup> MTH and MTR are commonly controlled. See Gregory B. Cundiff, Connie Cundiff, CGX, Inc., and Ironhorse Resources, Inc.—Continuance in Control Exemption—Mississippi Tennessee Holdings, LLC and Mississippi Tennessee Railroad, LLC, STB Finance Docket No. 34356 (STB served June 12, 2003).

<sup>2</sup> Notice of the institution of an exemption proceeding was served and published in the Federal Register on April 27, 2004 (69 FR 22901).

## BACKGROUND

The line proposed for abandonment is the southern part of an 87.7-mile rail line extending between Middleton, TN, and Houston, MS, that MTH acquired in May 2003.<sup>3</sup> MTR began operating the Middleton to Houston line in June 2003 under an agreement with MTH. The petitioners state that they had reasonable expectations of operating profitably the southern portion of the Middleton to Houston line, but have been unable to attract the necessary traffic to support its continued operation.

Petitioners state that, in the 9-month period between June 2003 and February 2004, MTR handled 357 carloads on the line. Five current shippers on the line have generated this traffic: International Paper Corp. (IP), Agrilance (AGRO), MPI Inc. (MPI), Farmers Marketing Association (Farmers), and Ware Milling Co. (Ware). According to petitioners, two former shippers are also located on the line: Chickasaw Farmers Marketing (Chickasaw) and Packaging Corp. of America (PCA). The principal commodities transported over the line are paper, cardboard, fertilizer, grain, glue and logs.

Randy Cundiff, MTR's Marketing Manager testifies that he met with IP, AGRO, MPI and Farmers in December 2003 to discuss the plans to abandon the line. He says that MTR also approached PCA in an attempt to attract its high-volume traffic. As noted, PCA is not an active shipper, but it previously had shipped more than 2,300 carloads of logs per year by rail from its yard near Houston. Mr. Cundiff states that MTR believed that rail service could be resurrected for PCA with the proper rate structure and service terms. Although the parties allegedly negotiated rail rates and workable daily switching times, Mr. Cundiff states that PCA declined to resume using rail service, because it could not reach a satisfactory agreement with a third party operator at its yard. Mr. Cundiff states that PCA then indicated that future rail service did not seem feasible.

Mr. Cundiff states further that IP has advised him that the rail traffic received at its plant at Houston has declined sharply. IP currently generates most of the traffic handled on the line. Mr. Cundiff indicates that IP received between 650 and 700 carloads per year prior to MTH's acquisition of the line, but that IP received only 273 carloads during the first 9 months after MTH acquired the line. Mr. Cundiff indicates further that the traffic levels for AGRO, MPI and Farmers have not increased from the previous year.

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<sup>3</sup> See Mississippi Tennessee Holdings, LLC and Mississippi Tennessee Railroad, LLC—Acquisition and Operation Exemption—Rail Line of Mississippi & Tennessee Railnet, Inc. between Houston, MS, and Middleton, TN, in Chickasaw, Pontotoc, Union and Tippah Counties, MS, and Hardeman County, TN, STB Finance Docket No. 34355 (STB served June 12, 2003).

Petitioners assert that the line is unprofitable. In support, petitioners have submitted a verified statement from Barry S. McClure, the Chief Financial Officer of MTR's parent, Ironhorse Resources, Inc., who indicates that he is responsible for financial affairs for MTR. Mr. McClure has submitted data indicating that, during the 9-month period between June 2003 and February 2004, MTR realized revenues totaling \$201,187 and incurred avoidable costs totaling \$274,002, resulting in an avoidable loss of \$72,815. Petitioners note that MTR has attempted to generate additional revenue by assessing a surcharge for traffic on the line, but the surcharge failed to produce sufficient revenue to make operations profitable.

Mr. McClure also has submitted forecast year projections showing that MTR would handle 568 carloads on the line and would realize \$298,024 in revenues and incur avoidable costs of \$400,041, resulting in a projected avoidable loss from operations of \$102,017. Mr. McClure has calculated that MTR would also incur an opportunity cost of \$292,236 per year if it continued to operate the line. No objections have been received to the cost and revenue data submitted in Mr. McClure's testimony.

Petitioners claim further that the line needs substantial track and bridge rehabilitation to remain in service. MTR's General Manager, Greg Lockhart, testifies that the line is currently maintained as Federal Railroad Administration (FRA) excepted track. Mr. Lockhart, estimates that a total of \$779,908 would be required to repair tracks, bridges and grade crossings and replace ties for the line to meet FRA Class 1 safety standards.<sup>4</sup> No objections have been received to Mr. Lockhart's rehabilitation cost estimates.

Petitioners state that shippers on the line have motor transportation alternatives available. They also point out that MTR has arranged an alternate transloading site in New Albany, MS, for shippers on the line.

## 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, 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.

The petitioners have established that they are incurring losses on the line, and will continue to incur losses until the line is abandoned and service discontinued. The line is not

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<sup>4</sup> FRA's track safety standards are published in 49 CFR part 213.

generating enough traffic to justify continued operation, despite petitioners' efforts to attract additional traffic.

In these circumstances, detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative time and expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will promote a safe and efficient rail transportation system, foster sound economic conditions in transportation, and encourage efficient management by relieving petitioners from the expense of retaining and maintaining a line with limited traffic and revenue [49 U.S.C. 10101(3), (5), and (9)]. Other aspects of the rail transportation policy will not be affected adversely.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. The petitioners have met with the shippers on the line to advise them of their plan to abandon the line and have certified that they served copies of the exemption petition on all current and former shippers. None of the current or former shippers on the line has objected to the proposed abandonment. As noted, the petition indicates that shippers have motor transportation alternatives available and that MTR has arranged an alternate transloading site in New Albany, MS, for shippers on the line. Nevertheless, to ensure that the shippers are aware of our action, petitioners will be required to serve a copy of this decision on each shipper on the line within 5 days of the service date of this decision and to certify to the Board that it has done so. Given our market power finding, we need not determine whether the proposed transaction 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, we will impose the employee protective conditions set forth in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979).

Petitioners have submitted an environmental report with their petition and have 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. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, analyzed the probable effects of the proposed action on the quality of the human environment, and served an environmental assessment (EA) on June 4, 2004.

In the EA, SEA noted that the Natural Resources Conservation Service (NRCS) was concerned that salvage activities could adversely affect prime agricultural lands. Therefore, SEA recommended that a condition be imposed requiring that MTH consult with NRCS prior to salvage regarding measures to avoid impacts to prime farmlands. SEA also noted a comment by the U.S. Army Corps of Engineers and recommended a condition requiring that MTH consult with the Mobile District of the Corps prior to beginning salvage activities.

No comments to the EA were filed by the July 6, 2004 due date. We will impose the conditions recommended by SEA. Based on SEA's recommendations, we conclude that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

Pontotoc County requests that an interim trail use/rail banking condition be imposed under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act). It has submitted a statement of willingness to assume financial responsibility for the right-of-way and acknowledged that use of the right-of-way is subject to possible future reconstruction and reactivation of the right-of-way for rail service as required under 49 CFR 1152.29. In a letter filed on June 10, 2004, petitioners state that they are willing to negotiate with Pontotoc County for interim trail use during a 180-day period from the service date of the Board's decision granting the exemption. Pontotoc County's request complies with the requirements of 49 CFR 1152.29, and petitioners are willing to enter into negotiations. Therefore, we will issue a NITU for the subject line. The parties may negotiate an agreement during the 180-day period. If an agreement is executed, no further Board action is necessary. If no agreement is reached within 180 days, MTH may fully abandon the line subject to the conditions imposed below. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

SEA has indicated in its EA that the right-of-way may be suitable for other public use after abandonment. Pontotoc County also requests imposition of a 180-day public use condition, precluding MTH from: (1) disposing of the rail corridor, other than the tracks, ties and signal equipment, except for public use on reasonable terms; and (2) removing or destroying potential trail-related structures such as bridges, trestles, culverts and tunnels. Pontotoc County states that the corridor would make an excellent recreational trail and conversion of the property to trail use is in accordance with local plans. It also states that the corridor provides important wildlife habitat and green space and its preservation as a recreational trail is consistent with that end.

The Board has determined that persons who file under the Trails Act may also file for public use under 49 U.S.C. 10905. See Rail Abandonments--Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986) (Trails). When the need for both conditions is established, it is the Board's policy to impose them concurrently, subject to the execution of a trail use agreement. Pontotoc County has met the public use criteria prescribed at 49 CFR 1152.28(a)(2) by specifying: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) justification for the period of time requested. Accordingly, a 180-day public use condition also will be imposed, commencing from the effective date of this decision and notice, to enable any state or local government agency or other interested person to negotiate the acquisition of the line for public use. If a trail use agreement is reached on a portion of the right-of-way, MTH must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, the Board notes that a public use condition is not imposed for the benefit of any one potential

purchaser. Rather, it provides an opportunity for any interested person to acquire a right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, MTH is not required to deal exclusively with Pontotoc County, but may engage in negotiations with other interested persons.

The parties should note that operation of the trail use and public use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in Trails, 2 I.C.C.2d at 608, offers of financial assistance (OFA) to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking and public use. Accordingly, if an OFA is timely filed under 49 U.S.C. 1152.27(c)(1), the effective date of this decision and notice will be postponed beyond the effective date indicated here. See 49 CFR 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. See 49 CFR 1152.27(f). Finally, if the line is sold under the OFA procedures, the petition for abandonment exemption will be dismissed and trail use and public use precluded. Alternatively, if a sale under the OFA procedures does not occur, the trail use and public use processes may proceed.

It is ordered:

1. Under 49 U.S.C. 10502, the Board exempts from the prior approval requirements of 49 U.S.C. 10903 the abandonment by MTH of, and the discontinuance of service by MTR over, the above-described line, subject to the employee protective conditions set forth in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979), and subject to the conditions that MTH shall: (1) leave intact all of the right-of-way, including bridges, trestles, culverts and tunnels (except track, ties and signal equipment), for a period of 180 days from the effective date of this decision and notice, to enable any state or local government agency or any other interested person to negotiate the acquisition of the line for public use; (2) comply with the terms and conditions for implementing interim trail use/rail banking as set forth below; (3) consult with NRCS prior to salvage regarding measures to avoid impacts to prime farmlands; and (4) consult with the Mobile District of the Corps prior to beginning salvage activities.

2. Petitioners are directed to serve a copy of this decision and notice on IP, AGRO, MPI, Farmers, Ware, Chickasaw and PCA within 5 days after the service date of this decision and notice and to certify to the Board that they have done so

3. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

4. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.

5. If interim trail use is implemented and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

6. If an agreement for interim trail use/rail banking is reached by the 180th day after service of this decision and notice, interim trail use may be implemented. If no agreement is reached by that time, MTH may fully abandon the line, provided the conditions imposed above are met.

7. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by August 5, 2004, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by the filing fee, which currently is set at \$1,100. See 49 CFR 1002.2(f)(25).

8. 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.”**

9. Provided no OFA has been received, this exemption will be effective August 25, 2004. Petitions to stay must be filed by August 10, 2004, and petitions to reopen must be filed by August 20, 2004.

10. Pursuant to the provisions of 49 CFR 1152.29(e)(2), MTH 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 MTH'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 no 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