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SERVICE DATE – LATE RELEASE JANUARY 15, 2008

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE

STB Docket No. AB-1001X

CHILLICOTHE-BRUNSWICK RAIL MAINTENANCE AUTHORITY–  
DISCONTINUANCE EXEMPTION–  
IN LIVINGSTON, LINN, AND CHARITON COUNTIES, MO

STB Docket No. AB-993X<sup>1</sup>

MOTIVE RAIL, INC. d/b/a MISSOURI NORTH CENTRAL RAILROAD–  
DISCONTINUANCE EXEMPTION–  
IN LIVINGSTON, LINN, AND CHARITON COUNTIES, MO

Decided: January 15, 2008

On February 5, 2007, in STB Docket No. AB-1001X, Chillicothe-Brunswick Rail Maintenance Authority (CBRA) filed a verified notice of exemption under 49 CFR 1152 Subpart F–Exempt Abandonments to discontinue service over an approximately 37.44-mile line of railroad between milepost 226.0, in Chillicothe, and milepost 188.56, near Brunswick, in Livingston, Linn, and Chariton Counties, MO. Also on February 5, 2007, in STB Docket No. AB-993X, Motive Rail d/b/a Missouri North Central Railroad (Motive Rail) filed a verified notice of exemption under 49 CFR 1152 Subpart F–Exempt Abandonments to discontinue service over an approximately 29.55-mile line of railroad between milepost 218.25, near Norville, and milepost 188.7, near Kelly, in Livingston, Linn, and Chariton Counties, MO. On February 8, 2007, the City of Chillicothe (Chillicothe) filed a request for issuance of a notice of interim trail use (NITU) pursuant to section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), in both dockets. Notice of the exemption in STB Docket No. AB-1001X was served and published in the Federal Register on February 23, 2007 (72 FR 8255). Notice of the exemption in STB Docket No. AB-993X was also served and published in the Federal Register on February 23, 2007 (72 FR 8255-56).

The exemption notice in both dockets contained an identical footnote 3 regarding trail use/rail banking. The subject footnote reads as follows:

Because this is a discontinuance proceeding and not an abandonment, trail use/rail banking and public use conditions are not appropriate. Likewise, no environmental or historical

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<sup>1</sup> These proceedings are not consolidated. A single decision is being issued for administrative convenience.

documentation is required here under 49 CFR 1105.6(c) and 1105.8(b), respectively.

On March 12, 2007, Chillicothe, CBRA, and Motive Rail (collectively, petitioners) filed a joint petition for reconsideration in STB Finance Docket No. AB-1001X. Petitioners request that the Board remove footnote 3 from the notice issued on February 23, 2007, as contrary to Board precedent and the Trails Act and issue a NITU to permit interim trail use/rail banking from milepost 226.0 to milepost 188.7, or in the alternative issue a NITU to permit interim trail use/rail banking from milepost 218.25 to milepost 188.7 with a condition providing that the Board reserves jurisdiction to permit interim trail use/rail banking from milepost 226.0 to milepost 218.25 when and if Motive Rail discontinues service over that portion.

On March 20, 2007, a petition for leave to intervene in opposition to the joint petition for reconsideration was filed by landowners John Rupp, Jr., Steve Waits, Jim Daugherty, John Foster, Kevin Foster, Wayne Foster, R & H Sanders Farms, Inc., Leonard T. Stephens, Steve Winkey, Jim Waits, Mary Kenney, and Gerald Sowers (collectively, landowners). On March 22, 2007, CBRA replied in opposition to the landowners' petition to intervene. On March 26, 2007, Vandalia Railroad Company (VRC) late-filed a notice of intent to file an offer of financial assistance (OFA) under 49 U.S.C. 10904.<sup>2</sup>

## DISCUSSION AND CONCLUSIONS

Pursuant to 49 CFR 1115.3, a petition for reconsideration of an administratively final decision must state in detail the respects in which the proceeding involves material error, new evidence, or changed circumstances. In the case at hand, petitioners essentially argue that the Board committed material error in the language contained in the subject footnote.

Petitioners argue that the Trails Act is available here, citing State of Vermont and Vermont Railway, Inc.—Discontinuance of Service Exemption—in Chittenden County, VT, Docket No. AB-265 (Sub-No. 1X) (ICC served Feb. 7, 1986) (Vermont), and Vermont & Vt Ry—Discontinuance—Chittenden Co., VT, 3 I.C.C.2d 903 (1987), aff'd, Preseault v. ICC, 853 F.2d 145 (2d Cir. 1988), aff'd, 494 U.S. 1 (1990) (Preseault) (collectively, State of Vermont). In State of Vermont, the Board's predecessor, the Interstate Commerce Commission (ICC), authorized a non-common carrier owner of a previously abandoned line to implement interim trail use/rail banking under the Trails Act in a proceeding where the only authority necessary for the parties in

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<sup>2</sup> On June 6, 2007, VRC filed a motion to withdraw its notice of intent to file an OFA. VRC's motion is unopposed and will be granted. Accordingly, the following pleadings will be dismissed as moot: (1) the landowners' petition to intervene in opposition to VRC's notice, filed on April 2, 2007; (2) VRC's motion to strike the landowners' petition to intervene, filed on March 28, 2007; (3) VRC's motion to compel CBRA to provide financial information, filed on April 30, 2007; (4) VRC's motion to strike CBRA's reply in opposition to the motion to compel, filed on May 23, 2007; and (5) VRC's motion for sanctions, filed on May 23, 2007.

that case to abandon the line was authority for the operator of the line to discontinue its operations.<sup>3</sup> See Preseault, 494 U.S. at 9-10.

Based on the facts presented in these proceedings, it appears that here, as in State of Vermont, discontinuance authority is the only authority that would be needed to abandon the line, and that, accordingly, the Trails Act is available. In Finance Docket No. 30657, Green Hills Rural Development, Inc. (Green Hills), sought authority from the ICC to acquire the 37.44-mile segment of railroad between Kelly, IA, and Chillicothe, MO. In a decision served on January 10, 1986, the ICC dismissed Green Hills' request for lack of jurisdiction on grounds that the acquisition involved a previously abandoned line and Green Hills would not have a common carrier obligation, even though rail operations continued on the line via leased trackage rights.<sup>4</sup> The lease rights to operate on the line were subsequently assigned to CBRA in a transaction authorized by the ICC.<sup>5</sup> On December 31, 2003, Green Hills transferred by deed its interest in the line to Chillicothe. Chillicothe continued the lease agreement with CBRA for operation of the line on a month-to-month basis until April 2004. At that time Chillicothe entered into a lease with Motive Rail to provide common carrier service.<sup>6</sup> Motive Rail provided service on the line until August 2004.

In short, Chillicothe, like the State of Vermont, need not seek authority to abandon a line that has already been abandoned. Accordingly, the Trails Act applies even though CBRA and Motive Rail sought only discontinuance authority. In these circumstances, petitioners' joint petition for reconsideration will be granted. The Trails Act is available for the segment of the line covering milepost 218.25 to milepost 188.7. Further, the Board retains jurisdiction over the segment covering milepost 226.0 to milepost 218.25 for purposes of permitting trail use/rail

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<sup>3</sup> In that case, the State of Vermont had purchased previously abandoned rail property and did not assume a common carrier obligation. At the same time that the line was purchased, the ICC approved a carrier's application to lease and operate the line. When the State of Vermont and the carrier later sought discontinuance authority, the parties requested ICC authorization of a trail use agreement under the Trails Act, whereby the City of Burlington, VT, would operate a trail over the line. Adjacent property owners argued that the Trails Act should not be applied to a discontinuance proceeding. The ICC found the Trails Act available where "an exemption to discontinue service is the equivalent of an abandonment exemption for purposes of imposing a Trails Act condition." Vermont, slip op. at 2 (ICC served Feb. 7, 1986).

<sup>4</sup> See Green Hills Rural Development, Inc., and Chillicothe Southern Railroad Co.—Exemption from 49 U.S.C. 10901, 11301, and 11343, Finance Docket No. 30657 et al. (ICC served Jan. 10, 1986).

<sup>5</sup> See Chillicothe-Brunswick Rail Maintenance Authority—Lease and Operation Exemption—Green Hills Rural Development, Inc., Finance Docket No. 30902 (ICC served Jan. 23, 1987).

<sup>6</sup> See Motive Rail d/b/a Missouri North Central Railroad—Lease Exemption—City of Chillicothe, MO, STB Finance Docket No. 34500 (STB served May 13, 2004).

banking, should Motive Rail seek discontinuance authority for that segment at a future date.<sup>7</sup> In short, because Chillicothe's NITU request complies with the requirements of 49 CFR 1152.29, and because CBRA and Motive Rail are willing to enter into trail use negotiations, a NITU will be issued for the segment of the line between milepost 218.25 and milepost 188.7. The parties may negotiate a Trails Act agreement during the 180-day period prescribed below. If an agreement is reached, no further Board action is necessary. Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

The landowners' petition to intervene in these proceedings is granted. Their arguments against the joint petition for reconsideration, however, are unpersuasive. The landowners argue that Board precedent clearly demonstrates that the Trails Act does not apply to discontinuance proceedings. While it is true that the Trails Act is not commonly applied in discontinuance proceedings, the facts of this case, as discussed above, warrant its application as the discontinuance proposals here are tantamount to abandonment proposals. The landowners have not presented evidence or arguments showing that this case differs substantively from the facts and conclusions in State of Vermont.

CBRA and Motive Rail have submitted environmental and historic reports with their notices of exemption 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 discontinuance. See 49 CFR 1105.11. The Board's Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment. SEA served an environmental assessment (EA) on February 27, 2007, requesting comments by March 20, 2007. In the EA, SEA concluded that there was no potential for significant impacts and did not recommend that any environmental conditions be placed on any decision granting discontinuance authority. No comments were received in response to the EA. Therefore, no environmental conditions will be imposed.

Although the OFA process under 49 U.S.C. 10904 normally takes precedence over the Trails Act, the deadline for filing an OFA in these proceedings has long since passed.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition of the landowners to intervene in these proceedings in opposition to the joint petition for reconsideration is granted.

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<sup>7</sup> Extending the NITU to cover that segment of the line at this point would be inappropriate because Motive Rail has chosen to retain its operating authority.

2. VRC's motion to withdraw its notice of intent to file an OFA is granted. Accordingly, the motions related to VRC's notice, discussed above, are dismissed as moot.

3. The joint petition for reconsideration is granted. Upon reconsideration, the notices served and published in the Federal Register on February 23, 2007, in STB Docket No. AB-1001X and STB Docket No. AB-993X, exempting the discontinuances of the line described above, are modified for the rail segment between milepost 218.25 and milepost 188.7 to the extent necessary to issue a NITU permitting negotiations for interim trail use/rail banking as set forth below, for a period of 180 days commencing from the service date of this decision and notice (until **180 days from date of service**).

4. The exemption will become effective on the service date of this decision and notice, subject to the trail use/rail banking provisions discussed below.

5. If an interim trail use/rail banking agreement for the segment between milepost 218.25 and milepost 188.7 is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, for 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 payment of any and all taxes that may be levied or assessed against, the right-of-way.

6. Interim trail use/rail banking for the segment between milepost 218.25 and milepost 188.7 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.

7. If interim trail use for the segment between milepost 218.25 and milepost 188.7 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.

8. If an agreement for interim trail use/rail banking for the segment between milepost 218.25 and milepost 188.7 is reached by **180 days from service date**, interim trail use may be implemented.

9. This decision is effective on its date of service.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Anne K. Quinlan  
Acting Secretary