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SERVICE DATE – LATE RELEASE FEBRUARY 25, 2011

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 449 (Sub-No. 3X)

WESTERN KENTUCKY RAILWAY, LLC – ABANDONMENT EXEMPTION – IN  
WEBSTER, UNION, CALDWELL AND CRITTENDEN COUNTIES, KY.

Decided: February 25, 2011

Western Kentucky Railway, LLC (WKRL) filed a notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon all 5 of its remaining lines of railroad in Webster, Union, Caldwell, and Crittenden Counties, Ky.<sup>1</sup> Notice of the exemption was served and published in the Federal Register on January 20, 2011 (76 Fed. Reg. 3,696). The exemption is scheduled to become effective on February 26, 2011.

The Board's Office of Environmental Analysis (OEA) served an environmental assessment (EA) in this proceeding on February 1, 2011. In the EA, OEA states that the U.S. Army Corps of Engineers (USACE) has reviewed the proposed abandonment in accordance with the requirements of Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. However, based on the information provided, USACE cannot determine if the proposed action would result in the discharge of dredged or fill material into United States waters, including wetlands. Accordingly, OEA recommends a condition that requires WKRL to consult with the USACE prior to the commencement of any salvage activities and, if applicable, comply with any reasonable requirements of USACE.

OEA also states in the EA that the National Geodetic Survey (NGS) has identified approximately 18 geodetic station markers that may be affected by the proposed abandonment. Therefore, OEA recommends a condition requiring WKRL to consult with and notify NGS at least 90 days prior to beginning any salvage activities that will disturb or destroy any geodetic station markers.

Additionally, OEA states in the EA that WKRL submitted its historic report to the Tourism, Arts and Heritage Cabinet, Kentucky Heritage Council (State Historic Preservation

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<sup>1</sup> The lines are described as follows: (1) between milepost 48.0 at Dekoven and milepost 62.5 at Blackford; (2) between milepost 0.0 at Blackford and milepost 3.8 at Pyro Wye and between milepost 3.8 and milepost 8.5 at Clay; (3) between milepost 0.0 at Costain Prep Plant and milepost 9.5 at Providence; (4) the Wheatcroft loop track, which connects line 2 and line 3 described above, between milepost 0.8 +/- on line 3 and running north towards milepost 5.6 +/- and milepost 6.0 +/- on line 2; and (5) between milepost 0.0 at Costain Prep Plant and milepost 5.5 at Caney Creek.

Office or SHPO) as required by 49 C.F.R. § 1105.8. In response to WKRL, the SHPO indicated that it had insufficient information to provide a definitive assessment on the eligibility of the bridge located at Blackford, Ky., to be listed in the National Register of Historic Places (National Register).<sup>2</sup> Therefore, OEA recommends that a condition be imposed requiring WKRL to retain its interest in and take no steps to alter the historic integrity of the bridge at Blackford within the project right-of-way (the Area of Potential Effect) that may be eligible for listing or listed in the National Register until the Section 106 process of the National Historic Preservation Act, 16 U.S.C. § 470(f), has been completed.

Comments to the EA were due by February 16, 2011. Through letters and discussions, OEA states that the SHPO informed OEA that as long as the bridge would not be altered or removed during the salvage process, the SHPO required no additional information and there would be no adverse effect on the rail line. However, the SHPO wanted assurance that it would be notified of any future action regarding the bridge following abandonment. On February 11, 2011, WKRL submitted a letter affirming that it would notify the SHPO of any future actions on the bridge that would involve alteration or removal. OEA states that the SHPO concurred with WKRL's statement and agreed that the abandonment could now be granted without a historic preservation condition. Accordingly, OEA now recommends that the Section 106 condition not be imposed.

On February 8, 2011, Union County, Ky. (Union County), filed a request for the issuance of a public use condition under 49 U.S.C. § 10905 and a request for the issuance of a notice of interim trail use (NITU) under the National Trail System Act, 16 U.S.C. § 1247(d) (Trails Act) and 49 C.F.R. § 1152.29 for that portion of the right-of-way between milepost 48.0 at Dekoven and the Union/Webster County Line (Union County right-of-way).<sup>3</sup> Union County has submitted a statement of willingness to assume financial responsibility for the management of, for any legal liability arising out of the transfer or use of and for the payment of any and all taxes that may be levied or assessed against, the right-of-way as required at 49 C.F.R. § 1152.29, and acknowledged that the use of the right-of-way for trail purposes is subject to future reconstruction and reactivation for rail service. In a response submitted on February 24, 2011, WKRL consents to the issuance of a NITU.

Because Union County's request complies with the requirements of 49 C.F.R. § 1152.29, and WKRL is willing to negotiate for trail use, a NITU will be issued. The parties may negotiate an agreement during the 180-day period prescribed below. If the parties reach a mutually acceptable final agreement, no further Board action is necessary. If no agreement is reached within 180 days, WKRL may fully abandon the line subject to any outstanding conditions. See

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<sup>2</sup> The bridge at Blackford is located between milepost 0.00 at Blackford and milepost 3.8 at Pyro Wye and between milepost 3.8 and milepost 8.5 at Clay.

<sup>3</sup> On January 25, 2011, the Magistrate of District 3 of Union County purported to file a public use request. However, that filing failed to address the requirements listed at 49 C.F.R. § 1128(a)(2).

49 C.F.R. § 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

As noted above, Union County also requested a 180-day public use condition for the Union County right-of-way. Union County requested that WKRL be prohibited from disposing of the corridor, other than the tracks, ties, and signal equipment, except for public use on reasonable terms, and that WKRL be barred from removing or destroying potential trail-related structures, such as bridges, trestles, culverts, and tunnels, for a 180-day period from the effective date of the abandonment. The County states that the 180-day period is needed to complete a plan to convert the property to a recreational trail.

As an alternative to interim trail use under the Trails Act, the right-of-way may be acquired 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). Under § 10905, the Board may prohibit the disposal of rail properties that are proposed to be abandoned and are appropriate for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment.

To justify a public use condition, a party must set forth: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be effective; and (iv) justification for the imposition of the period of time requested. See 49 C.F.R. § 1152.28(a)(2). Because Union County has satisfied these requirements, a 180-day public use condition will be imposed, commencing from the February 26, 2011 effective date of the exemption.

When the need for interim rail use/rail banking and public use is shown, it is the Board's policy to impose both conditions concurrently, subject to the execution of a trail use agreement. Here, however, while both conditions will be imposed at this time, the public use condition will expire on August 25, 2011, while the trail use negotiating period will run 180 days from the service date of this decision and notice (until August 24, 2011). If a trail use agreement is reached on a portion of the right-of-way prior to August 25, 2011, WKRL must keep the remaining portion intact for the remainder of the 180-day period to permit public use negotiations. Also, a public use condition is not imposed for the benefit of any one potential purchaser, but rather to provide an opportunity for an interested person to acquire the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, WKRL is not required to deal exclusively with Union County, but may engage in negotiation with other interested persons.

As conditioned, this decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened.
2. Upon reconsideration, the notice served and published in the Federal Register on January 20, 2011, exempting the abandonment of the line described above, is modified to the extent necessary: (1) to implement interim trail use/rail banking as set forth below to permit Union County to negotiate with WKRL for trail use of the Union County right-of-way for a period of 180 days from the service date of this decision and notice (until August 24, 2011); and (2) to permit public use negotiations as set forth below for that same portion of the right-of-way, for a period of 180 days commencing from the February 26, 2011 effective date of the exemption (until August 25, 2011); and subject to the conditions that, prior to the commencement of any salvage activities, WKRL shall: (A) consult with the USACE regarding its requirements and, if applicable, shall comply with the reasonable requirements of the USACE; and (B) consult with the NGS and notify NGS at least 90 days prior to beginning salvage activities that will disturb or destroy any geodetic station markers.
3. Consistent with the public use and interim trail use/rail banking conditions imposed in this decision and notice, WKRL may discontinue service and salvage track, and related materials. WKRL shall keep intact the right-of-way, including bridges, trestles, culverts and tunnels, for a period of 180 days to enable any state or local government agency, or other interested person, to negotiate the acquisition of the line for public use. If an interim trail use/rail banking agreement is executed before August 25, 2011, the public use condition will expire to the extent the trail use/rail banking agreement covers the same line.
4. 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, 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 the payment of any and all taxes that may be levied or assessed against, the right-of-way.
5. 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.
6. If interim trail use is implemented and subsequently the user intends to terminate trail use, the trail user must send the Board a copy of this decision and notice and request that it be vacated on a specified date.
7. If an agreement for interim trail use/rail banking is reached by August 25, 2011, interim trail use may be implemented. If no agreement is reached by that time, WKRL may fully abandon the line, provided that the other conditions in this proceeding are met. See 49 C.F.R. § 1152.29(d)(1).

8. This decision and notice is effective on its date of service.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.