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SERVICE DATE – OCTOBER 12, 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: October 11, 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 became effective on February 26, 2011. By decision and notice of interim trail use or abandonment (NITU) served on February 25, 2011 (February decision), the proceeding was reopened and a 180-day period was authorized for the Union County, Ky. (Union County) to negotiate an interim trail use/rail banking agreement with WKRL for the portion of the right-of-way between milepost 48.0 at Dekoven and the Union/Webster County Line, pursuant to the National Trails System Act, 16 U.S.C. § 1247(d) (Trails Act).<sup>2</sup>

On August 24, 2011, Union County filed a request for an extension of time “to negotiate the acquisition of the line for public use.” On September 7, 2011, Union County submitted a filing clarifying the August filing and stating that it was actually requesting an extension of the NITU negotiating period for 180 days.

On September 9, 2011, Webster County, Ky. (Webster County) also filed a request for an extension of time “to negotiate the acquisition of the line for public use.” Webster County

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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. By letter filed on February 24, 2011, WKRL stated that although it owns property in Caldwell and Crittenden Counties, the lines being abandoned are located only in Union and Webster Counties.

<sup>2</sup> In addition to interim trail use, the February decision also imposed a public use condition and 2 environmental conditions. By decision served on April 26, 2011, an additional condition recommended by the Board’s Office of Environmental Analysis was imposed. The 3 conditions remain in effect.

attached a letter dated March 14, 2011, requesting imposition of a public use condition and for issuance of a NITU. However, these requests were never received by the Board. Webster County's March 14 request included a statement of willingness to assume full responsibility for the 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, as required by 49 C.F.R. § 1152.29, and acknowledged that the use of the right-of-way for trail purposes is subject to possible future reactivation for rail service. Accordingly, Webster County's September 9 filing will be considered as an NITU request.

Union County states that it requests an extension of time and Webster County requests an NITU because they are each in the process of forming a committee to consider use of the right-of-way as a trail and the Counties have been delayed in pursuing this action due to extensive flooding earlier this year. By letter filed on September 15, 2011, WKRL concurs with the request of Union County and agrees to negotiate with Webster County for interim trail use and rail banking.<sup>3</sup> WKRL also requests that the NITUs for the Counties run and expire concurrently.

Although Webster County's March 14, 2011 request for issuance of a NITU was not timely filed, it complies with the requirements of 49 C.F.R. § 1152.29, and WKRL is willing to negotiate with Webster County for trail use. Accordingly, a NITU will also be issued to Webster County. As requested by WKRL, both of the NITUs will run and expire concurrently. However, regarding Webster County's request for the public use condition, under 49 U.S.C. § 10905, the Board may only impose a public use condition for up to 180 days after the effective date of an abandonment. As this time frame has expired, the request to extend the public use condition will be denied.

Regarding Union County's request, where, as here, the carrier has not consummated the abandonment at the end of the previously imposed negotiating period and is willing to continue trail use negotiations, the Board retains jurisdiction and the NITU negotiating period may be extended.<sup>4</sup> Under the circumstances, extension of the negotiating period is warranted. See Birt v. STB, 90 F.3d 580, 588-90 (D.C. Cir. 1996); Grantwood Vill. v. Mo. Pac. R.R., 95 F.3d 654, 659 (8th Cir. 1996). An extension of the NITU negotiating period will promote the establishment of trails use and rail banking consistent with the Trails Act. Accordingly, the NITU negotiating period will be extended for 180 days from August 24, 2011, to February 20, 2012.

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<sup>3</sup> By letter filed on September 20, 2011, WKRL clarified that it is willing to negotiate for interim trail use and rail banking with Union County for the lines in Union County and with Webster County for the lines in Webster County.

<sup>4</sup> See Rail Abans.—Use of Rights-of-Way as Trails—Supplemental Trails Act Procedures, 4 I.C.C.2d 152, 157-58 (1987).

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

It is ordered:

1. Webster County's request to extend the public use condition is denied.
2. Webster County's request for issuance of a NITU is granted.
3. Union County's request to extend the NITU negotiating period is granted.
3. The negotiating period under each NITU will expire on February 20, 2012.
4. This decision is effective on its date of service.

By the Board, Joseph H. Dettmar, Acting Director, Office of Proceedings.