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SERVICE DATE – LATE RELEASE JANUARY 5, 2010

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-1031X

EAST TENNESSEE RAILWAY, L.P.—ABANDONMENT EXEMPTION—IN
WASHINGTON AND CARTER COUNTIES, TN

Decided: January 5, 2010

East Tennessee Railway, L.P. (ETRY), filed a verified notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments to abandon a segment of its rail line between milepost 1.2, in Johnson City (the City), and milepost 11.2 at the end of the line, in Elizabethton, in Washington and Carter Counties, TN. Notice of the exemption was served and published in the Federal Register on December 7, 2009 (74 FR 64120) (December 2009 notice). The exemption is scheduled to become effective on January 6, 2010.

The Board's Section of Environmental Analysis (SEA) served an environmental assessment (EA) in this proceeding on December 11, 2009. In the EA, SEA states that ETRY had served the historic report on the Tennessee State Historic Preservation Officer (SHPO), pursuant to 49 CFR 1105.8(c), but SEA has not heard from the SHPO, and, therefore, has not been able to consider the SHPO's opinion before determining if the rail line may be potentially eligible for listing in the National Register of Historic Places (National Register). Accordingly, SEA recommends a condition requiring ETRY to retain its interest in and take no steps to alter the historic integrity of all sites, buildings, structures, and objects within the project right-of-way (ROW) that are eligible for listing or are listed in the National Register (generally, 50 years old or older) until the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f (NHPA), has been completed. In addition, SEA recommends that ETRY be required to report back to SEA regarding any consultations with the SHPO and any other section 106 consulting parties, and that ETRY be prohibited from filing its consummation notice or initiating any salvage activities related to abandonment (including removal of tracks and ties) until the section 106 process has been completed and the Board has removed this condition.

SEA also states in the EA that the National Geodetic Survey (NGS) has identified 7 geodetic survey markers that may be disturbed by the proposed abandonment. Therefore, SEA recommends a condition requiring ETRY to consult with NGS at least 90 days prior to the beginning of salvage activities that could disturb or destroy any of the 7 geodetic station markers.

Additionally, SEA indicates that it conducted a search of the Native American Consultation Database (Database) at <http://www.nps.gov/nacd/> to identify Federally recognized tribes that may have ancestral connections to the project area. According to SEA, the Database indicated that the Eastern Band of Cherokee Indians of North Carolina may have an interest in

the proposed abandonment. Accordingly, SEA states in the EA that it is sending a copy of the EA to this tribe for its review and comment.

Comments to the EA were due by December 24, 2009. No comments were received. Accordingly, the conditions recommended by SEA in the EA will be imposed.

On November 24, 2009, the City filed a request for the issuance of a notice of interim trail use or abandonment (NITU) for the line under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act) and 49 CFR 1152.29, to negotiate with ETRY for acquisition of the ROW for use as a trail. The City has submitted a statement of willingness to assume financial responsibility (1) for the management of the ROW, (2) for any legal liability arising out of the transfer or use of the ROW (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and (3) for the payment of any and all taxes that may be levied or assessed against the ROW, as required by 49 CFR 1152.29. The City also has acknowledged that the use of the ROW for trail purposes is subject to future reactivation for rail purposes. By letter filed on December 3, 2009, ETRY states that it is willing to negotiate an interim trail use/rail banking agreement with the City.

Because the City's request complies with the requirements of 49 CFR 1152.29, and ETRY is willing to negotiate with the City 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, ETRY may fully abandon the line, subject to any outstanding conditions imposed in this proceeding. See 49 CFR 1152.29(d)(1). Use of the ROW for trail purposes is subject to future use of the property for restoration of railroad operations.

On December 23, 2009, the City filed a request for a 180-day public use condition. The City requests that ETRY be prohibited from selling or otherwise transferring any interest ETRY holds, if any, in the underlying real estate in the line at issue in this proceeding, except for public use, and that ETRY be barred from the removal or destruction of all bridges, culverts, and roadbed for a 180-day period from the effective date of the abandonment authorization. The City states that the ROW would make an excellent trail and greenway facility for residents as well as visitors to the region. The City justifies its request for the entire 180-day time period by noting that the length of time will not interfere with ETRY's salvage activities for removal of the rail and ties or with closing a transaction between the City and ETRY, and may be necessary for negotiations.

As an alternative to interim trail use under the Trails Act, the ROW may be acquired for public use as a trail 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 section 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 CFR 1152.28(a)(2). Because the City has satisfied these requirements, a 180-day public use condition will be imposed, commencing from the January 6, 2010 effective date of the exemption.

When the need for interim trail 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 July 5, 2010, while the trail use negotiating period will run 180 days from the service date of this decision and notice (until July 4, 2010). If a trail use agreement is reached on a portion of the ROW, ETRY must keep the remaining portion intact for the remainder of the 180-day public use 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 any interested person to acquire the ROW that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, ETRY is not required to deal exclusively with the City, but may engage in negotiations with other interested persons.

As conditioned, this decision and notice 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 December 2009 notice, exempting the abandonment of the line described above, is modified to the extent necessary to implement interim trail use/rail banking and to permit public use negotiations as set forth below. ETRY may negotiate with the City for trail use of the subject line, for a period of 180 days commencing from the service date of this decision and notice (until July 4, 2010), and subject to the conditions that ETRY shall:
 - (1) retain its interest in and take no steps to alter the historic integrity of all sites, buildings, structures, and objects within the project ROW that are eligible for listing or are listed in the National Register (generally, 50 years old or older) until the section 106 process of the NHPA has been completed, report back to SEA regarding any consultations with the SHPO and any other section 106 consulting parties, and refrain from filing its consummation notice or initiating any salvage activities related to abandonment (including removal of tracks and ties) until the section 106 process has been completed and the Board has removed this condition; and
 - (2) consult with NGS at least 90 days prior to the beginning of salvage activities that could disturb or destroy any of the 7 geodetic station markers.

3. Consistent with the public use and interim trail use/rail banking conditions imposed in this decision and notice, ETRY may discontinue service and may salvage track and related materials. ETRY shall keep intact the ROW, including bridges, culverts, and roadbed, for a period of 180 days from the effective date of the abandonment exemption (until July 5, 2010), 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 July 5, 2010, the public use condition will expire to the extent the trail use/rail banking agreement covers the same portions of the 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 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 ROW.

5. Interim trail use/rail banking is subject to any future use of the property for restoration of railroad operations and to the user's continuing to meet the financial obligations for the ROW.

6. 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.

7. If an agreement for interim trail use/rail banking is reached by July 4, 2010, interim trail use may be implemented. If no agreement is reached by that time, ETRY may fully abandon the line, provided the conditions imposed above are met. See 49 CFR 1152.29 (d)(1).

8. This decision is effective on its service date.

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