

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-290 (Sub-No. 310X)

NORFOLK SOUTHERN RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN  
FLOYD AND POLK COUNTIES, GA

Decided: August 12, 2009

Norfolk Southern Railway Company (NSR) filed a notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments to abandon a 12.31-mile line of railroad between milepost 3.69-N and milepost 16.00-N, in Floyd and Polk Counties, GA. Notice of the exemption was served and published in the Federal Register on May 5, 2009 (74 FR 20776) (May 2009 notice). The exemption became effective on June 4, 2009.

By decision served on June 3, 2009 (June 2009 decision), the proceeding was reopened at the request of the Board's Section of Environmental Analysis (SEA) and the exemption was made subject to two conditions. The first condition required NSR to consult with the National Geodetic Survey (NGS) and to notify NGS at least 90 days prior to beginning salvage activities that could disturb or destroy any geodetic station markers. The second condition required NSR, prior to commencement of any salvage activities, to consult with the U.S. Army Corps of Engineers – Mobile District (Corps) regarding potential impacts to waters of the U.S., including wetlands, and to comply with the reasonable requirements of any Corps permit.<sup>1</sup>

On May 29, 2009, the City of Rome, on behalf of itself, Floyd County, and the City of Cave Spring, GA (collectively referred to as City of Rome) filed a late-filed request for the issuance of a notice of interim trail use (NITU)<sup>2</sup> for the line under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act) and 49 CFR 1152.29, and for a public use condition<sup>3</sup> under

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<sup>1</sup> In the June 2009 decision, the Board also determined that NSR's request to be exempted from the requirements of 49 U.S.C. 10904 (offers of financial assistance) was moot.

<sup>2</sup> The May 2009 notice provided that requests for trail use/rail banking had to be filed by May 15, 2009, and that requests for public use conditions had to be filed by May 26, 2009. However, because there is no indication that the City of Rome's late-filed request will prejudice any party, it will be accepted. See Wheeling & Lake Erie Railway Company—Abandonment Exemption—in Starke County, OH, STB Docket No. AB-227 (Sub-No. 10X), slip op. at 1 n.1 (STB served Nov. 7, 1997).

<sup>3</sup> SEA indicated in an environmental assessment served on May 8, 2009, that the right-of-way may be suitable for other public use following abandonment.

49 U.S.C. 10905, to negotiate with NSR for acquisition of the right-of-way for use as a trail. The City of Rome has submitted a statement of willingness to assume financial responsibility (1) for the management of the right-of-way, (2) for any legal liability arising out of the transfer or use of the right-of-way (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 right-of-way, as required at 49 CFR 1152.29.

In a response filed on June 11, 2009, NSR consents to the City of Rome's request for trail use. However, NSR states that portions of the right-of-way may not be eligible for or suitable for interim trail use or may be the subject of other disposition by NSR. For example, NSR indicates that it has already identified a segment of the right-of-way that will be conveyed to the Georgia Department of Transportation (GA DOT) for highway use. NSR also states that it reserves the right to withdraw segments of the line from trail use negotiations upon identification of the exact limits of the segments that are not eligible for or suitable for interim trail use or with respect to which other dispositions or commitments have been made.

Because the City of Rome's request complies with the requirements of 49 CFR 1152.29, and NSR 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, NSR may fully abandon the line, subject to any outstanding conditions imposed in this proceeding. See 49 CFR 1152.29(d)(1). Under the Trails Act, use of the right-of-way for trail purposes is subject to future use of the property for restoration of railroad operations.

As noted above, the City of Rome also requested a 180-day public use condition. The City of Rome requests that NSR be prohibited from disposing of the corridor, other than the tracks, ties, and signal equipment, except for public use on reasonable terms, and that NSR be barred from the removal or destruction of potential trail-related structures, such as bridges, trestles, culverts, and tunnels, for a 180-day period from the effective date of the abandonment authorization. The City of Rome states that this time period is needed to assemble the required information, to negotiate with NSR, and to obtain the necessary approvals.

As an alternative to interim trail use under the Trails Act, the right-of-way 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 of Rome has satisfied these requirements, a 180-day public use condition will be imposed, commencing from the June 4, 2009 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 December 1, 2009, while the trail use negotiating period will run 180 days from the service date of this decision and notice (until February 8, 2010). If a trail use agreement is reached on a portion of the right-of-way, NSR 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 right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, NSR is not required to deal exclusively with the City of Rome, 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. The City of Rome's late-filed request for a NITU under 16 U.S.C. 1247(d) and a public use condition under 49 U.S.C. 10905 is accepted.
3. Upon reconsideration, the May 2009 notice, exempting the abandonment of the line described above, and the June 2009 decision, reopening the proceeding and making the exemption subject to several environmental conditions, are modified to the extent necessary to implement interim trail use/rail banking and to permit public use negotiations as set forth below. NSR may negotiate with the City of Rome for trail use of the subject line, for a period of 180 days from the service date of this decision and notice (until February 8, 2010), and subject to the conditions imposed in the June 2009 decision.
4. Consistent with the public use and interim trail use/rail banking conditions imposed in this decision and notice, and the conditions imposed in the June 2009 decision, NSR may discontinue service and may salvage track and related materials. NSR shall keep intact the right-of-way, including bridges, trestles, culverts, and tunnels, for a period of 180 days from the effective date of the abandonment exemption (until December 1, 2009), 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 December 1, 2009, the public use condition will expire to the extent the trail use/rail banking agreement covers the same portions of the line.

5. 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.

6. 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.

7. 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.

8. If an agreement for interim trail use/rail banking is reached by February 8, 2010, interim trail use may be implemented. If no agreement is reached by that time, NSR may fully abandon the line, provided any outstanding conditions imposed in this proceeding are met. See 49 CFR 1152.29(d)(1).

9. This decision is effective on its service date.

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

Anne K. Quinlan  
Acting Secretary