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SERVICE DATE – FEBRUARY 6, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-290 (Sub-No. 271X)

NORFOLK SOUTHERN RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN
WYOMING AND GENESEE COUNTIES, NY

Decided: February 5, 2008

Norfolk Southern Railway Company (NSR) filed a notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments to abandon a 4.50-mile line of railroad extending between milepost UG 360.20 at Alexander and milepost UG 364.70 at Attica, in Wyoming and Genesee Counties, NY. Notice of the exemption was served and published in the Federal Register on December 18, 2007 (72 FR 71738). The notice stated that the exemption would become effective on January 17, 2008, unless stayed by the Board or unless a formal expression of intent to file an offer of financial assistance (OFA) under 49 U.S.C. 10904 and 49 CFR 1152.27(c)(2) was filed by December 28, 2007.

On November 29, 2007, BP Rail Corporation D/B/A BP Rail (BPR) filed a formal expression of intent to file an OFA to purchase the line. This filing automatically stayed the effective date of the exemption for 10 days, until January 27, 2008.¹ BPR simultaneously requested that NSR provide BPR with the financial data and information prescribed in 49 CFR 1152.27(a), including the required minimum purchase price. BPR also requested, pursuant to 49 CFR 1152.27(c)(2)(ii)(C), that the 30-day period for filing an OFA be tolled for an additional 60 days to provide the offeror with an adequate opportunity to receive, review and analyze the material provided by NSR and submit its OFA. By decision served on December 21, 2007, BPR's request was granted, and the time period for BPR to file an OFA was tolled until March 17, 2008, and the effective date of the exemption was postponed until March 27, 2008.

The Board's Section of Environmental Analysis (SEA) issued an environmental assessment (EA) in this proceeding on December 21, 2007. In the EA, SEA states that the National Geodetic Survey (NGS) has advised that it has identified three geodetic station markers that may be affected by the proposed abandonment. Accordingly, SEA recommends that NSR be required to consult with and notify NGS at least 90 days prior to beginning salvage activities that will disturb or destroy any geodetic station markers.

SEA also states that it has not heard from the New York State Historic Preservation Office (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

¹ See 49 CFR 1152.27(c)(2)(i).

Historic Places (National Register). Accordingly, SEA recommends that NSR be required to retain its interest in and take no steps to alter the historic integrity of all historic properties including sites, buildings, structures, and objects within the project right-of-way (the Area of Potential Effect) that are eligible for listing or are listed in the National Register until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f (NHPA), that NSR be required to report back to SEA regarding any consultations with the SHPO and any other section 106 consulting parties that have been identified and the public, and that NSR not be allowed to file its consummation notice or initiate 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.

No comments to the EA were received by the January 4, 2008 due date. Therefore, the environmental conditions recommended by SEA in the EA will be imposed.

SEA indicated in the EA that the right-of-way may be suitable for other public use following abandonment. On January 14, 2008, the New York State Office of Parks, Recreation and Historic Preservation (SRHP) filed a request for the issuance of a notice of interim trail use (NITU) for the 4.50-mile line of railroad under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and for a public use condition under 49 U.S.C. 10905. Although SRHP's request is late-filed, the Board accepts filings made after the due date when good cause is shown.² Because there is no indication that SRHP's late-filed request will prejudice any party, it will be accepted.

SRHP 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 (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, as required at 49 CFR 1152.29, and has acknowledged that the use of the right-of-way for trail purposes is subject to future reconstruction and reactivation for rail service. By letter dated January 15, 2008, NSR consents to SRHP's request. Thus, the requirements for issuance of a NITU have been met.

As noted above, SRHP also has requested the imposition of a public use condition. SRHP requests that NSR be prohibited from disposing of the corridor, other than 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. SRHP states that the 180-day period is needed to evaluate the corridor and commence negotiations with NSR.

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

² The notice that was served and published in the Federal Register on December 18, 2007 (72 FR 71738) provided that any request for trail use/rail banking was due by December 28, 2007, and any request for a public use condition was due by January 7, 2008.

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). SRHP has met the requirements for imposing a public use condition.

Because SRHP has satisfied the requirements for issuance of a NITU and for a public use condition, issuance of a NITU and imposition of a public use condition would be appropriate commencing with the effective date of the exemption. However, an OFA takes priority over a request for issuance of a NITU or for a public use condition. Therefore, issuance and effectiveness of the NITU and the public use condition will be delayed until the OFA process has been completed. If agreement is reached on the sale of the line, the NITU and the public use condition would be unnecessary and unavailable. If no OFA is filed or if no agreement is reached on the OFA, the appropriate decision will be issued.

As noted previously, the due date for BPR to file an OFA is March 17, 2008, and the abandonment exemption in this proceeding is due to become effective on March 27, 2008.

As conditioned, this action 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 December 18, 2007, exempting the abandonment of the line described above, is subject to the conditions that NSR shall: (1) consult with and notify NGS at least 90 days prior to beginning salvage activities that will disturb or destroy any geodetic station markers; and (2) retain its interest in and take no steps to alter the historic integrity of all historic properties including sites, buildings, structures, and objects within the project right-of-way (the Area of Potential Effect) that are eligible for listing or are listed in the National Register until completion of the section 106 process of the NHPA, report back to SEA regarding any consultations with the SHPO and any other section 106 consulting parties that have been identified and the public, and not file its consummation notice or initiate 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.
3. The requests for issuance of a NITU and imposition of a public use condition are held in abeyance pending completion of the OFA process.
4. If the OFA process terminates, a decision effective on its service date will be issued to implement interim trail use/rail banking and impose the public use condition.

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

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

Anne K. Quinlan
Acting Secretary