

44737  
DO

SERVICE DATE – LATE RELEASE SEPTEMBER 17, 2015

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 6 (Sub-No. 490X)

BNSF RAILWAY COMPANY—ABANDONMENT EXEMPTION—  
IN KING COUNTY, WASH.

Decided: September 17, 2015

BNSF Railway Company (BNSF) filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon 1,100 linear feet of rail line between milepost 4.53 and the end of the line at Engineering Station 258+07 in Seattle, King County, Wash. (the Line). Notice of the exemption was served and published in the Federal Register on August 19, 2015 (80 Fed. Reg. 50,381). The notice is scheduled to become effective on September 18, 2015.

On August 20, 2015, as discussed in more detail below, the City of Seattle (City) filed a request for the issuance of a notice of interim trail use (NITU) to negotiate with BNSF for acquisition of the Line for use as a trail under the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d), and 49 C.F.R. § 1152.29, and for a public use condition under 49 U.S.C. § 10905 for the right-of-way. The August 20 filing includes a discussion of agreements that the City describes as requiring BNSF to convey the right-of-way to the City if BNSF seeks abandonment authority. By letter filed on September 9, 2015, BNSF states that it supports the issuance of a NITU.

The Board's Office of Environmental Analysis (OEA) issued an Environmental Assessment (EA) for public review and comment on August 24, 2015. In the EA, OEA concluded that the proposed abandonment would not have potentially significant environmental impacts but stated that it had not yet received comments from the Washington Department of Ecology, Coastal Zone Management Program (WDE) regarding the proposed abandonment, noting that the Line is located within a coastal zone. Thus, OEA recommended imposing a condition that, pursuant to the Coastal Zone Management Act (CZMA), 16 U.S.C. §§ 1451-1465, would require BNSF to consult with WDE prior to beginning any salvage activities to determine whether state coastal management consistency certification is required, and if so, to comply with any applicable requirements. The condition would require BNSF to report the results of the consultation to OEA in writing and have the Board remove this condition before BNSF could file its consummation notice or initiate any salvage activities.

On September 8, 2015, the City filed a combined motion to reopen and motion for an environmental stay of the effective date of the abandonment pending clarification that the Line

would be available for railbanking under the Trails Act.<sup>1</sup> The City argues that a portion of track on the Line is subject to an industry track agreement with a customer and thus may not be abandoned using the notice of exemption process.<sup>2</sup> The City further argues that if only a narrow width of the Line is made available to the City after the notice of exemption becomes effective, and that portion would not be wide enough to restore rail service in the future, then the portion would appear to be ineligible for railbanking.<sup>3</sup> The City argues that this could impact the existing railbanked trails in that area.<sup>4</sup>

Environmental Review. OEA issued a Final EA on September 11, 2015, concluding the process under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4347, for this abandonment and noting the City's August 20 comments and September 8 motions. OEA states that it has reviewed the City's filings and concludes that the City has raised no concerns about the adequacy of the EA or the environmental review process. Rather, OEA concludes that the City's filings are limited to concerns regarding potential trail use and railbanking, which are not part of the environmental review process under NEPA. Therefore, OEA finds that the City did not demonstrate a need to defer issuing the Final EA and recommends that the CZMA condition presented in the EA be imposed. Because there is no outstanding environmental issue requiring further analysis under NEPA, see 49 C.F.R. § 1152.50(d)(4), the City's request for an environmental stay of the exemption's effective date will be denied, and the condition recommended by OEA will be imposed.<sup>5</sup>

Interim Trail Use. In the EA, OEA also stated that the right-of-way may be suitable for other public use following abandonment and salvage of the Line. As mentioned above, the City filed a request for the issuance of a NITU under the Trails Act to allow it to negotiate with BNSF for use of the Line for interim trail use. Pursuant to 49 C.F.R. § 1152.29, the City submitted a statement of its willingness to assume financial responsibility for the right-of-way and acknowledges that the use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service.

Because the City's request complies with the requirements of 49 C.F.R. § 1152.29 and BNSF 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 an interim trail use agreement is reached (and thus interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2), (h). If no agreement is reached within 180 days, BNSF may fully abandon the Line, provided the conditions imposed in

---

<sup>1</sup> City Mot. 5-6.

<sup>2</sup> Id. at 3.

<sup>3</sup> Id. at 5.

<sup>4</sup> Id.

<sup>5</sup> The City's motion to reopen regarding whether it was appropriate for BNSF to file a notice of exemption here, and what, if any, portion of the Line is subject to an industry track agreement, will be addressed in a separate decision.

this proceeding are met. 49 C.F.R. § 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service.

Public Use. As mentioned above, the City also has requested the imposition of a public use condition under 49 U.S.C. § 10905 for the right-of-way. The City asks that BNSF be prohibited from alienating the property at issue for a 180-day period from the effective date of the abandonment authorization. The City's justification for this request is that the property is suitable for trail use as part of the City's trail system, and that the 180-day period is needed for the City and BNSF to agree upon the surveyed property description.

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 Abans.—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. 49 C.F.R. § 1152.28(a)(2). Because the City has satisfied these requirements, the 180-day public use condition will be imposed, requiring BNSF to keep intact the right-of-way, including trail-related structures, commencing from the September 18, 2015 effective date of the exemption.

When the need for interim trail use/railbanking 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. While both conditions will be imposed at this time, the public use condition will expire on March 16, 2016, while the trail use negotiation period will run 180 days from the service date of this decision and notice, until March 15, 2016. If a trail use agreement is reached for a portion of the right-of-way prior to March 16, 2016, BNSF must keep the remaining right-of-way intact for the remainder of the 180-day public use condition period to permit public use negotiations. Also, while we recognize the City's argument that BNSF is contractually obligated to convey the Line to the City should BNSF receive abandonment authority for it, under 49 U.S.C. § 10905, 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, BNSF is not required to deal exclusively with the City, but may engage in negotiations with other interested persons.

As conditioned, the proposed abandonment, 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's motion for an environmental stay is denied.

3. The exemption of the line described above is modified to the extent necessary to implement interim trail use/railbanking as set forth below to permit the City to negotiate with BNSF for trail use of the subject line for a period of 180 days from the service date of this decision and notice, until March 15, 2016, and to permit public use negotiations as set forth below, for a period of 180 days commencing from the effective date of the exemption, until March 16, 2016. The abandonment exemption is also subject to the condition that, pursuant to the CZMA, BNSF shall consult with WDE prior to beginning any salvage activities to determine whether state coastal management consistency certification is required, and if so, BNSF shall comply with any applicable requirements. BNSF may not file its consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties) until it reports the results of these consultations in writing to OEA and the Board has removed this condition.

4. Consistent with the public use and interim trail/railbanking conditions imposed in this decision and notice, BNSF shall keep intact the right-of-way, including potential trail-related structures such as bridges, trestles, culverts, and tunnels, for a period of 180 days, until March 16, 2016, to enable any state or local government agency, or other interested person to negotiate the acquisition of the right-of-way for public use. If an interim trail use/railbanking agreement is executed before expiration of the 180-day public use condition period, the public use condition will expire to the extent the trail use/railbanking agreement covers the same portion of the right-of-way.

5. If an interim trail use/railbanking agreement is reached, it must require the trail sponsor to assume, for the term of the agreement, full responsibility for: (i) managing the right-of-way; (ii) any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability); and (iii) the payment of any and all taxes that may be levied or assessed against the right-of-way.

6. Interim trail use/railbanking is subject to possible future reconstruction and reactivation of the right-of-way for rail service and to the trail sponsor's continuing to meet its responsibilities for the right-of-way described in the paragraph above.

7. If an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2), (h).

8. If interim trail use is implemented, and subsequently the trail sponsor intends to terminate trail use on all or any portion of the right-of-way covered by the interim trail use agreement, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

9. If an agreement for interim trail use/railbanking is reached by March 15, 2016, for the right-of-way, interim trail use may be implemented. If no agreement is reached, BNSF may fully abandon the Line.

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

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