

33894
EB

SERVICE DATE - OCTOBER 31, 2003

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-55 (Sub-No. 638X)

CSX TRANSPORTATION, INC.–ABANDONMENT EXEMPTION–IN KNOX COUNTY, OH

Decided: October 29, 2003

By petition filed on July 14, 2003, CSX Transportation, Inc. (CSXT), seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon an approximately 6.37-mile line of railroad, in CSXT's Midwest Region, Louisville Division, Lake Erie Subdivision, extending from milepost BQ-25.90, at Mt. Vernon, to milepost BQ-32.27, at Fredericktown, in Knox County, OH (the line). Notice of the petition was served and published in the Federal Register (68 FR 45311) on August 1, 2003, instituting an exemption proceeding. A request for imposition of a public use condition and issuance of a notice of interim trail use (NITU) was filed by the Knox County, OH Commissioners (Knox County). The exemption will be granted, subject to trail use, public use, environmental, and standard employee protective conditions.

BACKGROUND

There are currently two shippers located on the line: Rural Farm Distributors (Rural) and B&B Farm Service (B&B), both operators of farm supply businesses that sell fertilizer to customers in the Fredericktown area. CSXT states that traffic volume for both Rural and B&B is minimal and that no new rail-oriented business is expected to develop.¹ CSXT states that, although both shippers tend to rely on rail transportation, both periodically use truck transportation. According to CSXT, it is also investigating the possibility of establishing a transload site in the area and has agreed to refrain from exercising any abandonment exemption authority granted here for a period of time sufficient to allow Rural and B&B to make alternative transportation arrangements. CSXT states that its customers have been apprised of the filing and includes letters from Rural and B&B stipulating that they do not oppose the abandonment.

¹ Rural received 37 carloads in 2001, 40 carloads in 2002, and 27 carloads from January to May 2003. B&B received 49 carloads in 2001, 36 carloads in 2002, and 22 carloads from January to May 2003.

CSXT has provided an economic analysis of the line. This analysis shows a profit in the base year, ending March 31, 2003, of \$7,658. However, once return on value is taken into account, there is a loss of \$1,477 per year in the forecast and subsidy years. Although CSXT states that it did not include any subsidization costs in the analysis, it estimated that 35% of the ties on the line will require replacement in the near future.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without the Board's prior approval. Under 49 U.S.C. 10502, however, the Board must exempt a transaction or service from regulation when it finds that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of the application process, an exemption will expedite regulatory decisions and reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will also foster sound economic conditions and encourage efficient management by relieving CSXT of the costs of maintaining and operating an under-utilized line of railroad [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be adversely affected.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. Rural and B&B make minimal use of the line, apparently have viable motor carrier alternatives, and do not oppose the exemption. Additionally, CSXT is investigating the potential for establishing a transloading facility in the area and has promised not to exercise abandonment exemption authority for a period of time to allow the shippers to make alternative transportation arrangements. Nevertheless, to ensure that Rural and B&B are informed of the Board's action, CSXT will be required to serve a copy of this decision and notice on these shippers within 5 days of the service date and certify to the Board that it has done so. Given the market power finding, the Board need not determine whether the proposed abandonment is limited in scope.

Under 49 U.S.C. 10502(g), the Board's exemption authority may not be used to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979) will be imposed.

CSXT has submitted environmental and historic reports with its petition and has notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed action. See 49 CFR 1105.11. The Board's

Section of Environmental Analysis (SEA) reviewed and investigated the record in this proceeding, and served an environmental assessment (EA) on September 12, 2003.

SEA notes that the Ohio Environmental Protection Agency, Central District Office (Ohio EPA) indicates that there should be no adverse effects on streams or aquatic life as long as appropriate best management practices are performed during salvage operations. Accordingly, SEA recommends that a condition be placed on any Board decision granting abandonment authority that would require CSXT to carry out appropriate best management practices during the removal of track material and the upper layer of ballast in the vicinity of local streams or rivers. SEA also notes that the National Geodetic Survey (NGS) has identified six geodetic station markers that may be affected by the proposed abandonment. Therefore, SEA recommends that a condition be imposed requiring CSXT to provide NGS with at least 90 days' notice prior to initiation of any salvage operations that may disturb or destroy the markers so that plans can be made for their relocation. Additionally, SEA notes that the U.S. Environmental Protection Agency (EPA), Region 5, has expressed concerns regarding salvage methods to be used by CSXT during the proposed abandonment. Accordingly, SEA recommends that, prior to commencement of any salvage activities on the line, CSXT contact EPA Region 5 concerning removal and salvage methods, final disposition of crossties preserved with creosote, procedures for the storing and fueling of construction equipment, procedures for the prevention and/or control of spills, and stormwater runoff mitigation practices.

In response to the EA, the U.S. Department of the Interior, Fish and Wildlife Service (FWS) indicated that the federally endangered Indiana bat may have a summer habitat within the area and that the federally threatened bald eagle may be nesting within the area. Accordingly, to protect the Indiana bat's habitat, SEA recommends that CSXT save trees exhibiting characteristics of Indiana bat habitat wherever possible, if such trees must be cut, not cut them between April 15 and September 15, and if this time restriction is unacceptable, conduct a survey, in coordination with the FWS Ecological Services, Reynoldsburg, OH office endangered species coordinator, to determine if bats are present. To preserve bald eagle nesting sites, SEA recommends that, prior to any salvage activities on this project, CSXT contact the Ohio Division of Wildlife for the locations of eagle nests in the county, and if any nests are located within 0.5 miles of the project site, notify and further coordinate abandonment activities with the FWS, Ecological Services, Reynoldsburg, OH office.

The Ohio Department of Natural Resources (ODNR) also filed comments in response to the EA, noting that two rare animal species, the state endangered eastern hellbender and potentially threatened woodland bulrush, have habitats near the line and that the line is located near the Knox Lake Wildlife Area. Accordingly, SEA recommends that, prior to any salvage activities, CSXT consult with ODNR, Division of Wildlife, to evaluate potential impacts to rare animal species that may live near the line and to evaluate possible impacts to the Knox Lake Wildlife Area.

The conditions recommended by SEA both in the EA and in response to the comments filed after the EA was served will be imposed. The proposed abandonment, as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

As indicated, on August 4, 2003, Knox County timely filed a request for the issuance of a NITU under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act) and a request for public use under 49 U.S.C. 10905. Knox County has submitted a statement of willingness to assume financial responsibility for the management of, for indemnification of the railroad against any potential liability arising from the transfer and use of, and for payment of any and all taxes that may be levied or assessed against, the right-of-way, and acknowledged that use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation for rail service, as required under 49 CFR 1152.29. CSXT has indicated that it is willing to negotiate for interim trail use. Because the request complies with the requirements of 49 CFR 1152.29 and CSXT is willing to enter into negotiations, a NITU will be issued as requested. The parties may negotiate an agreement during the 180-day period prescribed below. If an agreement is executed, no further Board action is necessary. If no agreement is reached within 180 days, CSXT may fully abandon the line, subject to the conditions imposed below. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

SEA has indicated in the EA that, if abandonment and salvage of the line does take place, the right-of-way may be suitable for other public use.² Knox County requests imposition of a 180-day public use condition to commence negotiations with CSXT. Specifically, Knox County requests that CSXT be precluded from: (1) disposing of the corridor, other than the tracks, ties, and signal equipment, except for public use on reasonable terms; and (2) removing or destroying potential trail-related structures such as bridges, trestles, culverts, and tunnels.

Persons who file under the Trails Act may also file for public use under 49 U.S.C. 10905. See Rail Abandonments—Use of Rights-of Way as Trails, 2 I.C.C.2d 591, 609 (1986) (Trails). When the need for both conditions has been established, it is the Board's policy to impose them concurrently, subject to the execution of a trail use agreement. Knox County has met the public use criteria prescribed at 49 CFR 1152.28(a)(2) by specifying: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) justification for the period of time requested. Accordingly, a 180-day public use condition will be imposed on the rail line to be abandoned, commencing from the effective date of this decision and notice, to enable any state or local government agency or other interested person to negotiate the acquisition of the line for public use. A public use condition is not imposed for the benefit of any one potential purchaser.

² Knox County states that the line, if converted to a public trail, would serve as part of a much larger recreational trail, tie in with local plans, and provide an important wildlife habitat and green space.

Rather, it provides an opportunity for any interested person to acquire a right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, CSXT is not required to deal exclusively with Knox County, but may engage in negotiations with other interested persons.

The parties should note that operation of the trail use and public use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in Trails, 2 I.C.C.2d at 608, offers of financial assistance (OFA) to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking and public use. Accordingly, if an OFA is timely filed under 49 CFR 1152.27(c)(1), the effective date of this decision and notice will be postponed beyond the effective date indicated here. See 49 CFR 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. See 49 CFR 1152.27(f). Finally, if the line is sold under the OFA procedures, the petition for abandonment exemption will be dismissed and trail use and public use precluded. Alternatively, if a sale under the OFA procedures does not occur, the trail use and public use processes may proceed.

It is ordered:

1. Under 49 U.S.C. 10502, an exemption from the prior approval requirements of 49 U.S.C. 10903 for the abandonment by CSXT of the above-described line is granted, subject to the employee protective conditions set forth in Oregon Short Line R. Co. – Abandonment – Goshen, 360 I.C.C. 91 (1979), and subject to the conditions that CSXT shall: (1) leave intact all of the right-of-way, including bridges, trestles, culverts, and tunnels (except for track, ties, and signal equipment) for a period of 180 days from the effective date of this decision and notice, to enable any state or local government agency or any other interested person to negotiate the acquisition of the line for public use; (2) comply with the terms and conditions for implementing interim trail use/rail banking as set forth below; (3) carry out appropriate best management practices during the removal of track material and the upper layer of ballast in the vicinity of local streams or rivers; (4) provide NGS with at least 90 days' notice prior to initiation of any salvage activities that may disturb or destroy any geodetic station markers so that plans can be made for their relocation; (5) prior to the commencement of any salvage activities on the line, contact EPA Region 5 concerning removal and salvage methods, final disposition of cross-ties preserved with creosote, procedures for the storing and fueling of construction equipment, procedures for the prevention and/or control of spills, and stormwater runoff mitigation practices to be used during abandonment activities; (6) save trees exhibiting characteristics of Indiana bat habitat wherever possible, if such trees must be cut, not cut them between April 15 and September 15, and if this time restriction is unacceptable, conduct a survey, in coordination with the FWS Ecological Services, Reynoldsburg, OH office endangered species coordinator, to determine if bats are present; (7) prior to any salvage activities on this project, contact the Ohio Division of Wildlife for the locations of eagle nests in the county, and if any nests are located within 0.5 miles of the project site, notify and further

coordinate abandonment activities with the FWS, Ecological Services, Reynoldsburg, OH office; and (8) prior to any salvage activities, consult with ODNR, Division of Wildlife, to evaluate potential impacts to rare animal species that may occur near the line and to evaluate possible impacts to the Knox Lake Wildlife Area.

2. CSXT is directed to serve a copy of this decision and notice on Rural and B&B within 5 days after the service date of this decision and notice and to certify to the Board that it has done so.

3. 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, 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.

4. 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.

5. 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.

6. If an agreement for interim trail use/rail banking is reached by the 180th day after service of this decision and notice, interim trail use may be implemented. If no agreement is reached by that time, CSXT may fully abandon the line, provided the conditions imposed above are met.

7. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by November 10, 2003, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by the filing fee, which currently is set at \$1,100. See 49 CFR 1002.2(f)(25).

8. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **“Office of Proceedings, AB-OFA.”**

9. Provided no OFA has been received, this exemption will be effective November 30, 2003. Petitions to stay must be filed by November 17, 2003; petitions to reopen must be filed by November 25, 2003.

10. Pursuant to the provisions of 49 CFR 1152.29(e)(2), CSXT shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by CSXT's filing of a notice of consummation by October 31, 2004, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary