

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-369 (Sub-No. 7X)

BUFFALO & PITTSBURGH RAILROAD, INC.—ABANDONMENT EXEMPTION—
IN ERIE AND CATTARAUGUS COUNTIES, NY

Decided: November 4, 2008

Buffalo & Pittsburgh Railroad, Inc. (BPRR) filed a verified notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments to abandon a 27.6-mile line of railroad extending from milepost 8.4 in Orchard Park, in Erie County, NY, to milepost 36 in Ashford, in Cattaraugus County, NY. Notice of the exemption was served and published in the Federal Register on October 6, 2008 (73 FR 58297). The exemption is scheduled to become effective on November 5, 2008. In this decision, the Board is imposing environmental, historic preservation, interim trail use/rail banking, and public use conditions.¹

The Board's Section of Environmental Analysis (SEA) issued an environmental assessment (EA) in this proceeding on October 10, 2008. In the EA, SEA states that the National Geodetic Survey (NGS) has identified 39 geodetic station markers that may be affected by the proposed abandonment and has requested notification at least 90 days in advance of any activities that would disturb or destroy these markers in order to plan for their relocation. Accordingly, SEA recommends that BPRR be required to consult with and notify NGS at least 90 days prior to beginning salvage activities that would disturb or destroy any geodetic station markers.

SEA states that the New York State Department of Environmental Conservation (New York DEC), Division of Fish, Wildlife & Marine Resources' Natural Heritage Program, has indicated that rare or state-listed animals and plants and other significant habitats may occur in the area of the proposed abandonment. SEA, therefore, recommends that, prior to the commencement of any salvage activities, BPRR be required to consult with the appropriate New York DEC regional office regarding rare or state-listed animals and plants and other significant habitats that may be affected by the proposed abandonment and comply with New York DEC's reasonable requirements.

SEA notes that New York DEC submitted additional comments stating that part of the line is located in a state-protected wetland and that BPRR would likely need a Freshwater

¹ On October 31, 2008, Western New York Railway Historical Society, Inc. late-filed comments in opposition to the proposed abandonment. On November 3, 2008, BPRR filed a reply. These filings will be addressed in a separate decision.

Wetland Permit. SEA also notes that the U.S. Environmental Protection Agency's Region 2 Office (USEPA) submitted comments advising that wetland resources are located in the area of the proposed abandonment. Thus, SEA recommends that, prior to the commencement of any salvage activities, BPRR be required to consult with USEPA and the appropriate New York DEC regional office regarding wetland resources that may be affected by the proposed abandonment and comply with the reasonable requirements of those agencies and report the results of those consultations in writing to SEA.

SEA states that the New York State Historic Preservation Office (SHPO) has reviewed the Historic Report prepared by BPRR and has requested additional information, including a survey of archaeological resources in the project area. Accordingly, SEA recommends that BPRR 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 listed in the National Register of Historic Places (National Register) until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f (NHPA). SEA also recommends that BPRR be required to report back to SEA regarding any consultations with the SHPO and the public and that BPRR be prohibited from filing 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 October 27, 2008 due date. Therefore, the environmental conditions recommended by SEA in the EA will be imposed.

In the EA, SEA states that the right-of-way may be suitable for other public use following abandonment and salvage of the line. By letter dated September 22, 2008, the New York State Office of Parks, Recreation and Historic Preservation (NYS Office of Parks) filed a request for the issuance of a notice of interim trail use (NITU) for the 27.6-mile line of railroad 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 under 49 U.S.C. 10905. NYS Office of Parks has submitted a statement of willingness to assume full 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 the payment of any and all taxes that may be levied or assessed against, the right-of-way for trail purposes, 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 September 26, 2008, BPRR states that it is willing to negotiate with NYS Office of Parks for interim trail use.

On October 16, 2008, Erie Cattaraugus Rail Trail, Inc. also filed a request for a NITU for the 27.6-mile line of railroad. ECRT expresses its interest in acquiring the right to use the right-of-way of the abandoned line for a proposed public, multi-use trail. ECRT has made this separate filing to preserve its interest in using the right-of-way for an interim trail, should negotiations between BPRR and NYS Office of Parks fail to result in a trail use agreement. By letter dated October 20, 2008, BPRR states that, at this time, it elects to continue to negotiate with NYS Office of Parks.

Because NYS Office of Parks' request complies with the requirements of 49 CFR 1152.29, and BPRR is willing to negotiate for trail use, a NITU will be issued for the 27.6-mile line. 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, BPRR 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.

As noted above, NYS Office of Parks also requested the imposition of a public use condition. NYS Office of Parks requests that BPRR be prohibited from disposing of the corridor, other than tracks, ties and signal equipment, except for public use on reasonable terms, and that BPRR 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. NYS Office of Parks states that the time period is needed to fully evaluate the rail corridor and to continue negotiations with BPRR for use of the right-of-way as a trail.

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 NYS Office of Parks has met these requirements, a 180-day public use condition will be imposed, commencing from the November 5, 2008 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. If a trail use agreement is reached on a portion of the right-of way, BPRR must keep the remaining right-of-way intact for the remainder of the 180-day 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, BPRR is not required to deal exclusively with NYS Office of Parks, but may engage in negotiation with other interested persons.

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 October 6, 2008, 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, for a period of 180 days commencing from the November 5, 2008 effective date of the exemption (until May 4, 2009), and subject to the conditions that BPRR 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; (2) prior to the commencement of any salvage activities, consult with the appropriate New York DEC regional office regarding rare or state-listed animals and plants and other significant habitats that may be affected by the proposed abandonment and comply with New York DEC's reasonable requirements; (3) prior to the commencement of any salvage activities, (a) consult with the USEPA and the appropriate New York DEC regional office regarding wetland resources that may be affected by the proposed abandonment, (b) comply with the reasonable requirements of those agencies, and (c) report the results of those consultations in writing to SEA; and (4)(a) 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 listed in the National Register until completion of the section 106 process of the NHPA, (b) report back to SEA regarding any consultations with the SHPO and the public, and (c) be prohibited from filing 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. Consistent with the public use and interim trail use/rail banking conditions imposed in this decision and notice, BPRR may discontinue service and salvage track and related materials. BPRR shall keep intact the right-of-way, including bridges, trestles, culverts and tunnels, for a period of 180 days 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 May 4, 2009, the public use condition will expire to the extent the trail use/rail banking agreement covers the same 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 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.

5. 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.

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 May 4, 2009, interim trail use may be implemented. If no agreement is reached by that time, BPRR may fully

abandon the line, provided the conditions imposed in this proceeding are met. See 49 CFR 1152.29(d)(1).

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

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

Anne K. Quinlan
Acting Secretary