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SERVICE DATE - DECEMBER 22, 2000

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-55 (Sub-No. 580X)

CSX TRANSPORTATION, INC.–ABANDONMENT EXEMPTION–IN MUHLENBERG  
AND MCLEAN COUNTIES, KY

Decided: December 20, 2000

By petition filed September 5, 2000, 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 a 7.48-mile portion of its line of railroad in the Midwest Region, known as its Nashville Division, O&N Nashville Subdivision, extending from milepost 00D-186.35 near Moorman in Muhlenberg County, KY, to milepost 00D-193.83 near Livermore in McLean County, KY. The Board served and published notice of the petition in the Federal Register (65 FR 57651) on September 25, 2000. A request for issuance of a notice of interim trail use (NITU) and for imposition of a public use condition was filed by the Counties of McLean and Muhlenberg, KY, and the City of Island, KY (collectively, McLean County). We will grant the exemption, subject to trail use, public use, and standard employee protective conditions.

BACKGROUND

According to petitioner, there is only one shipper on the line, Perdue Farms (Perdue), which operates a facility at the end of the line at Livermore. Perdue uses the line for outbound shipments of corn. Petitioner asserts, however, that Perdue's usage does not justify the continuance of service because the amount of business does not generate sufficient revenue to cover the operating expenses and capital costs associated with the line. CSXT claims that Perdue's use of rail transportation over the past several years has decreased significantly. According to petitioner, Perdue shipped 951 carloads of traffic in 1997, 581 carloads in 1998, and only 301 carloads in 1999.

CSXT contends that rail service to Perdue at Livermore is cumbersome and time-consuming. According to petitioner, service is provided by a crew originating in Atkinson Yard located in Madisonville, KY, at milepost HC 275.0. Petitioner states that, in order to serve the Perdue facility, the crew must travel approximately 20 miles to Moorman at milepost HE 118.8. At Moorman, the crew must take the south leg of the Wye track eastwardly toward Paradise and then must shove the train, consisting of approximately 15 cars, in the opposite direction to Livermore, a distance of almost 8 miles. CSXT adds that, after leaving the facility, the crew is required to pull the cars back to Moorman where the crew backs up over the north leg of the Wye track toward Kronos and then must continue back to the Atkinson Yard on the Henderson Subdivision.

CSXT further argues that continued service to Perdue will cause petitioner to sustain significant economic losses. Specifically, CSXT contends that two of the bridges on the line are in such poor condition that they need to be replaced and, in fact, are the reason that the line is currently out of service. Petitioner avers that the total cost to replace both bridges with concrete structures is estimated to be in excess of \$2,000,000. CSXT further avers that, although the bridges could be repaired somewhat and potentially used for a few more years, the repair and maintenance costs would be approximately \$65,000 and, in the end, the two bridges would still require replacement.

CSXT claims that Perdue has been contacted about this abandonment filing and has expressed no opposition. Petitioner avers that, following abandonment, Perdue will have alternative transportation options available to it, including the use of truck and barge service (since its Livermore facility is located on the Green River). CSXT adds that Perdue has been using alternative transportation since the line was embargoed on April 3, 2000.

#### DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without our prior approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find 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 an abandonment application, an exemption will 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 cost of owning and maintaining the line and allowing it to apply its assets more productively elsewhere on its system [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be affected adversely.

Regulation of the proposed transaction is not necessary to protect shippers from an abuse of market power because the only shipper on the line does not object to the proposed transaction and has alternative transportation available to it.<sup>1</sup> Nevertheless, to ensure that Perdue is informed of our decision, we will require CSXT to serve a copy of this decision on the shipper within 5 days of the service date and to certify to us that it has done so.

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<sup>1</sup> Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

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

CSXT has submitted an environmental report 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. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment. SEA served an environmental assessment (EA) on November 3, 2000, recommending that no environmental or historic conditions be imposed on the abandonment. No comments were filed in response to the EA. Based on SEA's recommendation, we conclude that the proposed abandonment, if implemented, will not significantly affect either the quality of the human environment or the conservation of energy resources.

On December 1, 2000, McLean County requested that interim trail use/rail banking be imposed under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act). McLean County has submitted a statement of willingness to assume financial responsibility for the right-of-way, and has acknowledged that use of the right-of-way is subject to possible future reconstruction and reactivation of the right-of-way for rail service as required under 49 CFR 1152.29. CSXT has stated that it is agreeable to negotiating with McLean County for trail use.

McLean County's request complies with the requirements of 49 CFR 1152.29 and CSXT is willing to enter into negotiations. Therefore, we will issue a NITU. 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.

As noted, SEA has indicated in its EA that the right-of-way may be suitable for other public use following abandonment. McLean County has also requested that a 180-day public use condition be imposed.<sup>2</sup> McLean County requests that CSXT be precluded from: (1) disposing of the corridor, other than the tracks, ties, and signal equipment; and (2) removing or destroying potential trail-related structures, such as bridges, trestles, culverts, and tunnels. McLean County asserts that the subject rail corridor is along a scenic river and will connect a public park to a major residential area. It maintains that the corridor would make an excellent recreational trail. McLean County adds that the corridor provides an important wildlife habitat and greenspace.

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<sup>2</sup> Although McLean County's public use request was late-filed, we will accept and consider it as there is no evidence that our doing so will prejudice any party.

McLean County seeks a 180-day period because it has not had an opportunity to assemble or review title information, complete a trail plan, or commence negotiations with the carrier.

We have determined that persons who file under the Trails Act may also file for public use under 49 U.S.C. 10905. See Trails, 2 I.C.C.2d at 609. When the need for both conditions is established, it is our policy to impose them concurrently, subject to the execution of a trail use agreement. McLean 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 also will be imposed, commencing from the effective date of this decision and notice. If a trail use agreement is reached on a portion of the right-of-way, CSXT must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, we note that a public use condition is not imposed for the benefit of any one potential purchaser. 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 condition, CSXT is not required to deal exclusively with McLean County but may engage in negotiations with other interested persons.

The parties should note that operation of the trail use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in Rail Abandonments–Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 608 (1986) (Trails), 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) for purchase or subsidy of the line, 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 precluded. Alternatively, if a sale under the OFA procedures does not occur, trail use may proceed.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903 the abandonment by CSXT of the above-described 7.48-mile rail line, 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 (but not track and track materials), for a period of 180 days 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; and (2) comply with the terms and conditions for implementing interim trail use/rail banking set forth below.

2. 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, 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.

3. 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.

4. 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.

5. 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 abandon the line, provided the conditions imposed above are met.

6. CSXT must serve a copy of this decision on Perdue Farms within 5 days after the service date of this decision and certify to the Board that it has done so.

7. An offer of financial assistance (OFA) under 49 CFR 1152.27(c)(1)<sup>3</sup> to allow rail service to continue must be received by the railroad and the Board by January 2, 2001, 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 a \$1,000 filing fee. 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 January 21, 2001. Petitions to stay must be filed by January 8, 2001, and petitions to reopen must be filed by January 16, 2001.

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<sup>3</sup> See Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903, STB Ex Parte No. 537 (STB served Dec. 24, 1996, and June 27, 1997).

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 December 22, 2001, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If any legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed not later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams  
Secretary