

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

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

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

Decided: September 24, 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.<sup>1</sup> 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, 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.

By decision served on February 6, 2008 (February 2008 decision), two environmental conditions were imposed, which had been recommended by the Board's Section of Environmental Analysis. Additionally, the February 2008 decision addressed a request by the New York State Office of Parks, Recreation and Historic Preservation (SRHP) for the issuance of a notice of interim trail use (NITU) and imposition of a public use condition on the 4.50-mile rail line. The Board found that SRHP had satisfied the requirements for issuance of a NITU and the imposition of a public use condition but stated that the issuance and effectiveness of the NITU and public use condition would be held in abeyance until completion of the OFA process, which took precedence.

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<sup>1</sup> See 49 CFR 1152.27(c)(2)(i).

By decision and notice of interim trail use or abandonment (NITU) served on March 26, 2008, the proceeding was reopened, the OFA process was terminated, and a 180-day period was authorized for SRHP to negotiate an interim trail use/rail banking agreement with NSR for the right-of-way involved in this proceeding pursuant to the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act). The trail use negotiating period under the NITU is schedule to expire on September 23, 2008.<sup>2</sup>

By letter dated September 17, 2008, SRHP requested an extension of the NITU negotiating period. SRHP states that the parties expect to conclude negotiations, but will not be able to do so by the September 23, 2008 deadline. By letter dated September 18, 2008, NSR consents to a 180-day extension of the negotiating period.

Where, as here, the carrier has not consummated the abandonment at the end of the previously imposed negotiating period and is willing to continue trail use negotiations, the Board retains jurisdiction and the NITU negotiating period may be extended.<sup>3</sup> Under the circumstances, further extension of the negotiating period is warranted. See Birt v. STB, 90 F.3d 580, 588-90 (D.C. Cir. 1996); Grantwood Village v. Missouri Pac. R.R. Co., 95 F.3d 654, 659 (8th Cir. 1996). Accordingly, the NITU negotiating period will be extended from September 23, 2008, to March 22, 2009.

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

It is ordered:

1. SRHP's request to extend the negotiation period is granted.
2. The negotiating period under the NITU is extended to March 22, 2009.
3. This decision is effective on its service date.

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

Anne K. Quinlan  
Acting Secretary

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<sup>2</sup> In addition to interim trail use, the NITU also imposed a public use condition, which will expire on September 23, 2008, and may not be extended, and two environmental conditions. The environmental conditions remain in effect.

<sup>3</sup> See Rail Abandonments—Supplemental Trails Act Procedures, 4 I.C.C.2d 152, 157-58 (1987).