

SURFACE TRANSPORTATION BOARD

DECISION

Finance Docket No. 32609

CHESAPEAKE RAILROAD COMPANY–CERTIFICATE OF INTERIM TRAIL USE AND
TERMINATION OF MODIFIED RAIL CERTIFICATE

Decided: August 21, 2009

This decision denies the request of the Maryland Transit Administration (MTA) to vacate the current certificate of interim trail use (CITU) in this proceeding and issue new CITUs.

BACKGROUND

In Chesapeake Railroad Company–Modified Rail Certificate, Finance Docket No. 32609 (ICC served Nov. 23, 1994), Chesapeake Railroad Company (CHRR) was issued a modified certificate of public convenience and necessity (modified certificate) under 49 CFR 1150, subpart C, to operate approximately 54.1 miles of rail line owned by the State of Maryland between milepost 00.0 at Clayton, DE, and milepost 45.3 at Easton, MD, and a connecting branch line between milepost 00.0 at Queen Anne, MD, and milepost 8.8 at Denton, MD (collectively, Clayton-Easton line).

On July 28, 2005, MTA, on behalf of the State of Maryland, filed notice on behalf of CHRR of its intent to terminate service under the modified certificate over the Clayton-Easton line.¹ On that same date, MTA simultaneously filed a request for issuance of a certificate of interim trail use (CITU) under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), for the Clayton-Easton line. MTA submitted a statement indicating its willingness to assume financial responsibility for management of the right-of-way (ROW) as required at 49 CFR 1152.29, and acknowledged that the use of the ROW for trail purposes would be subject to future reconstruction and reactivation for rail service. On January 9, 2006, a decision and CITU was served authorizing a 180-day period for MTA to negotiate an interim trail use/rail banking agreement for the Clayton-Easton line.

On June 7, 2006, MTA filed a motion to extend the negotiating period for an additional 180 days. MTA's motion stated that it was in the process of negotiating an agreement with the

¹ Under 49 CFR 1150.24, an operator must provide 60 days' notice of its intent to terminate service over a line covered by a modified certificate. CHRR, however, no longer had an operating agreement with MTA, and CHRR was determined to have ceased existence as a corporate entity in Maryland. Therefore, the Board allowed MTA to file on CHRR's behalf.

Maryland Department of Natural Resources (MDNR) to become the interim trail user for the Clayton-Easton line. However, the Board had received no statement of willingness to assume financial responsibility from MDNR, and MTA was asked to supplement its motion. On June 28, 2006, MTA filed a supplemental motion, stating that MTA was negotiating with the Maryland Department of Transportation (MDOT) to become the interim trail user for the Clayton-Easton line. MDOT executed the necessary statement of willingness to assume financial responsibility as an attachment to MTA's supplemental motion. By decision served on July 10, 2006, the Board granted MTA's motion to extend the CITU negotiating period an additional 180 days, until January 6, 2007. The Board granted another negotiating period extension by decision served on January 5, 2007 (until July 5, 2007).

On June 13, 2007, MTA filed a notice of intent pursuant to 49 CFR 1152.29(c), to "remove property known as the "Easton Spur" from the CITU." The Easton Spur consists of a parcel of approximately 5.514 acres on which is situated a spur track extending between the main ROW at approximately milepost 45.3, at Easton, and U.S. Route 50, a distance of approximately 1,645 feet. By pleading filed on June 14, 2007, MTA also requested an extension of the CITU negotiating period. By decision served on July 5, 2007, the Board reopened the proceeding, partially vacated the CITU with respect to the "Easton Spur," and extended the negotiating period for the remaining ROW. By decisions served on December 26, 2007, and March 25, 2008, the CITU negotiating period for the remaining ROW was extended to September 27, 2008.

On September 26, 2008, MTA filed a notice indicating that it had entered into interim trail use agreements on the remaining ROW. MTA stated that it has entered into an agreement with MDNR for the portion of the ROW located in Maryland (Maryland segment).² In addition, MTA stated that it has entered into an interim trail use agreement with the Delaware Department of Natural Resources and Environmental Control (DNREC) for the portion of the ROW located in Delaware (Delaware segment).³ On May 22, 2009, MTA filed a request to amend its notice of consummation of trail use agreements. MTA requests that the CITU be vacated and that new CITUs be issued to address MDNR's trail-use responsibilities for the Maryland segment and DNREC's trail-use responsibilities for the Delaware segment.

DISCUSSION AND CONCLUSION

Under the Trails Act and the Board's regulations at 49 CFR 1152.29(a)(2), a prospective trail user is required to include "a statement indicating the user's willingness to assume full responsibility: for managing the [ROW]; for any legal liability arising out of the use of the

² The Maryland segment includes the "Oxford Branch" from milepost 13.6 in Marydel, Caroline County, MD, to milepost 45.3 in Easton, Talbot County and the "Denton Spur" from milepost 0.0 in Queen Anne, to milepost 8.8 in Denton.

³ The Delaware segment includes the line of railroad from milepost 0.0 in Clayton, Kent County, DE, to milepost 13.5 in Marydel, Kent County.

[ROW] (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 all taxes assessed against the [ROW].”

Although MTA’s notice and amended notice contained statements purporting to address DNREC’s obligation to “assume full responsibility... for any legal liability arising out of the use of the [ROW] (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability),” DNREC’s representations do not comply with the requirements of 49 CFR 1152.29(a)(2). DNREC’s “Statement of Willingness to Assume Financial Responsibility” (Exhibit B in MTA’s September 26, 2008 notice) contains a caveat that could negate the required indemnification. It states that DNREC “will indemnify MTA against any potential liability provided that such indemnification shall not constitute or be deemed to constitute an obligation of future appropriations by the Delaware General Assembly” (emphasis added). Likewise, MTA’s May 22, 2009 amended notice included as Exhibit A a copy of the license agreement between MTA and DNREC. The agreement includes a similar caveat under the provisions covering indemnity and liability.

In addition, MDNR’s statement of willingness to assume financial responsibility in the lease agreement with MTA (Exhibit C in MTA’s September 26, 2008 notice) (1) does not indicate whether MDNR will be responsible for the payment of all taxes assessed on the Maryland segment and (2) appears to contain a limitation on liability by reference to the Maryland Tort Claims Act. The Board cannot issue a CITU without the required statements of willingness from the prospective interim trail users. Accordingly, MTA’s requests to vacate the current CITU and to issue new CITUs will be denied.

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

It is ordered:

1. MTA’s request to vacate the CITU is denied.
2. MTA’s request for issuance of CITUs under 16 U.S.C. 1247(d) is denied.
3. This decision is effective on the date of service.

By the Board, Joseph H. Dettmar, Acting Director, Office of Proceedings.

Anne K. Quinlan
Acting Secretary