

SURFACE TRANSPORTATION BOARD<sup>1</sup>

DECISION

Docket No. AB-55 (Sub-No. 514X)

CSX TRANSPORTATION, INC.  
— ABANDONMENT EXEMPTION —  
IN MONROE AND OWEN COUNTIES, IN

Decided: September 19, 1997

BACKGROUND

A notice of exemption was served and published in the *Federal Register* on October 20, 1995 (60 FR 54252-53), with respect to the abandonment by CSX Transportation, Inc. (CSXT), under 49 CFR Subpart F—*Exempt Abandonments*, of a 10.28-mile line of railroad between milepost Q-203.13 at Gosport and milepost Q-213.41 at Ellettsville, in Monroe and Owen Counties, IN. A decision and notice of interim trail use or abandonment (NITU) was served on December 5, 1995, allowing time for CSXT and a potential trail sponsor to negotiate interim trail use and rail banking under section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and imposing a salvage condition.<sup>2</sup>

Victor Oolitic Stone Company, Inc. (Victor), the owner of a fee-simple interest in a portion of the right-of-way that crosses through its quarry, has petitioned for reopening and reconsideration of the NITU. Victor contends that the NITU was based on false and misleading information and should be deemed to be void *ab initio*.<sup>3</sup> No replies or comments were filed.

Specifically, Victor argues that Monroe County filed the request for a NITU on behalf of Monroe County Parks and Recreation Department (MCPRD), but that MCPRD never had, and does not now have, any intention to convert the right-of-way into a recreational trail. Instead, Victor asserts that the Monroe County Commissioner filed the NITU request to preserve the right-of-way for the construction of a public road, a use that it contends is inconsistent with interim trail use and rail banking.

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<sup>1</sup> The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10903 and 16 U.S.C. 1247(d). Therefore, this decision applies the law in effect prior to ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

<sup>2</sup> The NITU was issued in response to a comment with an attached Statement of Willingness to Assume Financial Responsibility (Statement) filed October 12, 1995. The comment was filed "on behalf of Monroe County Parks and Recreation Department, with the support of Monroe County (hereinafter jointly referred to as 'Monroe County')." The comment specifies that "Monroe County" requests the NITU. CSXT agreed to the imposition of a NITU in this case.

<sup>3</sup> Victor's contention, that the notice of exemption is void *ab initio* under 49 CFR 1152.50(d)(3), our out-of-service abandonment regulations, is misdirected because Victor seeks to void only the NITU and not the abandonment. Victor neither challenges the notice of exemption nor attributes any false or misleading information to CSXT. Therefore, we will interpret Victor's petition as a petition to have the NITU involuntarily revoked.

Victor submitted an affidavit along with a newspaper account of the MCPRD meeting where the trail proposal apparently was discussed.<sup>4</sup> The newspaper account does indeed suggest that MCPRD has no interest in developing a trail, but reports that the Monroe County Commissioners are interested in building a road on the right-of-way and that accommodations would be made for pedestrian and bike traffic.<sup>5</sup> According to the newspaper account, Victor opposes a trail, but not a road, because of the dangers that Victor perceives would result from bringing pedestrian traffic and active mining operations together.

#### DISCUSSION AND CONCLUSIONS

It is well settled that the ICC did not analyze, approve, or set the terms for a trail use arrangement. Neither does the Board. Our role under the Trails Act is ministerial and thus we require only the essential information to process Trails Act requests. When a prospective trail user files the required statement of willingness to assume financial responsibility for the right-of-way (and the railroad consents), section 1247(d) of the Trails Act directs that we "shall impose" a trail condition and "shall not permit abandonment." Thus, we lack the discretion to disapprove an interim trail use that has been voluntarily negotiated. *Iowa Southern R. Co.—Exemption—Abandonment*, 5 I.C.C.2d 496, 502-504 (1989) (*Iowa Southern*), *aff'd sub nom. Goos v. ICC*, 911 F.2d 1283 (8th Cir. 1990).<sup>6</sup>

In short, section 1247(d) imposes only two conditions on interim trail use: the rail banking requirement (that the right-of-way be subject to future reactivation of rail service), and the requirement that the trail user assume liability for the property's management and taxes.<sup>7</sup> Use of a rail banked right-of-way is subject to the user's continuing to meet these responsibilities. Therefore, we have made it clear that where, as here, we are presented with serious questions about whether the statutory conditions continue to be met, we will look into the matter. If we determine that the rail sponsor does not have the ability to meet the financial and liability conditions in the statute, the trail condition may be involuntarily revoked and the line declared fully abandoned.

Victor has presented enough evidence to call into question the continued application of the Trails Act in this case. If MCPRD does not intend to use the property in a manner consistent with interim trail use, the requirements of the Trails Act might not be satisfied. We do not believe, however, that the present record warrants revoking the NITU as Victor requests, and hereby reopen the proceeding to take evidence and argument as to whether the statutory requirements of the Trails Act continue to be satisfied.

It is important to note that there is no requirement under section 1247(d) that the trail be "developed" in any particular way for recreational use. There can be differing types or levels of trail use, and we will not become involved in determining the type or level of trail use for a particular right-of-way. In addition, there is no time limit on how quickly a trail must be developed to its intended level of use. *Missouri Pacific Railroad Company—Abandonment in Okmulgee*,

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<sup>4</sup> The affiant, Mr. John J. Edgeworth, a director of Victor, allegedly was in attendance at the MCPRD meeting that is the subject of the newspaper account.

<sup>5</sup> Nothing in the statute or our regulations precludes a right-of-way from being used for mixed highway (or light rail) and recreational use. See *The Baltimore and O. R. Co., Metropolitan So. R. Co. and Washington and W. Md. Ry. Co.—Aband. and Discont. of Serv.—in Montgomery Cty, MD, and the Dist. of Col.*, Docket No. AB-19 (Sub-No. 112) (ICC served Mar. 2, 1990).

<sup>6</sup> If the parties do not reach a voluntary trail use agreement, the abandonment authority becomes effective upon expiration of the NITU. Once in possession of effective abandonment authority, the railroad may "at any time thereafter exercise its option to fully abandon the line by clearly exhibiting its intent to do so." *Birt v. STB*, 90 F.3d 580, 583 (D.C. Cir.), *reh'g denied*, 98 F.3d 644 (D.C. Cir. 1996).

<sup>7</sup> We reiterate these conditions in every NITU that we issue.

*Okfuskee, Hughes, Pontotoc, Coal, Johnston, Atoka, and Bryan Counties, OK*, Docket No. AB-3 (Sub-No. 63) (ICC served Jan. 4, 1991).

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

*It is ordered:*

1. The proceeding is reopened to afford CSXT and MCPRD the opportunity to show that the statutory requirements of the Trails Act continue to be satisfied. Statements by CSXT and MCPRD are due October 30, 1997, and Victor's reply is due November 19, 1997.

2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary