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SERVICE DATE - FEBRUARY 7, 2001

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-290 (Sub-No. 192X)

NORFOLK SOUTHERN RAILWAY COMPANY—ABANDONMENT EXEMPTION—
IN ANDERSON AND WOODFORD COUNTIES, KY

Decided: February 6, 2001

The Norfolk Southern Railway Company (NSR) and the Rails to Trails Conservancy (RTC) (collectively petitioners) have filed a joint petition to reopen the abandonment proceeding and issue a notice of interim trail use/rail banking (NITU) under section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and if necessary, to extend the deadline for the filing of a notice of consummation of the abandonment authority. The petition will be granted for the reasons discussed in this decision.

BACKGROUND

NSR filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments to abandon its line of railroad between milepost 0.7-LL, at Lawrenceburg, and milepost 3.5-LL, at Tyrone, in Anderson and Woodford Counties, KY, a distance of approximately 2.8 miles (line). The notice was served and published in the Federal Register on December 27, 1999 (64 FR 72376). The notice stated that, if consummation had not been effected by NSR's filing of a notice of consummation by December 27, 2000, and there were no legal or regulatory barriers to consummation, the authority to abandon would automatically expire.

By decision served January 25, 2000 (January 25 decision), the Board reopened the proceeding. The January 25 decision denied a request made by the Anderson County Fiscal Court (Anderson County) for issuance of a NITU,¹ but granted the request for imposition of a public use condition for a period of 180 days until July 24, 2000, and imposed the condition that NSR retain its interest in and take no steps to alter the historic integrity of the entire rail line until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f. By decision served November 13, 2000 (November 13 decision), the Board again reopened the

¹ By letter to the Board dated January 19, 2000, NSR indicated that it was unwilling to negotiate with Anderson County, as it had agreed to convey its interest in the line to the Tyrone Rail & Bridge Society, Inc. (TRBS). However, NSR also indicated in its letter that, "[i]n the unforeseen event that the transaction is not consummated, NSR will reconsider whether it should negotiate for interim trail use, should the offer still be outstanding."

proceeding and, based on a recommendation from the Kentucky State Historic Preservation Officer (SHPO), removed the section 106 historic preservation condition imposed in the January 25 decision.²

On January 11, 2001, petitioners requested that the Board reopen the proceeding and issue a NITU pursuant to the Trails Act to permit interim trail use/rail banking negotiations on the right-of-way. Petitioners further requested that, if necessary, the Board's regulations at 49 CFR 1152.29(e)(2)³ prescribing a deadline for filing a notice of consummation of the abandonment be waived and that the deadline be extended to January 12, 2001, or a later date, if required to permit issuance of a NITU.⁴

DISCUSSION AND CONCLUSIONS

In the petition, NSR states that it had entered into an agreement to transfer the property to TRBS, including an agreement that TRBS would accept the historic preservation covenants discussed above. NSR further states that, at the time the Board issued its November 13 decision, the transaction with TRBS had not yet closed but notes that it had every reason to believe that TRBS would complete the transaction and anticipated that the closing would take place promptly and certainly prior to December 27, 2000, much less January 12, 2001. NSR states that it

² The November 13 decision anticipated that the entire right-of-way would be deeded to TRBS, which had evidently agreed to retain and maintain the entire rail line, including all bridges and trestles eligible for inclusion in the National Register of Historic Places.

³ Under 49 CFR 1152.29(e)(2), a railroad has 1 year from the service of the date of the decision permitting abandonment to file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. Notices will be deemed conclusive on the point of consummation if there are no legal or regulatory barriers to consummation.

⁴ As further discussed below, petitioners state that NSR did not learn that TRBS would be unable to accept the property until December 26, 2000, one day before expiration of the 1-year period for filing a notice of consummation set forth in 49 CFR 1152.29(e)(2). Nonetheless, NSR was of the opinion that the deadline for providing notice of consummation here was January 12, 2001 (60 days after service of the Board's November 13 decision removing the historic preservation condition). Because of confusion regarding whether the notice of consummation deadline was December 27, 2000, or January 12, 2001, petitioners request an extension or waiver of the deadline for filing a notice of consummation if it is determined that the deadline has just passed.

intended to issue its notice of consummation of abandonment at the time the transaction closed.⁵ On December 26, 2000, however, NSR learned that TRBS was permitting its non-profit corporation charter to lapse and would no longer exist as a corporate entity. Thus, TRBS could not accept ownership of the line. NSR also learned that Anderson County was no longer interested in acquiring the property for interim trail use. NSR indicates that it was faced with a choice between exercising the abandonment at the last minute (but being unable to convey the property subject to the historic preservation covenants) or finding another transferee, presumably a trail sponsor, who would be willing to accept the property and adhere to the covenants.

According to NSR, after the negotiations with TRBS ended, it promptly contacted RTC as an alternative trail sponsor, offering the property for interim trail use/rail banking. Petitioners state that they are willing to negotiate an interim trail use/rail banking agreement. RTC has provided a statement of willingness to assume full responsibility for management of, for any legal liability arising out of the transfer or use of the right-of-way (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 right-of-way.

It is not necessary to determine whether the notice of consummation deadline was December 27, 2000, or January 12, 2001, because under the facts described by petitioners, an extension of the deadline is warranted. It is clear that NSR had no intent to consummate the abandonment prior to satisfying the concerns of the SHPO, and there is no apparent public benefit in finding that the abandonment authorization has lapsed. The deadline for filing a notice of consummation will therefore be extended to the date of service of this decision to allow acceptance of the trail use request and statement of willingness and issuance of a NITU. Good cause exists to accept the late-filed trail use statement. Trail use requests may be accepted as long as the Board retains jurisdiction over the right-of-way⁶ and the carrier is willing to enter into negotiations. Because NSR has not consummated the abandonment and is willing to negotiate for interim trail/rail banking use, a NITU will be issued under 49 CFR 1152.29. The parties may negotiate an interim trail use/rail banking agreement during the 180-day period, commencing on January 12, 2001. If the parties reach a mutually acceptable final agreement, further Board approval will not be necessary. If no agreement is reached within the 180 days, NSR may fully abandon the line. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for rail purposes.

⁵ Because that transaction would not have taken place under the Trails Act, a notice of consummation would have been required.

⁶ See Rail Abandonments--Supplemental Trails Act Procedures, 4 I.C.C.2d 152, 157-58 (1987); Soo Line Railroad Company--Exemption--Abandonment in Waukesha County, WI, Docket No. AB-57 (Sub-No. 23X) (ICC served May 14, 1987); and Missouri-Kansas-Texas Railroad Company--Abandonment--in Pettis and Henry Counties, MO, Docket No. AB-102 (Sub-No. 16) (ICC served Apr. 26, 1991).

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. The deadline for the filing of a notice of consummation of the abandonment authorization in this proceeding is extended to the service date of this decision to allow acceptance of the trail use request and issuance of a NITU in the present decision.
3. The decision served and published in the Federal Register on December 27, 1999, exempting the abandonment by NSR of the line described above, is modified to the extent necessary to implement interim trail use/rail banking as set forth below, for a period of 180 days from January 12, 2001, or until July 11, 2001.
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 imposed on the right-of-way.
5. Interim trail use/rail banking is subject to the future restoration of rail service and to the user continuing to meet the financial obligations for the right-of-way.
6. If the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that trail use be vacated on a specified date.
7. If an agreement for interim trail use/rail banking is reached by July 11, 2001, interim trail use may be implemented. If no agreement is reached by that date, NSR may fully abandon the line.
8. This decision is effective on its service date.

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

Vernon A. Williams
Secretary