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SERVICE DATE – AUGUST 25, 2009

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-290 (Sub-No. 168X)

NORFOLK AND WESTERN RAILWAY COMPANY—ABANDONMENT EXEMPTION—
BETWEEN KOKOMO AND ROCHESTER IN HOWARD, MIAMI, AND FULTON
COUNTIES, IN

Decided: August 24, 2009

By decision and notice of interim trail use or abandonment (NITU) served on May 14, 1996 (May 14 decision and notice),¹ the Board granted Norfolk and Western Railway Company (N&W) and Central Railroad Company of Indianapolis (CERA) an exemption under former 49 U.S.C. 10505 from the prior approval requirements of former 49 U.S.C. 10903-04 for Norfolk Southern Railway Company (NSR)² to abandon 38.4 miles of rail line between milepost I-57.2 at or near Kokomo and milepost I-95.6 at or near Rochester, in Howard, Miami, and Fulton Counties, IN, and for CERA to discontinue service over approximately 51.4 miles of rail line between milepost I-57.2 and milepost I-108.6 at or near Argos, in Howard, Miami, Fulton, and Marshall Counties, IN. The May 14 decision and notice also issued a NITU (NITU 1)³ for a segment of the line between milepost I-57.2 and milepost I-74.2 to Hoosier Rails-To-Trails Council, Inc. (Hoosier), and Indiana Trails Fund, Inc. (ITF). Although Hoosier and ITF had requested the issuance of a NITU for the entire 38.4-mile line authorized for abandonment, the Board did not issue a NITU for the remainder of the right-of-way, between milepost I-74.2 and milepost I-95.6. The Board determined that the abandonment process for this segment could not be completed until Indiana Hi-Rail Corporation's (IHRC) discontinuance of its trackage rights⁴

¹ The May 14 decision and notice also embraced Docket No. AB-289 (Sub-No. 3X), Central Railroad Company of Indianapolis—Discontinuance of Service Exemption—Between Kokomo and Argos in Howard, Miami, Fulton, and Marshall Counties, IN.

² Effective September 1, 1998, NSR, through merger, became the successor to N&W. See Norfolk Southern Railway Company—Merger Exemption—Norfolk and Western Railway Company, STB Finance Docket No. 33648 (STB served Aug. 31, 1998).

³ In addition to trail use, the exemption was also made subject to environmental, public use, and standard employee protective conditions.

⁴ IHRC had trackage rights over a 21.4-mile segment of the line between milepost I-74.2 (Peru, IN) and milepost I-95.6 (Rochester, IN). IHRC had been operating as a Chapter 11 debtor under the jurisdiction of the United States Bankruptcy Court for the Southern District of Indiana. IHRC filed its bankruptcy petition in In Re: Sagamore National Corporation and Indiana Hi-Rail Corporation, Case No. IP94-08502-RLB-11.

was authorized.⁵ By NITU served on March 10, 2004, the proceeding was reopened and ITF was authorized to negotiate a trail use agreement with NSR for the portion of the right-of-way between milepost I-75.5 and milepost I-95.6 (NITU 2). By decision served on May 4, 2005, the Board denied petitions for reconsideration and petitions to revoke and reopen NITU 1 (May 2005 Decision).

On June 5, 2009, ITF and Nickel Plate Trail, Inc. (NPT), (collectively, petitioners) filed a joint petition, pursuant to 49 CFR 1152.29(f), requesting the Board to reopen the proceeding, to vacate the existing NITUs, and to issue an appropriate replacement NITU substituting NPT as the new interim trail user for the segments of the right-of-way between milepost I-57.2 and milepost I-74.2, and between I-75.5 and milepost I-95.6.⁶ In a letter attached to the petition, ITF indicates its support for the transfer. In the Agreement and Consent to Assignment of Interest in Trail and of Trail Management, attached as Exhibit F, NSR indicates that it consents and supports ITF's and NPT's request for the substitution of NPT as the new trail sponsor. On June 29, 2009, Hoosier filed a joinder in petition and motion to supplement the record, clarifying that ITF was the sole purchaser of the segments for trail use.⁷ On July 31, 2009, Hoosier filed a second motion to supplement the record, clarifying the status of segments of the right-of-way.⁸

Petitioners have submitted a copy of the extant NITUs and NPT's statement of willingness to assume financial responsibility for interim trail use and rail banking pursuant to

⁵ The Board stated, however, to facilitate action on the request for trail use for that line segment, NSR was to inform the trail user if and when IHRC's trackage rights were discontinued. The Board also reserved jurisdiction to impose a trail use condition if an appropriate request was made following IHRC's discontinuance of its trackage rights.

⁶ According to NSR, NSR consummated the segment of the right-of-way between milepost I-74.2 and milepost I-75.5.

⁷ Hoosier states that Hoosier and ITF previously acted together in the request for NITU 1 for NSR's 38.4-mile rail line. However, according to Hoosier, by the time NSR sold 34.2 miles for trail use, Hoosier and ITF had determined that ITF would be the entity undertaking real property acquisitions for trails. For this reason, the purchaser of the 34.2 miles was solely ITF. Also for this reason, Hoosier had no involvement in ITF's subsequent request for NITU 2. Hoosier states that it has yielded all management functions for the trail project to ITF but that it is still involved with ITF and NPT by engaging in public policy initiatives that support trails.

⁸ According to Hoosier, the segment between milepost I-57.2 and milepost I-58.5 is an active part of the interstate rail system. The segment between milepost I-72.7 and milepost I-72.8 is available to establish a connection to the interstate rail system. The segment between milepost I-72.8 and milepost I-74.2 is an active part of the interstate rail system. In the May 2005 Decision, slip op. at 8, the Board found that NSR's consummation of the segment from I-74.2 to I-75.5 did not sever the segment from I-75.5 to I-95.6 because the latter segment connects with another rail line.

the National Trails System Act, 16 U.S.C. 1247(d) and 49 CFR 1152.29, and NPT's acknowledgement that use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation for rail service. Petitioners have also indicated the date of transfer of responsibility for the right-of-way as June 15, 2009. Petitioners' submission meets the requirements of 49 CFR 1152.29(f). However, in the May 2005 Decision, slip op. at 11, the Board explained that the segment from milepost I-57.2 to I-58.5 was no longer eligible for a NITU. Accordingly, petitioners' request will be granted for the segments from milepost I-58.5 to milepost I-74.2 and from milepost I-75.5 to milepost I-95.6.

This decision 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 NITUs served on May 14, 1996 (NITU 1), and on March 10, 2004 (NITU 2), are vacated.
3. A replacement NITU applicable to NPT as interim trail user is issued for the segments of the right-of-way between milepost I-58.5 and milepost I-74.2, and between milepost I-75.5 and milepost I-95.6, effective on the service date of this decision and notice, subject to any environmental conditions that remain in effect.
4. The new trail user is required 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 that may be levied or assessed against, the right-of-way.
5. Interim trail use/rail banking is subject to the future restoration of rail service and to the new user's continuing to meet the financial obligations for the right-of-way.
6. If the new trail 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.

7. This decision and notice is effective on its service date.

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

Anne K. Quinlan
Acting Secretary