

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-6 (Sub-No. 435X)

BNSF RAILWAY COMPANY–ABANDONMENT EXEMPTION–
IN ROCK ISLAND AND WHITESIDE COUNTIES, IL

Decided: January 25, 2006

BNSF Railway Company (BNSF) and Iowa, Chicago & Eastern Railroad Corporation (ICE) (together, Applicants) jointly filed a notice of exemption under 49 CFR 1152 Subpart F–Exempt Abandonments and Discontinuances of Service for BNSF to abandon, and ICE to discontinue service over, approximately 5.09 miles of railroad between milepost 20.31 and milepost 25.40, near Albany, in Rock Island and Whiteside Counties, IL. Notice of the exemption was served on December 27, 2005, and published in the Federal Register on December 28, 2005 (70 FR 76912-13).¹ The exemption is scheduled to become effective on January 26, 2006.

The Board’s Section of Environmental Analysis (SEA) issued an environmental assessment (EA) in this proceeding on December 30, 2005. In the EA, SEA states that Applicants notified planning agencies in both Whiteside and Rock Island Counties. The Whiteside County Planning and Zoning Department (Whiteside County) commented that the right-of-way (ROW) has been designated as a future bike/walking path in its greenways and trails plan. Whiteside County indicated that the proposed trail use would not affect the environment or historical aspects of the alignment. Also, according to SEA, Applicants will forward any correspondence from the Rock Island County Planning Department (Rock Island) to SEA as it becomes available. Therefore, SEA recommends that Applicants consult with Rock Island regarding impacts to land use prior to commencement of any salvage activities.

SEA notes that Applicants have not provided any information on whether contact has been made with the National Geodetic Survey (NGS) for potential impacts to geodetic station markers. SEA has added NGS to the service list in this proceeding to ensure that it received a copy of this EA for comments. Therefore, SEA recommends that Applicants be required to

¹ The notice served on December 27, 2005, and published on December 28, 2005, embraced STB Docket No. 987X, Iowa, Chicago & Eastern Railroad Corporation–Discontinuance of Service Exemption–in Rock Island and Whiteside Counties, IL, in which Iowa, Chicago & Eastern Railroad Corporation was granted an exemption to discontinue service over the line.

consult with NGS prior to commencement of any salvage activities to determine if any geodetic station markers may be affected by the proposed abandonment. In the event any station markers are identified, Applicants shall notify NGS 90 days prior to the onset of salvage activities in order to plan for possible relocation by NGS and shall report the results to SEA in writing.

SEA also notes that Applicants contacted the U.S. Fish and Wildlife Service (USFWS) to determine if the proposed abandonment would likely have an adverse impact on any Federally listed species, or adversely modify any areas designated as critical habitats pursuant to section 7 of the Endangered Species Act, as amended. USFWS provided a list of Federally threatened and endangered species and designated critical habitats. Based on the review of USFWS, SEA notes that the area may contain a number of such species and habitats. Therefore, SEA recommends that a condition be imposed requiring that Applicants consult with the USFWS Rock Island Field Office prior to commencement of any salvage activities regarding potential impacts from salvaging activities to Federally listed threatened or endangered species that may occur in the vicinity of the line, and report the results of these consultations in writing to SEA.

SEA indicates that the U.S. Bureau of Land Management commented that there are no Federal lands administered through their office along the subject rail ROW. However, they indicate some of the original railroad grants were limited fee rights-of-way which may be subject to the Railroad Right-of-Way Forfeiture and Abandonment Act of March 8, 1922, 43 U.S.C. 912 (1922 Abandonment Act). Therefore, SEA recommends that Applicants be required to consult with the U.S. Bureau of Land Management, Eastern States Office, prior to commencement of any salvage activities to determine if the proposed abandonment is subject to any original railroad grants with limited fee rights-of-way pursuant to the 1922 Abandonment Act.

SEA also states that, at the time the EA was prepared, the National Park Service (NPS) had not provided comments. Therefore, SEA recommends that Applicants be required to consult with NPS prior to commencement of any salvage activities to determine if there would be any impacts to wildlife sanctuaries, refuges, national parks, or forests.

SEA further indicates that, at the time the EA was prepared, the U.S. Army Corps of Engineers (USACE) had not provided comments as to whether the proposed abandonment will require a permit under section 404 of the Clean Water Act. Therefore, SEA recommends that Applicants be required to consult with USACE prior to commencement of any salvage activities to determine whether a USACE permit under section 404 is required and report the results of these findings to SEA in writing.

SEA states that, at the time the EA was prepared, the U.S. Environmental Protection Agency (USEPA) had not provided comments on impacts to section 402 of the Clean Water Act. Therefore, SEA recommends that Applicants be required to consult with USEPA prior to commencement of any salvage activities to ensure any concerns regarding potential contamination of the right-of-way and the need for a section 402 stormwater permit are addressed and report the results of these consultations to SEA in writing.

SEA also states that the Illinois Historic Preservation Agency (SHPO) has not completed its evaluation of the potential impact of this project on historic resources. Accordingly, SEA

recommends that Applicants be required to retain their interest in and take no steps to alter the historic integrity of all sites and structures on the ROW that are eligible for listing or are listed in the National Register of Historic Places (National Register) until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f (NHPA), and that Applicants be required to report back to SEA regarding the results of any consultations with the SHPO prior to commencement of any salvage activities.

SEA states that it conducted a search of the National Park Service's Native American Consultation Database regarding tribes that may have an interest in the project. SEA is required to consult with tribes pursuant to 36 CFR 800.3(f)(2) to seek their input regarding any National Register eligible properties of traditional religious and cultural significance that may be affected by the proposed abandonment. The database provides information on Federally recognized tribes that may have ancestral connections to the project area and may therefore have an interest in the project's potential impacts on any areas of tribal interest. SEA has added those tribes to the service list for this proceeding to ensure that they received a copy of this EA for their comments. SEA recommends that, in the event that any archaeological sites, human remains, funerary items or associated artifacts are discovered during salvage activities, Applicants shall immediately cease all work and notify SEA, interested Federally recognized tribes, and the SHPO. SEA will then consult with the SHPO, interested Federally recognized tribes, and Applicants to determine whether any mitigation measures are necessary.

Comments to the EA were due by January 17, 2006. By letter dated January 10, 2006, USEPA commented that the proposed abandonment may have an impact on the environment with regard to final disposition of crossties preserved with creosote. As a result, there is no need for a change in the USEPA condition previously recommended by SEA. Also, BNSF has forwarded letters from the USACE and SHPO. In the letters, USACE states that the project does not require a section 404 permit, and the SHPO states that abandonment will not affect any historic properties. Therefore, SEA no longer recommends the imposition of conditions to address those conditions. Also, SEA has clarified that the recommended conditions should apply only to BNSF. Because all of the mitigation measures recommended in the EA address potential impacts that may result from salvage activities on the rail line and only BNSF would be responsible for those impacts as the abandoning carrier,² SEA's clarification is proper. Accordingly, the conditions recommended by SEA in the EA, as amended and clarified, will be imposed.

On January 4, 2006, the Village of Albany (Village) filed a request for issuance of a notice of interim trail use (NITU) for the entire line under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and for a public use condition under 49 U.S.C. 10905,³ to negotiate with BNSF for acquisition of the ROW as a recreational trail. The Village has submitted a statement of willingness to assume financial responsibility for the management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which

² ICE has obtained discontinuance authority, not abandonment authority.

³ SEA indicated in the EA that the ROW may be suitable for other public use following abandonment.

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 ROW for trail purposes, as required at 49 CFR 1152.29, and has acknowledged that the use of the ROW for trail purposes is subject to future reconstruction and reactivation for rail service. By facsimile filed on January 12, 2006, BNSF states that it does not object to the issuance of a NITU.

Because the Village's request complies with the requirements of 49 CFR 1152.29 and BNSF is willing to negotiate for trail use, a NITU will be issued for the subject line. The parties may negotiate an agreement during the 180-day period prescribed below. If the parties reach a mutually acceptable final agreement, no further Board action is necessary. If no agreement is reached within 180 days, BNSF may fully abandon the line. See 49 CFR 1152.29(d)(1). Use of the ROW for trail purposes is subject to restoration for railroad purposes.

As noted above, the Village also requested a 180-day public use condition. The Village requests that BNSF be prohibited from disposing of the corridor, other than tracks, ties and signal equipment, except for public use on reasonable terms, and that BNSF be barred from removing or destroying any potential trail-related structures, such as bridges, trestles, culverts and tunnels, for a 180-day period from the effective date of the abandonment. The Village states that the time period is needed to commence negotiations with BNSF.

As an alternative to interim trail use under the Trails Act, the ROW may be acquired for public use as a trail under 49 U.S.C. 10905. See Rail Abandonments—Use of Rights-of-Way As Trails, 2 I.C.C.2d 591, 609 (1986). Under section 10905, the Board may prohibit the disposal of rail properties that are proposed to be abandoned and are appropriate for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment.

To justify a public use condition, a party must set forth: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be effective; and (iv) justification for the imposition of the period of time requested. See 49 CFR 1152.28(a)(2). Because the Village has satisfied these requirements, a 180-day public use condition will be imposed, commencing from the January 26, 2006 effective date of the exemption.

When the need for interim trail use/rail banking and public use is shown, it is the Board's policy to impose both conditions concurrently, subject to the execution of a trail use agreement. If a trail use agreement is reached on a portion of the ROW, BNSF must keep the remaining ROW intact for the remainder of the 180-day period to permit public use negotiations. Also, a public use condition is not imposed for the benefit of any one potential purchaser, but rather to provide an opportunity for any interested person to acquire the ROW that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, BNSF is not required to deal exclusively with the Village, but may engage in negotiation with other interested persons.

As conditioned, 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. Upon reconsideration, the notice served on December 27, 2005, and published in the Federal Register on December 28, 2005, exempting the abandonment of the line described above, is modified to the extent necessary to implement interim trail use/rail banking and to permit public use negotiations as set forth below, for a period of 180 days commencing from the January 26, 2006 effective date of the exemption (until July 25, 2006), and subject to the conditions that BNSF shall: (1) prior to commencement of any salvage activities, consult with Rock Island regarding impacts to land use; (2) prior to commencement of any salvage activities, consult with NGS to determine if any geodetic station markers may be affected by the proposed abandonment, and in the event any station markers are identified, notify NGS at least 90 days prior to the onset of salvage activities in order to plan for possible relocation by NGS, and report the results to SEA in writing; (3) prior to commencement of any salvage activities, consult with the USFWS Rock Island Field Office regarding potential impacts from salvaging activities to Federally listed threatened or endangered species that may occur in the vicinity of the line, and report the results of these consultations in writing to SEA; (4) prior to the commencement of any salvage activities, consult with the U.S. Bureau of Land Management, Eastern States Office, to determine if the proposed abandonment is subject to any original railroad grants with limited fee rights-of-way pursuant to the Railroad Right-of-Way Forfeiture and Abandonment Act, 43 U.S.C. 912; (5) prior to commencement of any salvage activities, consult with NPS to determine if there will be any impacts to wildlife sanctuaries, refuges, national parks, or forests; (6) prior to commencement of any salvage activities, consult with USEPA to ensure any concerns regarding potential contamination of the ROW and the need for a section 402 stormwater permit are addressed, and report the results of these consultations to SEA in writing; and (7) in the event that any archaeological sites, human remains, funerary items or associated artifacts are discovered during salvage activities, immediately cease all work and notify SEA, interested Federally recognized tribes, and the SHPO, and SEA will then consult with the SHPO, interested Federally recognized tribes, and BNSF to determine whether any mitigation measures are necessary.

3. Consistent with the public use and interim trail use/rail banking conditions imposed in this decision and notice, BNSF may discontinue service and salvage track and related materials. BNSF shall keep intact the ROW, including bridges, trestles, culverts and tunnels, for a period of 180 days to enable any state or local government agency, or other interested person, to negotiate the acquisition of the line for public use. If an interim trail use/rail banking agreement is executed before July 25, 2006, the public use condition will expire to the extent the trail use/rail banking agreement covers the same line.

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 that may be levied or assessed against, the ROW.

5. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the ROW.

6. If interim trail use is implemented, and subsequently the 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. If an agreement for interim trail use/rail banking is reached by July 25, 2006, interim trail use may be implemented. If no agreement is reached by that time, BNSF may fully abandon the line, provided the conditions imposed in this proceeding are met.

8. This decision is effective on its date of service.

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

Vernon A. Williams
Secretary