

34242
EB

SERVICE DATE - AUGUST 13, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-855 (Sub-No. 1X)¹

A & R LINE, INC.–ABANDONMENT EXEMPTION–
IN CASS AND PULASKI COUNTIES, IN

Decided: August 11, 2004

BACKGROUND

By decision and notice of interim trail use or abandonment (NITU) served on November 18, 2003, as revised by decision served on March 5, 2004, the Board, under 49 U.S.C. 10502, exempted from the prior approval requirements of 49 U.S.C. 10903 the abandonment by A & R Line, Inc. (A&R) of a line of railroad known as the A&R line.² At the same time, the Board exempted the discontinuance of service by Toledo, Peoria & Western Railway Corporation (TP&W) over the same line. A&R and TP&W are referred to jointly as “petitioners.” The line extends from milepost 0.0W at Kenneth to the end of the line at milepost 21.0W at Winamac, a distance of 21.0 miles in Cass and Pulaski Counties, IN. The exemption was granted subject to environmental and employee protective conditions, and conditions requested by Indiana Trails Fund, Inc. (ITF) for rail banking/interim trail use under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and for public use.

On March 15, 2004, Kokomo Grain Company (Kokomo) filed a revised offer of financial assistance (OFA) reflecting the correct description of the line as a 21-mile line.³ A decision

¹ Prior decisions in this proceeding also have embraced Toledo, Peoria & Western Railway Corporation–Discontinuance of Service Exemption–in Cass and Pulaski Counties, IN, STB Docket No. AB-847 (Sub-No. 2X).

² The March 5, 2004 decision revised the November 18, 2003 decision and NITU to correct the description of the subject line to cover 21 miles of rail line, rather than 15.9 miles as the petitioners originally had indicated.

³ Kokomo had originally filed an OFA on November 28, 2003. The effective date of the November 18, 2003 decision was postponed to permit the OFA process to proceed, and the OFA process subsequently was held in abeyance while the Board considered petitioners’ motion to
(continued...)

served on March 19, 2004, found that Kokomo was financially responsible and postponed the effective date of the exemption to permit the OFA process under 49 U.S.C. 10904 and 49 CFR 1152.27 to proceed.⁴ However, in a decision served on April 22, 2004, the Board terminated the OFA process because the parties were unable to reach an agreement and had not asked the Board to set terms and conditions for sale of the line. The exemption permitting abandonment of the 21-mile line subject to interim trail use, public use and other conditions became effective on the April 22, 2004 service date of that decision.

As noted in the April 22, 2004 decision, there is one outstanding matter that remains to be considered. In a pleading filed on November 24, 2003, the Board of Commissioners of Pulaski County, IN (County), has requested that the Board require the railroad or the not-for-profit interim trail sponsor to post a performance bond or to escrow funds, guaranteeing the payment of removal and clean-up costs.⁵ The County's primary concern is that the trail sponsor might not be financially able to maintain structures such as bridges, trestles, culverts and tunnels, or pay for removing or cleaning up those structures that, through age or disrepair, may no longer function and could collapse into ditches, streams and rivers. By requesting the imposition of a performance bond or escrow fund requirement on the railroad or the trail sponsor, the County seeks to protect taxpayers and property owners from being obligated to pay for future removal or clean-up costs associated with the rail line. Petitioners filed a joint reply on December 15, 2003.⁶

DISCUSSION AND CONCLUSIONS

The County's pleading will be treated as a petition to reopen under 49 CFR 1115.4, which requires a detailed showing of material error, new evidence, or substantially changed

³(...continued)
correct the description of the length of the line.

⁴ The March 19, 2004 decision also indicated that ITF had timely filed a revised request for a public use condition and an interim trail use condition for the entire 21-mile line, and that A&R agreed to negotiate for rail banking/interim trail use for the entire 21-mile rail line. The decision noted that, because these filings merely confirmed that the conditions sought were for the entire line already determined by the Board to be 21 miles long in its decision served March 5, 2004, further Board action was unnecessary with regard to the public use and interim trail use conditions previously imposed in this proceeding.

⁵ The County previously had filed comments on this matter on August 20, 2003.

⁶ In a letter filed on August 3, 2004, as corrected on August 4, 2004, A&R indicates that, on August 1, 2004, it transferred the entire line to ITF for interim trail use/rail banking.

circumstances that would materially affect the Board's prior decision. The County's filing fails to show that any of these criteria are met.

In enacting the Trails Act, Congress intended to lift from a railroad the cost of paying taxes and other maintenance costs for the property during the period of interim trail use. Requiring a railroad to post a performance bond or establish escrow funds would be contrary to Congress' intent. Moreover, as petitioners note, the Board has imposed an environmental condition in this case that addresses bridge and culvert maintenance activities following abandonment, and this condition would apply if the trail use were terminated and the NITU vacated by the Board pursuant to 49 CFR 1152.29. Should a rail banking/interim trail use agreement not be reached or be terminated and A&R fully abandon the line, A&R would then be obligated to comply with that condition.

Turning to the trail sponsor, the County essentially raises general, unsupported concerns regarding ITF's financial ability to maintain the line during the period of rail banking/interim trail use. But the Board's policy is to apply a rebuttable presumption that any private organization that files a statement of willingness meets the statutory requirement to serve as a trail sponsor.⁷ As the Board and the courts have stated, a financial fitness test is unnecessary and would be contrary to the intent behind the Trails Act to facilitate and encourage rail banking/interim trail use where the statutory conditions are met. Jost v. STB, 194 F.2d 79, 88-90 (D.C. Cir. 1999) (Jost); Central Kansas Ry., Ltd. Liab. Co.—Abandonment Exemption—in Marion and McPherson Counties, KS, STB Docket No. AB-406 (Sub-No. 6X) (STB served Dec. 18, 1998, and May 8, 2001) (Central Kansas); Idaho Northern & Pacific Railroad Company—Abandonment and Discontinuance Exemption—in Washington and Adams Counties, ID, Docket No. AB-433 (Sub-No. 2X) et al. (STB served Apr. 1, 1998) (Idaho Northern).

As in other Trails Act cases, the Board issued a NITU because the statutory criteria were met: (1) the trail sponsor had filed a statement of willingness to assume financial responsibility for the right-of-way and acknowledged that use of the right-of-way was subject to future reactivation of rail service and (2) A&R had agreed to negotiate. If ITF were shown to be unable to continue to meet the financial and liability conditions of the statute, the interim trail use authority would be revoked. Central Kansas; Idaho Northern. There has been no showing on this record, however, rebutting the presumption that ITF is capable of meeting its responsibilities as a trail sponsor.

As a trail sponsor, ITF must comply with state and local public health and safety laws, and may not use the right-of-way in such a manner that it would present a public nuisance under

⁷ While a trail sponsor must be willing to assume responsibility for management of the trail and to assume legal liability, there is no statutory or regulatory requirement (as there is in connection with entities filing OFAs) that the trail sponsor be financially responsible.

state and local laws applied in a nondiscriminatory manner. Central Kansas (May 8, 2001 decision at 5); Burlington Northern Railroad Company–Abandonment Exemption–In Skagit County, WA, Docket No. AB-6 (Sub-No. 299X) (ICC served Oct. 19, 1993). These laws can impose substantial responsibilities on trail sponsors, in the areas of maintenance, removal and clean-up. Jost, 194 F.3d at 90. If ITF is not managing the trail in a lawful manner, the Board remains available to consider whether to revoke the interim trail use authority that was issued in this proceeding. If that authority were revoked, A&R could then abandon the line, and it would be responsible for the bridges and culverts.

In sum, the County has failed to show that the protections available to it are deficient or that further relief is warranted. Accordingly, we will deny the County’s petition to reopen.

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

It is ordered:

1. The County’s petition to reopen this proceeding is denied.
2. This decision is effective September 12, 2004.

By the Board, Chairman Nober, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A. Williams
Secretary