

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-6 (Sub-No. 379X)

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY—  
ABANDONMENT EXEMPTION—IN GARFIELD AND LOGAN COUNTIES, OK

Decided: March 22, 2010

On October 27, 1998, the Board, at the request of The Burlington Northern and Santa Fe Railway Company (BNSF)<sup>1</sup> and the Oklahoma Department of Transportation (ODOT), issued a Decision and Notice of Interim Trail Use or Abandonment (NITU) in this proceeding for the 42.80-mile rail line (Line) between milepost 73.60 near Fairmont and milepost 116.40 near Guthrie, in Garfield and Logan Counties, OK.<sup>2</sup> Shortly thereafter, BNSF and ODOT entered into an interim trail use/rail banking agreement.

On August 31, 2009, ODOT and Montoff Transportation Company, LLC (Montoff) (jointly, movants), filed a motion pursuant to 49 CFR 1152.29(f) requesting that the Board vacate the existing NITU, and issue a replacement NITU allowing Montoff to substitute for ODOT as interim trail user for the Line. Montoff submitted a Statement of Willingness to Assume Financial Responsibility for the Line, and movants indicated that the transfer of responsibility for the Line would occur on September 30, 2009, or as soon thereafter as a final environmental review is complete.

BNSF filed a reply in opposition to the substitution motion on September 3, 2009, contending that it did not know: (1) whether Montoff is a “qualified private organization” within the meaning of the National Trails System Act, 16 U.S.C. 1247(d); and (2) whether the substitution agreement between Montoff and ODOT preserves BNSF’s contractual right of first refusal to repurchase the Line’s track materials. Movants responded on October 14, 2009, requesting that their motion be held in abeyance. They stated that Montoff and BNSF had reached an agreement in principle under which BNSF would consent to the proposed substitution and that the agreement was being drafted and would be completed shortly. The Board granted movants’ abeyance request in a decision served on October 26, 2009.

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<sup>1</sup> Now BNSF Railway Company.

<sup>2</sup> Notice of the exemption was served and published in the Federal Register on May 6, 1998, at 63 FR 25132-33.

On February 17, 2010, Montoff reported that it has entered into an agreement with ODOT and BNSF, and it renewed its motion for the substitution of interim trail users. Simultaneously with this renewed motion, Montoff filed a notice of exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901 to acquire from BNSF its right to reactivate rail service on the Line. See Montoff Transportation Company, LLC—Acquisition Exemption—BNSF Railway Company, Finance Docket No. 35354 (STB served Mar. 5, 2010).

Montoff states that it intends to restore rail service on the Line but cannot do so until track and bridge rehabilitation work is completed. It claims that its bankers have advised that to secure their investment in the funds needed for rehabilitation, Montoff must first acquire BNSF's right to reactivate rail service. BNSF, in a reply filed on February 23, 2010, confirms that it has agreed to the substitution of interim trail users but only if Montoff is first permitted to acquire BNSF's right to reactivate service on the Line. Montoff's notice of exemption was accepted for filing to facilitate the return of this rail-banked Line to active rail service in a timely fashion, and it became effective on March 21, 2010.

Montoff has submitted the required Statement of Willingness to Assume Financial Responsibility for interim trail use/rail banking in compliance with 49 CFR 1152.29. Montoff has also acknowledged that use of the right-of-way for trail purposes is subject to possible future reactivation for rail service. Accordingly, Montoff's substitution motion will be granted.<sup>3</sup>

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

It is ordered:

1. This proceeding is reopened.
2. The NITU served on October 27, 1998, is vacated.
3. A replacement NITU applicable to Montoff as interim trail user is issued, 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

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<sup>3</sup> We remind Montoff that under 49 CFR 1152.29(d)(2) the outstanding NITU in this proceeding must be vacated before operations over the Line may commence.

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, Rachel D. Campbell, Director, Office of Proceedings.