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SERVICE DATE - APRIL 9, 2004

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-55 (Sub-No. 625X)

CSX TRANSPORTATION, INC.—ABANDONMENT EXEMPTION—IN
PRESTON COUNTY, WV

Decided: April 6, 2004

By petition filed on December 22, 2003, CSX Transportation, Inc. (CSXT), seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon approximately 14.3 miles of a line of railroad extending from milepost BAJ 0.0 at Rowlesburg to milepost BAJ 14.3 near Albright in Preston County, WV. Notice of the filing was served and published in the Federal Register on January 9, 2004 (69 FR 1615). A late-filed request for imposition of a public use condition and issuance of a notice of interim trail use (NITU) was filed by Friends of the Cheat (Friends).¹ The petition for exemption will be granted, subject to trail use, public use, environmental, and standard employee protective conditions.

BACKGROUND

According to CSXT, there is only one shipper on the line proposed for abandonment and that shipper's use of the line has recently declined. The shipper, Allegheny Wood Products (AWP), operates a facility at Caddell, WV. CSXT transported 60 carloads of wood products for AWP for the year 2001, 53 carloads for the year 2002, and only 18 carloads for the year 2003. CSXT notes that

¹ The January 9 notice provided that any request for a public use condition under 49 CFR 1152.28 or for trail use/rail banking under 49 CFR 1152.29 was due by January 29, 2004. Friends' request was filed on February 20, 2004, as amended on February 25, 2004. In revising its abandonment rules in Aban. and Discon. of R. Lines and Transp. Under 49 U.S.C. 10903, 1 S.T.B. 894 (1996) and 2 S.T.B. 311 (1997), the Board retained the policy of accepting filings after the due date when good cause is shown. Because there is no indication that Friends' late-filed request will prejudice any party, it will be accepted. Additionally, the Monongahela River Trails Conservancy (MRTC) prematurely filed a request for imposition of a public use condition and a trail use condition. On March 3, 2004, MRTC advised that it was no longer involved in the trail use negotiations and that it now supported Friends' request.

AWP also operates a facility at Petersburg, WV, which would continue to have rail access. CSXT states that AWP is aware of the proposed abandonment and that AWP's primary source of alternative transportation would be motor carrier transportation. CSXT indicates that it is negotiating with AWP for a post-abandonment property sale that would improve truck access to the Caddell facility. Because of the declining traffic from AWP on the line and the lack of any potential for new traffic that would support the operation of the line, CSXT seeks to abandon the line to avoid future losses.

CSXT estimates that it incurred an avoidable loss from operations of \$45,160 for the base year ending on September 30, 2003. CSXT estimates an avoidable loss from operations of \$44,575 for the forecast year beginning on December 1, 2003.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without the Board's prior approval. Under 49 U.S.C. 10502, however, the Board must exempt a transaction or service from regulation when it finds that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will also foster sound economic conditions and encourage efficient management by relieving CSXT from the expense of retaining and maintaining a line that generates very little traffic and allowing CSXT to apply its assets more productively elsewhere on its system [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be adversely affected.

Nor is regulation of the transaction necessary to protect shippers from the abuse of market power. The sole shipper on the line has made little use of rail transportation on the line recently, and has transportation alternatives available, including the use of motor carriers and an alternate rail-served facility. And AWP has not filed in opposition to the proposed abandonment. Nevertheless, to ensure that AWP is informed of this action, the Board will require CSXT to serve a copy of this decision and notice on AWP within 5 days of the service date and certify to the Board that it has done so. In light of the market power finding, the Board need not determine whether the proposed transaction is limited in scope.

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to

granting this exemption, the Board will impose the employee protective conditions set forth in Oregon Short Line R. Co.–Abandonment–Goshen, 360 I.C.C. 91 (1979).

CSXT has submitted an environmental report with its petition and has notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed action. See 49 CFR 1105.11. The Board's Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment.

SEA served an environmental assessment (EA) on February 20, 2004, recommending the imposition of two environmental conditions. Comments on the EA were due March 22, 2004.

Based on the comments received on the EA, SEA recommends that the following conditions be placed on any decision granting abandonment authority: (1) CSXT shall notify the National Geodetic Survey (NGS) 90 days prior to any salvage activities in order to plan for the relocation of 18 geodetic station markers that have been identified on the line that may be affected by the proposed abandonment; and (2) CSXT shall retain its interest in and take no steps to alter the historic integrity of all sites and structures on the right-of-way that are 50 years old or older until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f (NHPA).

The conditions recommended by SEA will be imposed. Accordingly, based on SEA's recommendation, the Board concludes that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

As previously noted, Friends filed a request for the issuance of a NITU under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act). Friends has submitted a statement of willingness to assume financial responsibility for the right-of-way, and has acknowledged that use of the right-of-way is subject to possible future reconstruction and reactivation of the right-of-way for rail service as required under 49 CFR 1152.29. By letter filed on March 12, 2004, CSXT states that it is willing to negotiate with Friends for interim trail use. Because Friends' request complies with the requirements of 49 CFR 1152.29, and CSXT is willing to enter into trail use negotiations, the Board will issue a NITU for the subject line. The parties may negotiate an agreement during the 180-day period prescribed below. If an agreement is executed, no further Board action is necessary. If no agreement is reached within 180 days, CSXT may fully abandon the line, subject to the conditions imposed below. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

SEA has indicated in the EA that, if abandonment and salvage of the line does take place, the right-of-way may be suitable for other public use. Friends requests imposition of a 180-day public use condition to study recreational uses for the right-of-way. Friends requests that CSXT be prohibited from: (1) disposing of the corridor, other than the tracks, ties, and signal equipment, except for public use on reasonable terms; and (2) removing or destroying potential trail-related structures such as bridges, trestles, culverts, and tunnels.

The Board has determined that persons who file under the Trails Act may also file for public use under 49 U.S.C. 10905. See Rail Abandonments–Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986) (Trails). When the need for both conditions is established, it is the Board’s policy to impose them concurrently, subject to the execution of a trail use agreement. Friends has met the public use criteria prescribed at 49 CFR 1152.28(a)(2) by specifying: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) justification for the period of time requested. Accordingly, a 180-day public use condition will be imposed on the rail line to be abandoned, commencing from the effective date of this decision and notice, to enable any state or local government agency or other interested person to negotiate the acquisition of the line for public use. If a trail use agreement is reached on a portion of the right-of-way, Friends must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, the Board notes that a public use condition is not imposed for the benefit of any one potential purchaser. Rather, it provides an opportunity for any interested person to acquire the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, CSXT is not required to deal exclusively with Friends, but may engage in negotiations with other interested persons.

The parties should note that operation of the trail use and public use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in Trails, 2 I.C.C.2d at 608, offers of financial assistance (OFA) to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking and public use. Accordingly, if an OFA is timely filed under 49 CFR 1152.27(c)(1), the effective date of this decision and notice will be postponed beyond the effective date indicated here. See 49 CFR 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. See 49 CFR 1152.27(f). Finally, if the line is sold under the OFA procedures, the petition for abandonment exemption will be dismissed and trail use and public use precluded. Alternatively, if a sale under the OFA procedures does not occur, the trail use and public use processes may proceed.

It is ordered:

1. Under 49 U.S.C. 10502, the Board exempts from the prior approval requirements of 49 U.S.C. 10903 the abandonment by CSXT of the above-described line, subject to employee protective conditions set forth in Oregon Short Line R. Co.–Abandonment–Goshen, 360 I.C.C. 91 (1979), and subject to the conditions that CSXT shall: (1) leave intact all of the right-of-way, including bridges, trestles, culverts, and tunnels (except track, ties, and signal equipment) for a period of 180 days from the effective date of this decision and notice, to enable any state or local government agency or any other interested person to negotiate the acquisition of the line for public use; (2) comply with the terms and conditions for implementing interim trail use/rail banking as set forth below; (3) notify NGS 90 days prior to any salvage activities in order to plan for the relocation of the 18 geodetic station markers that have been identified on the line that may be affected by the proposed abandonment; and (4) retain its interest in and take no steps to alter the historic integrity of all sites and structures on the right-of-way that are 50 years old or older until completion of the section 106 process of the NHPA.
2. CSXT is directed to serve a copy of this decision and notice on AWP within 5 days after the service date of this decision and notice and to certify to the Board that it has done so.
3. 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 the management of, 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.
4. 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 right-of-way.
5. 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.
6. If an agreement for interim trail use/rail banking is reached by the 180th day after service of this decision and notice, interim trail use may be implemented. If no agreement is reached by that time, CSXT may fully abandon the line, provided the conditions imposed above are met.
7. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by April 19, 2004, subject to time extensions authorized under 49 CFR

1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by the filing fee, which currently is set at \$1,100. See 49 CFR 1002.2(f)(25).

8. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **“Office of Proceedings, AB-OFA.”**

9. Provided no OFA has been received, this exemption will be effective May 9, 2004. Petitions to stay must be filed by April 26, 2004, petitions to reopen must be filed by May 4, 2004.

10. Pursuant to the provisions of 49 CFR 1152.29(e)(2), CSXT shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by CSXT’s filing of a notice of consummation by April 9, 2005, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary