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SERVICE DATE - LATE RELEASE MARCH 9, 2004

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-55 (Sub-No. 645X)

CSX TRANSPORTATION, INC.–ABANDONMENT EXEMPTION–IN FLOYD, KY

Decided: March 9, 2004

CSX Transportation (CSXT) filed a notice of exemption under 49 CFR 1152 Subpart F–Exempt Abandonments to abandon approximately 9.1 miles of railroad between milepost COQ-1.0 at McNalley and milepost COQ-10.1 near East David, in Floyd County, KY. Notice of the exemption was served and published in the Federal Register on February 9, 2004. (69 FR 6014). The exemption is scheduled to become effective on March 10, 2004.

The Board's Section of Environmental Analysis (SEA) served an environmental assessment (EA) in this proceeding on February 13, 2004. In the EA, SEA states that the National Geodetic Survey (NGS) has identified three geodetic station markers that may be affected by the proposed abandonment. NGS request that it be notified 90 days in advance of any activities that may disturb or destroy these markers. Therefore, SEA recommends that a condition be imposed requiring CSXT to consult with the NGS and provide NGS with 90 days notice prior to disturbing or destroying any geodetic station markers.

SEA also states that the Kentucky Heritage Council & State Historic Preservation Officer (SHPO) has not completed its review of the proposed abandonment. Therefore, SEA recommends imposition of a condition requiring CSXT to 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).

SEA states that the right-of-way may be suitable for public use following abandonment. On February 19, 2004, Middle Creek National Battlefield Foundation (Middle Creek)<sup>1</sup> late-filed a request for issuance of a notice of interim trail use (NITU) for the 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, to negotiate with CSXT for acquisition of the right-of-way for use as a recreational trail. Middle Creek requests that CSXT be prohibited from disposing of the corridor other than tracks, ties and signal equipment, except for public use on reasonable terms, and that CSXT be barred from removing or destroying any trail-related structures, such as bridges, trestles, culverts and tunnels, for a 180-day period from the effective date of the abandonment exemption. Middle Creek indicates that the 180-day period is needed because it has not had the opportunity to assemble or to review title information, complete a trail plan, or commence negotiations with CSXT.

Middle Creek also 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 case it need only indemnify the railroad against any potential liability), and for payment of any and all taxes that may be levied or assessed against, the right-of-way, as required at 49 CFR 1152.29, and acknowledged that the use of the right-of-way for trail purposes is subject to possible future reactivation for rail service. In a response submitted on March 5, 2004, CSXT indicated a willingness to negotiate with Middle Creek for interim trail use.

Because Middle Creek's request complies with the requirements of 49 CFR 1152.29 and CSXT is willing to negotiate for trail use, a NITU will be issued. 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, CSXT may fully abandon the line. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

As an alternative to interim trail use under the Trails Act, the right-of-way 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

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<sup>1</sup> The February 9, 2004 notice provided that trail use/rail banking requests had to be filed by February 19, 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 Middle Creek's late-filed request will prejudice any party, it will be accepted. See Wheeling & Lake Erie Railway Company—Abandonment Exemption—in Starke County, OH, STB Docket No. AB-227 (Sub-No. 10X), slip op. at 1 n. 1 (STB served Nov. 7, 1997).

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 Middle Creek has satisfied these requirements, a 180-day public use condition will be imposed, commencing from the March 10, 2004 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 right-of-way, CSXT must keep the remaining right-of-way 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 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 Middle Creek, but may engage in negotiations 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. The late-filed request for a NITU under 16 U.S.C. 1247(d) and a public use condition under 49 U.S.C. 10905 is accepted.
3. Upon reconsideration, the abandonment of the line described above is subject to the conditions that CSXT shall: (a) consult with NGS and provide NGS with 90 days' notice prior to disturbing or destroying any geodetic station markers on the line in order to plan for their relocation; and (b) 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.
4. The notice served and published in the Federal Register on February 9, 2004, exempting the abandonment of the line described above is modified to the extent necessary to implement interim trail use/rail banking as set forth below, subject to the conditions that CSXT keep intact the right-of-way underlying the tracks, including bridges, trestles, culverts and tunnels, for a period of 180 days after the

March 10, 2004 effective date (until September 6, 2004), 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 expiration of the 180-day period specified above, the public use condition will expire to the extent that the trail use/rail banking agreement covers the same line.

5. 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 right-of-way.

6. 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.

7. 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.

8. If an agreement for interim trail use/rail banking is reached by September 6, 2004, interim trail use may be implemented. If no agreement is reached by that time, CSXT may fully abandon the line, provided the conditions imposed in this proceeding are met.

9. This decision is effective on its service date.

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

Vernon A. Williams  
Secretary