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SERVICE DATE - JUNE 14, 2002

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-55 (Sub-No. 606X)

CSX TRANSPORTATION, INC.—ABANDONMENT EXEMPTION—
IN ALLEGHENY COUNTY, PA

Decided: June 12, 2002

By petition filed on February 25, 2002,¹ 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 a line of railroad in its Northeast Region, Baltimore Division, P&W Subdivision, extending between milepost BFH 0.0 and milepost BFH 2.1, a distance of approximately 2.1 miles, in Pittsburgh, Allegheny County, PA. We will grant the exemption, subject to trail use, historic preservation, and standard employee protective conditions.

BACKGROUND

The rail line to be abandoned extends from Millvale, PA, into the City of Pittsburgh along the north bank of the Allegheny River. According to CSXT, the last customer located on the rail line, H. J. Heinz Company (Heinz), notified the carrier in September 2001 that it intended to discontinue rail shipping and close its facility served by the line. CSXT indicates that it previously handled the following shipments of food products for Heinz: 11 carloads in 1999, 3 carloads in 2000, and 1 carload in 2001. CSXT states that it is not aware of any potential for other freight business on the rail line.

CSXT states that the right-of-way (ROW) was originally acquired by the Pittsburgh and Western Railroad Company between 1887 and 1892, and that CSXT acquired control of the line in 1987 following a series of railroad consolidations. CSXT indicates that land use in the proximate area is industrial, that the ROW may be subject to reversionary interests if abandonment occurs, and that the City of Pittsburgh has expressed an interest in establishing a recreational trail along the line proposed for abandonment. Following abandonment, the carrier states that the crossties, other track material, and

¹ Notice of the filing was served and published in the Federal Register on March 15, 2002 (67 FR 11743-44).

debris would be transported away from the ROW and that the removal contractor would be required to minimize soil disturbance during salvage activities.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned or service discontinued without our prior approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find 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 of the cost of owning and maintaining the line and by allowing CSXT to use its assets more productively elsewhere on its rail system [49 U.S.C. 10101(4), (5) and (9)]. Other aspects of the rail transportation policy will not be adversely affected.

Regulation of the proposed transaction is not necessary to protect shippers from an abuse of market power. Heinz, the last customer located on the rail line, does not oppose the abandonment and has notified CSXT that it will close its facility. Nevertheless, to ensure that this shipper is informed of our action, we will require CSXT to serve a copy of this decision on Heinz within 5 days of the service date of this decision and certify to us that it has done so. Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

Under 49 U.S.C. 10502(g), we may not use our 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, we 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 government agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed abandonment. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified its data, and analyzed

the probable effects of the proposed action on the quality of the human environment. SEA served an environmental assessment (EA) on April 26, 2002, and requested comments by May 24, 2002.²

In the EA, SEA states that, although CSXT indicated that there are no CSXT-owned structures on the rail line proposed for abandonment that are eligible for the National Register of Historic Places, the Pennsylvania Bureau of Historic Preservation (the State Historic Preservation Office or SHPO) has informed SEA that the subject rail line has been determined to be eligible for the National Register of Historic Places.³ According to SEA, the SHPO maintains that, although the removal of crossties and rails may not adversely affect the resource, the transfer of the ROW to others, such as reversion of the ROW to adjacent landowners without protective covenants, would result in adverse effects. SEA notes in the EA, however, that the Board does not have the authority to require a railroad to place a restrictive covenant upon a deed as a condition to obtaining abandonment authority, or to require a railroad to sell a ROW for any purpose other than continued rail use. SEA also states that the Board cannot deny an abandonment solely on the ground that it would adversely affect an historic resource, that imposing a restrictive covenant or a forced sale would constitute an unauthorized taking of property under the Fifth Amendment to the United States Constitution, and that, as a practical matter, documentation of the rail line before it is abandoned is the only form of nonconsensual mitigation available to the Board. Therefore, SEA limits its recommendation to the Board to imposing conditions requiring CSXT to: (1) retain its interest in and take no steps to alter the historic integrity of the ROW until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f; and (2) consult with the SHPO to determine the appropriate level of documentation.

SEA is correct that we lack the authority to require the imposition of a restrictive covenant upon a ROW deed as a condition to obtaining abandonment authority.⁴ We will therefore impose the more limited conditions recommended by SEA. Based on SEA's recommendation, we conclude that the proposed abandonment, if implemented in accordance with SEA's historic conditions, will not significantly affect either the quality of the human environment or the conservation of energy resources.

² No comments were received in response to the EA.

³ According to SEA, the SHPO's October 31, 2001 database of "National Register/Listed and Eligible Properties in PA" indicates that the historic designation of CSXT's line occurred in 1997.

⁴ As SEA noted, we cannot force a railroad to sell its ROW for any purpose other than continued rail use, or to place a restrictive covenant upon a deed as a condition to obtaining abandonment authority. See Implementation of Environmental Laws, 7 I.C.C.2d 807, 809 (1991), codified at 49 CFR 1105.

On June 3, 2002, the City of Pittsburgh, PA (City) late-filed a request for issuance of a notice of interim trail use (NITU) under the National Trails System Act, 16 U.S.C. 1247(d), in order to negotiate with CSXT for acquisition of a 1.6-mile portion of the ROW, between milepost BFH 0.5 and milepost BFH 2.1, for use as a trail.⁵ The City submitted a statement of willingness to assume financial responsibility for the 1.6-mile portion of the ROW, and has acknowledged that the use of the ROW is subject to possible future reconstruction and reactivation for rail service as required under 49 CFR 1152.29. By letter filed June 6, 2002, CSXT states that it is willing to enter into negotiations with the City.

Trail use requests may be accepted as long as the Board retains jurisdiction over the involved ROW⁶ and the carrier is willing to enter into negotiations. Inasmuch as CSXT is willing to negotiate with the City, a NITU will be issued for the 1.6-mile portion sought by the City. 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 ROW for trail purposes is subject to restoration for railroad purposes.

The parties should note that the operation of the trail use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in Rail Abandonments—Use of Rights-of-Ways as Trails, 2 I.C.C.2d 591, 608 (1986), 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) for purchase or subsidy of the line, 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,

⁵ The March 15 notice provided that trail use/rail banking requests had to be filed no later than April 4, 2002. However, 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), appeal dismissed sub nom. National Assoc. of Reversionary Prop. Owners v. STB, 158 F.3d 135 (D.C. Cir. 1998) (Abandonment Rules), the Board retained the policy of accepting filings after the due date when good cause is shown. Because there is no indication that the City'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).

⁶ See Rail Abandonments—Supplemental Trails Act Procedures, 4 I.C.C.2d 152, 157-58 (1987); Soo Line Railroad Company—Exemption—Abandonment in Waukesha County, WI, Docket No. AB-57 (Sub-No. 23X) (ICC served May 14, 1987); and Missouri-Kansas-Texas Railroad Company—Abandonment—in Pettis and Henry Counties, MO, Docket No. AB-102 (Sub-No. 16) (ICC served Apr. 26, 1991).

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 precluded. Alternatively, if a sale under the OFA procedures does not occur, trail use may proceed.

SEA indicates that, following the abandonment/discontinuance, the ROW may be suitable for other public use under 49 U.S.C. 10905. We note, however, that no one has sought a public use condition, and none will be imposed.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903 the abandonment by CSXT of the above-described rail line, subject to the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), the terms and conditions for implementing interim trail use/rail banking set forth below, and the conditions that CSXT shall: (1) retain its interest in and take no steps to alter the historic integrity of the ROW until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f; and (2) consult with the Pennsylvania SHPO to determine the appropriate level of documentation to be completed on the segment of rail line proposed for abandonment.

2. CSXT is directed to serve a copy of this decision and notice on H. J. Heinz Company 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 agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for 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 to 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.

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

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 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 abandon the entire line, provided the conditions imposed above are met.

7. An OFA under 49 CFR 1152.27(c)(1)⁷ to allow rail service to continue must be received by the railroad and the Board by June 24, 2002, 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 is currently 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 on July 14, 2002. Petitions to stay must be filed by July 1, 2002, and petitions to reopen must be filed by July 9, 2002.

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 June 14, 2003, 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 not later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams
Secretary

⁷ See Abandonment Rules.