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SERVICE DATE – OCTOBER 23, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 290 (Sub-No. 336X)

NORFOLK SOUTHERN RAILWAY COMPANY—ABANDONMENT AND  
DISCONTINUANCE OF SERVICE EXEMPTION—IN LAKE COUNTY, IND., AND COOK  
COUNTY, ILL.

Decided: October 23, 2012.

Norfolk Southern Railway Company (NSR) filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments and Discontinuances of Service to abandon approximately 6.30 miles of rail line (the Eastern Line Segment) located in Lake County, Ind., and Cook County, Ill., and to discontinue service over a contiguous line segment of approximately 1.2 miles (the Western Line Segment) located in Cook County, Ill.<sup>1</sup> The roughly 6.30-mile Eastern Line Segment extends from milepost JH 12.80 (near the Eastern Line Segment's crossing of Eagle Ridge Drive) in Schererville, Ind., to milepost JH 19.10 (near the Eastern Line Segment's crossing of Cottage Grove Avenue) in Ford Heights, Ill. The roughly 1.2-mile Western Line Segment extends from milepost JH 19.10 (near Cottage Grove Avenue) in Ford Heights, Ill., to milepost JH 20.30 (near State Street) in Chicago Heights, Ill. NSR stated that it filed the notice of exemption to facilitate the construction by Canadian National Railway Company (CN) and Elgin, Joliet & Eastern Railway (EJ&E) of a grade separation over U.S. Route 30, a project upon which the Board conditioned its approval of CN's acquisition of control of EJ&E<sup>2</sup> and which is in close proximity to the Line. Notice of the exemption was served and published in the Federal Register on September 24, 2012 (77 Fed. Reg. 58,909). The exemption is scheduled to become effective on October 24, 2012.

The Board's Office of Environmental Analysis (OEA) served an environmental assessment (EA) in this proceeding on September 28, 2012. In the EA, OEA recommends that two conditions be imposed on any decision granting abandonment authority. First, due to concerns about impacts from grading or excavation activities and the disposal of solid and hazardous waste, OEA recommends that, prior to commencement of any salvage activities, NSR be required to consult with the Illinois Environmental Protection Agency, Division of Pollution Control regarding National Pollutant Discharge Elimination System permit requirements.

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<sup>1</sup> The Eastern Line Segment and the Western Line Segment, which are commonly known as the Hartsdale Industrial Track, will be referred to collectively as the Line.

<sup>2</sup> Canadian Nat'l Ry. and Grand Trunk Corp.—Control—EJ&E W. Co., FD 35087 (STB served Dec. 24, 2008).

Second, OEA indicated in the EA that NSR served a copy of the historic report on the Illinois and Indiana State Historic Preservation Officers (SHPO(s)), pursuant to 49 C.F.R. § 1105.8(c). The Illinois SHPO submitted comments stating that no historic properties would be affected by the proposed abandonment, but OEA had not heard from the Indiana SHPO and therefore had not been able to consider the Indiana SHPO's opinion before determining whether the proposed project could affect historic properties. Accordingly, OEA recommended that NSR be required to retain its interest in and take no steps to alter the historic integrity of all historic properties in Indiana including sites, buildings, structures, and objects within the project right-of-way (the Area of Potential Effect) eligible for listing or listed in the National Register of Historic Places until the Section 106 process of the National Historic Preservation Act, 16 U.S.C. § 470f (NHPA), has been completed.

Comments on the EA were due by October 12, 2012. OEA received two comments. On September 27, 2012, NSR submitted a letter from the Indiana SHPO stating that the SHPO had not identified any historic buildings, structures, districts, or objects listed in or eligible for inclusion in the National Register of Historic Places within the area of the proposed abandonment. The Indiana SHPO also stated that no archeological investigations appear necessary. Accordingly, OEA concluded that the Board has satisfied its responsibilities under Section 106 of the NHPA in this proceeding, and OEA recommends that the Board not impose the Section 106 condition.

On October 12, 2012, NSR submitted electronic correspondence from the National Geodetic Survey (NGS) stating that NGS had identified one geodetic station marker that may be located in the area of the proposed abandonment. Thus, OEA recommends in the final EA that a condition be imposed requiring NSR to consult with NGS and notify NGS at least 90 days prior to beginning salvage activities that will disturb or destroy any geodetic station markers. Accordingly, the conditions recommended by OEA in the EA and final EA as discussed above will be imposed.

In the EA, OEA states that the right-of-way may be suitable for other public use following abandonment and salvage of the Line. On October 1, 2012, Openlands (a non-profit corporation) filed a letter on behalf of itself and several other entities<sup>3</sup> (collectively, the Trail

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<sup>3</sup> The Town of Schererville, the Town of Dyer, the Village of Park Forest, the Village of Lynwood, the Forest Preserve District of Will County, the Forest Preserve District of Cook County, the Illinois Department of Natural Resources (public agencies), together with the Northwestern Indiana Regional Planning Commission, the South Suburban Mayors and

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Proponents), requesting the issuance of a notice of interim trail use (NITU) under the National Trails System Act, 16 U.S.C. § 1247(d) (Trails Act) and 49 C.F.R. § 1152.29 for the Eastern Line Segment. By letter filed October 9, 2012, NSR stated that it was not willing to negotiate an interim trail use agreement for the Eastern Line Segment.

The Trail Proponents' request for a NITU will not be granted. NSR has indicated that it is not willing to negotiate with the Trail Proponents for interim trail use. Under the Trails Act, only voluntary interim trail use is permitted between the railroad and the trail sponsor. The Board's authority to impose trail use conditions is limited because the Board's role under the Trails Act is largely ministerial, see Citizens Against Rails-to-Trails v. STB, 267 F.3d 1144, 1151-52 (D.C. Cir. 2001), and the trail use program is voluntary and consensual between the railroad and the trail user, see Rail Abans.—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 598 (1986). Because NSR does not consent to interim trail use/rail banking negotiations, the Board cannot issue a NITU in this proceeding.

The Trail Proponents also request the imposition of a 180-day public use condition under 49 U.S.C. § 10905 for the Eastern Line Segment. The Trail Proponents requested that NSR be prohibited from disposing of the corridor, other than tracks, ties, and signal equipment, except for public use on reasonable terms, and that NSR be barred from removing or destroying potential trail-related structures, such as bridges, trestles, culverts, and tunnels, for a 180-day period from the effective date of the abandonment. The Trail Proponents' justification for its request is that the Eastern Line Segment would make possible the extension of the existing 21.5-mile Old Plank Road Trail in Illinois, and could provide connections to the Pennsy Greenway and Erie-Lackawanna in Indiana, thus expanding recreational and functional transportation opportunities in the area. The Trail Proponents state that the 180-day period is needed to complete negotiations with NSR.

On October 9, 2012, NSR filed a response in opposition to the Trail Proponents' request. NSR expresses concern that imposition of a public use condition could interfere with plans to utilize a portion of the Line for the U.S. Route 30 grade separation project. NSR requests that, if the Board grants the request for a public use condition, it should not endorse one particular public purpose over another and should include language making clear that the public use condition is consistent with and is not intended to interfere with or delay plans to use a portion of the Eastern Line Segment's right-of-way for the rail-highway grade separation project. On

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Managers Association, Folks on Spokes Bicycle Club, League of Illinois Bicyclists, Trails for Illinois, and the Old Plank Road Trail Management Commission

October 10, 2012, CN filed a letter in support of NSR's request. On October 16, 2012, the Illinois Department of Transportation (IDOT) filed a letter opposing the Trail Proponents' request for a public use condition, but stating that, if the Board does grant the request for a public use condition and if the parties were able to reach an agreement to utilize the right-of-way as a recreational trail, IDOT would endeavor to make a portion of the property it acquired from NSR for the construction of the U.S. Route 30 overpass available to allow the recreational trail to be a continuing uninterrupted one. On October 16, 2012, the Trail Proponents filed a letter stating that they have no desire to delay or cause unnecessary costs in connection with the grade separation project and asserting that a public use condition would be entirely compatible with the use of the Eastern Line Segment for the grade separation project.

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 Abans.—Use of Rights-of-Way As Trails, 2 I.C.C.2d 591, 609 (1986). Under § 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 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: (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 imposition of the period of time requested. See 49 C.F.R. § 1152.28(a)(2). Because the Trail Proponents have satisfied these requirements, a 180-day public use condition will be imposed, limited as described below, commencing from the October 24, 2012 effective date of the exemption. The public use condition does not endorse one particular public purpose over another. 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. NSR is not required to deal exclusively with the Trail Proponents, but may engage in negotiation with other interested persons.

While the Board typically does not impose further limitations on a public use condition, the limitations requested by NSR here would facilitate the implementation of another condition that the Board imposed upon its approval of CN's acquisition of control of EJ&E.<sup>4</sup> Moreover, all the parties, including both NSR and the Trail Proponents, appear to be amenable to negotiating for public use with the limitations that NSR has requested. Therefore, the Board will

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<sup>4</sup> Canadian Nat'l Ry. and Grand Trunk Corp.—Control—EJ&E W. Co., FD 35087 (STB served Dec. 24, 2008).

impose a public use condition for the Eastern Line Segment, subject to the further limitations that the condition be consistent with and not interfere with or delay plans to use a portion of the Eastern Line Segment for the U.S. Route 30 grade separation project.

As conditioned, this decision 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 Trail Proponents' request for issuance of a NITU is denied.
3. The Trail Proponents' request for imposition of a public use condition is granted, subject to the limitations that it be consistent with and not interfere with or delay plans to use a portion of the Eastern Line Segment for the U.S. Route 30 grade separation project. Consistent with the public use condition imposed in this decision, NSR may discontinue service and salvage track and related materials. NSR shall keep intact the right-of-way, including bridges, trestles, culverts, and tunnels, for a period of 180 days commencing from the October 24, 2012 effective date of the exemption (until April 22, 2013), to enable any state or local government agency, or other interested person, to negotiate the acquisition of the Eastern Line Segment for public use.
4. NSR's exemption is also subject to the conditions that: (1) prior to commencement of any salvage activities, NSR shall consult with the Illinois Environmental Protection Agency, Division of Pollution Control regarding National Pollutant Discharge Elimination System permit requirements; and (2) NSR shall consult with NGS and notify NGS at least 90 days prior to beginning salvage activities that will disturb or destroy any geodetic station markers.
5. This decision is effective on its date of service.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.