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SERVICE DATE - MAY 26, 2004

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-6 (Sub-No. 408X)

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY
COMPANY—ABANDONMENT EXEMPTION— IN HAMILTON AND MERRICK COUNTIES,
NE

Decided: May 21, 2004

The Burlington Northern and Santa Fe Railway Company (BNSF) filed a notice of exemption under 49 CFR 1152 Subpart F-Exempt Abandonments to abandon a 15.60-mile line of railroad between BNSF milepost 1.90, near Aurora, and milepost 17.50, near Central City, in Hamilton and Merrick Counties, NE. Notice of the exemption was served and published in the Federal Register on March 22, 2004 (69 FR 13349-50).

The exemption was scheduled to become effective on April 21, 2004, but on March 10, 2004, The Garden City Western Railway, Inc. (GCW), filed a notice of intent to file an offer of financial assistance (OFA) under 49 U.S.C. 10904 and 49 CFR 1152.27(c)(2) to purchase the entire line. The filing of the notice of intent had the effect of staying the effective date of the exemption for 10 days (until May 1, 2004). GCW's OFA would have been due by April 21, 2004 (49 CFR 1152.27(c)(2)(ii)(B)), but, in its March 10 filing, GCW also requested that the Board toll the period for GCW to submit its OFA for an additional 30 days to provide GCW with an opportunity to review and analyze the material provided by BNSF and submit its OFA. By decision served on April 21, 2004,¹ the due date for GCW to submit its OFA was extended until May 21, 2004, and the effective date of the exemption was postponed until May 31, 2004. On May 10, 2004, GCW withdrew its notice of intent to file an OFA. Accordingly, the OFA process prescribed in the April 21, 2004 decision will be terminated and the exemption, as modified below, will be permitted to go into effect on May 31, 2004, subject to conditions imposed in this decision and notice and those conditions previously imposed in this proceeding.

On April 30, 2004, BNSF filed a motion to amend its notice of exemption filed in this proceeding. BNSF requests permission to remove a 2.47-mile segment of rail line located between milepost 1.90 and milepost 4.37 from the scope of its abandonment exemption. BNSF states that it

¹ By decision served on April 21, 2004, the proceeding was reopened and the exemption was made subject to several environmental conditions that remain in effect.

wishes to retain the 2.47-mile line segment to store empty rail cars. BNSF's motion to amend its notice of exemption will be granted, and the line segment between milepost 1.90 and milepost 4.37 will be withdrawn from the scope of the abandonment exemption. As modified, the abandonment exemption applies only to the line segment located between milepost 4.37, near Aurora, and milepost 17.50, near Central City.

The April 21, 2004 decision provided that a pending request for issuance of a notice of interim trail use (NITU) filed on behalf of the Nebraska Trails Foundation, Inc., and the Central City Community Trails Committee of Central City, NE (collectively, NTFI), for the entire line under the National Trails System Act, 16 U.S.C. 1247(d), and for a public use condition under 49 U.S.C. 10905, would be held in abeyance pending completion of the OFA process. Because GCW has withdrawn its notice of intent to file an OFA, a NITU will now be issued and a public use condition will be imposed, with the pertinent negotiation periods commencing with the effective date of the exemption. Due to the amendment to BNSF's abandonment proposal, the NITU and public use condition will apply only to the line segment remaining at issue in this proceeding between milepost 4.37 and milepost 17.50.

NTFI wishes to negotiate with BNSF for acquisition of the right-of-way for use as a recreational trail. NTFI requests that BNSF be prohibited from disposing of the corridor other than tracks, ties and signal equipment, except for public use on reasonable terms, and that BNSF be barred from removing or destroying any trail-related structures, such as bridges, culverts, ballast and rip/rap, for a 180-day period from the effective date of the abandonment exemption. NTFI indicates that the 180-day period is needed to coordinate efforts with local interest groups and to commence negotiations with BNSF.

NTFI 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 response, BNSF indicated a willingness to negotiate with NTFI for interim trail use.

Because NTFI's request complies with the requirements of 49 CFR 1152.29 and BNSF 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, BNSF 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 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 NTFI has satisfied these requirements, a 180-day public use condition will be imposed, commencing from the May 31, 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, BNSF 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, BNSF is not required to deal exclusively with NTFI, but may engage in negotiations with other interested persons.

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

It is ordered:

1. This proceeding is reopened.
2. GCW's withdrawal of its notice of intent to file an OFA is accepted, and the OFA process in this proceeding is terminated.
3. BNSF's motion to amend its notice of exemption to remove a 2.47-mile segment of rail line located between milepost 1.90 and milepost 4.37 from the scope of its abandonment exemption is granted.
4. Upon reconsideration, the notice of exemption served and published in the Federal Register on March 22, 2004, exempting BNSF's abandonment of the line segment between milepost 1.90, near Aurora, and milepost 17.50, near Central City, is modified to the extent necessary to implement interim

trail use/rail banking and to permit public use negotiations for the line segment between milepost 4.37 and milepost 17.50 as set below, for a period of 180 days commencing from the May 31 effective date of the exemption (until November 27, 2004).

5. A NITU under 49 CFR 1152.29(d) is issued authorizing interim trail use/rail banking and a public use condition only on BNSF's line segment between milepost 4.37, near Aurora, and milepost 17.50, near Central City, NE.

6. Consistent with the public use and interim trail use/rail banking conditions and other conditions imposed in this decision and notice, BNSF may discontinue service and salvage track and related materials. BNSF shall keep intact the right-of-way, including bridges, culverts, ballast, and rip/rap for a period of 180 days 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 November 27, 2004, the public use condition will expire to the extent the trail use/rail banking agreement covers the same line.

7. 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.

8. 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 of the right-of-way.

9. 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.

10. If an agreement for interim trail use/rail banking is reached by November 27, 2004, interim trail use may be implemented. If no agreement is reached by that time, BNSF may fully abandon the line, provided that the environmental conditions imposed in the April 21, 2004 decision are met. See 49 CFR 1152.29(d)(1).

11. This decision is effective on its service date.

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

Vernon A. Williams
Secretary