

28654
DO

SERVICE DATE - DECEMBER 15, 1997

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-391 (Sub-No. 3X)

RED RIVER VALLEY & WESTERN RAILROAD COMPANY--
ABANDONMENT EXEMPTION--IN BENSON COUNTY, ND

Decided: December 11, 1997

The Red River Valley & Western Railroad Company (RRVW) filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments to abandon an approximately 11.94-mile line of railroad from approximately milepost 16.56, approximately one mile west of state highway 30, near Maddock to approximately milepost 28.5 near Esmond, in Benson County, ND. The notice was served and published in the Federal Register on October 29, 1997 (62 FR 56235-36). The exemption became effective on November 28, 1997.

By decision served November 26, 1997, the exemption was made subject to the conditions that RRVW consult with the U.S. Army Corps of Engineers in advance of salvage operations to obtain, if necessary, a permit under 33 CFR 320-330 and that RRVW comply with the North Dakota Department of Health's "Construction and Environmental Disturbance Requirements."¹

By petition filed November 17, 1997, the City of Maddock (City) late-filed a request for the issuance of a notice of interim trail use (NITU), under the National Trails System Act (Trails Act), 16 U.S.C. 1247(d), and for a public use condition under 49 U.S.C. 10905, in order to negotiate with RRVW for acquisition of the right-of-way for use as a trail.²

¹ The decision served on November 26, 1997, dealt only with environmental conditions. The second ordering paragraph of that decision included an inadvertent and erroneous reference to interim trail use/rail banking. An appropriate correction to that paragraph will be made in this decision.

² The October 29 notice of exemption provided that trail use/rail banking requests had to be filed no later than November 10, 1997. The City's trail use request was filed on November 17, 1997. However, in Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903, STB Ex Parte No. 537 (STB served Dec. 24, 1996, and June 27, 1997), the Board stated that it would accept filings after the due date when good cause is shown. The City's trail use request was apparently filed before the due date but that filing did not properly identify the docket number of the proceeding. Subsequently, the docket number was correctly identified and the request was officially made a part of the record in the proceeding only after the deadline for filing trail use requests. Under these circumstances, and because the City's late-filed request does not appear to

(continued...)

The City requests that RRVW be prohibited from disposing of the corridor, other than the tracks, ties, and signal equipment, except for public use on reasonable terms, and that RRVW 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. The City states that it needs the full 180-day period to review title information, complete a trail plan, and commence negotiations with RRVW. It submitted a statement of willingness to assume financial responsibility for interim trail use and rail banking in compliance with 49 CFR 1152.29, and acknowledged that the use of the right-of-way for trail purposes is subject to future reactivation for rail service. By reply filed November 24, 1997, RRVW indicated that it is not opposed to interim trail use.³

The City's request complies with the requirements of 49 CFR 1152.29 and RRVW's response is tantamount to an expression of willingness to negotiate. Therefore, a NITU will be issued. The parties may negotiate a Trails Act agreement during the 180-day period prescribed below. If the parties reach a mutually acceptable Trails Act agreement, no further Board action is necessary. If no agreement is reached within 180 days, RRVW may fully abandon the line. See 49 CFR 1152.29(d)(1). Any use of the right-of-way for trail purposes would be 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, including recreational 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). Under section 10905, the Board may prohibit

²(...continued)

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).

³ RRVW reports that, while it owns the rail line for which it is seeking abandonment authority, RRVW's line enjoys an easement over real property owned by The Burlington Northern and Santa Fe Railway Company (BNSF). Accordingly, RRVW expresses its belief that, based on these ownership interests, RRVW may not be the appropriate party to whom a trail use request should be directed. RRVW appears to be the only rail carrier with the existing rights to provide rail carrier service over the line. Therefore, RRVW apparently is the proper party with whom trail use and rail banking should be negotiated. BNSF's position, as described by RRVW, is that of mere landowner whose ownership rights are subject either to the continuation of rail service or rail banking that would preserve the line for reinstatement of service at some time in the future after RRVW's operations have been discontinued. The situation would be different if BNSF had a residual common carrier obligation once RRVW's service ceased. If that were so, however, RRVW could obtain only discontinuance authority from the Board and BNSF would need abandonment authority from the Board before the line could leave the national rail network. It does not appear that that is the situation here.

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.⁴

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). The City has satisfied these requirements and, therefore, a 180-day public use condition will be imposed commencing with the effective date of the exemption.

When a proper request for interim trail use/rail banking is made, the railroad agrees to negotiate, and justification for a public use condition is shown, it is the Board's policy to impose both trail use and public use conditions concurrently. In this case, even if a trail use agreement is reached on a portion of the right-of way, RRVW must keep the remaining right-of-way intact for the remainder of the 180-day public use condition 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, RRVW is not required to deal exclusively with the City, but may engage in negotiations with other interested persons.

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

It is ordered:

1. This proceeding is reopened.
2. The second ordering paragraph of the decision served November 26, 1997, in this proceeding is corrected to read: "Upon reconsideration, the exemption served and published in the Federal Register on October 29, 1997, exempting the abandonment of the line described above is made subject to the conditions that RRVW shall: (a) consult with the Corps in advance of salvage operations to obtain, if necessary, a permit under 33 CFR 320-330; and (b) comply with the NDDH's 'Construction and Environmental Disturbance Requirements.'"
3. Upon reconsideration, the exemption that was the subject of the notice served and published in the Federal Register on October 29, 1997, is modified to the extent necessary to

⁴ In view of RRVW's representation that BNSF owns the underlying real property, the opportunity for the City or others to negotiate the acquisition of the line for public use outside the context of interim trail use might not be available.

implement interim trail use/rail banking as set forth below for a period of 180 days from the November 28, 1997 effective date of the exemption (until May 27, 1998).

4. Subject to the conditions imposed in the decision served November 26, 1997, RRVW may discontinue service, and salvage track and related materials consistent with the public use and interim trail use/rail banking conditions imposed in this decision after the effective date of this notice. RRVW shall otherwise keep intact the right-of-way underlying the tracks, including bridges, culverts, and similar structures, until May 27, 1998, to enable any state or local government agency or any other interested person to negotiate the acquisition of the line for public use. If an interim trail use/rail banking agreement is executed within this 180-day period, the public use condition will expire to the extent the trail use/rail banking agreement covers the same line segment.

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 May 27, 1998, interim trail use may be implemented. If no agreement is reached by that time, RRVW may fully abandon the line.

9. This decision is effective on its service date.

10. A copy of this decision will be served on The Burlington Northern and Santa Fe Railway Company and that entity is requested to advise the Board within 10 days of service of this decision if it perceives its ownership interest to be different from that which is described in this decision.

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

STB Docket No. AB-391 (Sub-No. 3X)

Vernon A. Williams
Secretary

28654
DO

SERVICE DATE - DECEMBER 15, 1997

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-391 (Sub-No. 3X)

RED RIVER VALLEY & WESTERN RAILROAD COMPANY--
ABANDONMENT EXEMPTION--IN BENSON COUNTY, ND

Decided: December 11, 1997

The Red River Valley & Western Railroad Company (RRVW) filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments to abandon an approximately 11.94-mile line of railroad from approximately milepost 16.56, approximately one mile west of state highway 30, near Maddock to approximately milepost 28.5 near Esmond, in Benson County, ND. The notice was served and published in the Federal Register on October 29, 1997 (62 FR 56235-36). The exemption became effective on November 28, 1997.

By decision served November 26, 1997, the exemption was made subject to the conditions that RRVW consult with the U.S. Army Corps of Engineers in advance of salvage operations to obtain, if necessary, a permit under 33 CFR 320-330 and that RRVW comply with the North Dakota Department of Health's "Construction and Environmental Disturbance Requirements."¹

By petition filed November 17, 1997, the City of Maddock (City) late-filed a request for the issuance of a notice of interim trail use (NITU), under the National Trails System Act (Trails Act), 16 U.S.C. 1247(d), and for a public use condition under 49 U.S.C. 10905, in order to negotiate with RRVW for acquisition of the right-of-way for use as a trail.²

¹ The decision served on November 26, 1997, dealt only with environmental conditions. The second ordering paragraph of that decision included an inadvertent and erroneous reference to interim trail use/rail banking. An appropriate correction to that paragraph will be made in this decision.

² The October 29 notice of exemption provided that trail use/rail banking requests had to be filed no later than November 10, 1997. The City's trail use request was filed on November 17, 1997. However, in Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903, STB Ex Parte No. 537 (STB served Dec. 24, 1996, and June 27, 1997), the Board stated that it would accept filings after the due date when good cause is shown. The City's trail use request was apparently filed before the due date but that filing did not properly identify the docket number of the proceeding. Subsequently, the docket number was correctly identified and the request was officially made a part of the record in the proceeding only after the deadline for filing trail use requests. Under these circumstances, and because the City's late-filed request does not appear to

(continued...)

The City requests that RRVW be prohibited from disposing of the corridor, other than the tracks, ties, and signal equipment, except for public use on reasonable terms, and that RRVW 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. The City states that it needs the full 180-day period to review title information, complete a trail plan, and commence negotiations with RRVW. It submitted a statement of willingness to assume financial responsibility for interim trail use and rail banking in compliance with 49 CFR 1152.29, and acknowledged that the use of the right-of-way for trail purposes is subject to future reactivation for rail service. By reply filed November 24, 1997, RRVW indicated that it is not opposed to interim trail use.³

The City's request complies with the requirements of 49 CFR 1152.29 and RRVW's response is tantamount to an expression of willingness to negotiate. Therefore, a NITU will be issued. The parties may negotiate a Trails Act agreement during the 180-day period prescribed below. If the parties reach a mutually acceptable Trails Act agreement, no further Board action is necessary. If no agreement is reached within 180 days, RRVW may fully abandon the line. See 49 CFR 1152.29(d)(1). Any use of the right-of-way for trail purposes would be 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, including recreational 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). Under section 10905, the Board may prohibit

²(...continued)

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).

³ RRVW reports that, while it owns the rail line for which it is seeking abandonment authority, RRVW's line enjoys an easement over real property owned by The Burlington Northern and Santa Fe Railway Company (BNSF). Accordingly, RRVW expresses its belief that, based on these ownership interests, RRVW may not be the appropriate party to whom a trail use request should be directed. RRVW appears to be the only rail carrier with the existing rights to provide rail carrier service over the line. Therefore, RRVW apparently is the proper party with whom trail use and rail banking should be negotiated. BNSF's position, as described by RRVW, is that of mere landowner whose ownership rights are subject either to the continuation of rail service or rail banking that would preserve the line for reinstatement of service at some time in the future after RRVW's operations have been discontinued. The situation would be different if BNSF had a residual common carrier obligation once RRVW's service ceased. If that were so, however, RRVW could obtain only discontinuance authority from the Board and BNSF would need abandonment authority from the Board before the line could leave the national rail network. It does not appear that that is the situation here.

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.⁴

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). The City has satisfied these requirements and, therefore, a 180-day public use condition will be imposed commencing with the effective date of the exemption.

When a proper request for interim trail use/rail banking is made, the railroad agrees to negotiate, and justification for a public use condition is shown, it is the Board's policy to impose both trail use and public use conditions concurrently. In this case, even if a trail use agreement is reached on a portion of the right-of way, RRVW must keep the remaining right-of-way intact for the remainder of the 180-day public use condition 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, RRVW is not required to deal exclusively with the City, but may engage in negotiations with other interested persons.

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

It is ordered:

1. This proceeding is reopened.
2. The second ordering paragraph of the decision served November 26, 1997, in this proceeding is corrected to read: "Upon reconsideration, the exemption served and published in the Federal Register on October 29, 1997, exempting the abandonment of the line described above is made subject to the conditions that RRVW shall: (a) consult with the Corps in advance of salvage operations to obtain, if necessary, a permit under 33 CFR 320-330; and (b) comply with the NDDH's 'Construction and Environmental Disturbance Requirements.'"
3. Upon reconsideration, the exemption that was the subject of the notice served and published in the Federal Register on October 29, 1997, is modified to the extent necessary to

⁴ In view of RRVW's representation that BNSF owns the underlying real property, the opportunity for the City or others to negotiate the acquisition of the line for public use outside the context of interim trail use might not be available.

implement interim trail use/rail banking as set forth below for a period of 180 days from the November 28, 1997 effective date of the exemption (until May 27, 1998).

4. Subject to the conditions imposed in the decision served November 26, 1997, RRVW may discontinue service, and salvage track and related materials consistent with the public use and interim trail use/rail banking conditions imposed in this decision after the effective date of this notice. RRVW shall otherwise keep intact the right-of-way underlying the tracks, including bridges, culverts, and similar structures, until May 27, 1998, to enable any state or local government agency or any other interested person to negotiate the acquisition of the line for public use. If an interim trail use/rail banking agreement is executed within this 180-day period, the public use condition will expire to the extent the trail use/rail banking agreement covers the same line segment.

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 May 27, 1998, interim trail use may be implemented. If no agreement is reached by that time, RRVW may fully abandon the line.

9. This decision is effective on its service date.

10. A copy of this decision will be served on The Burlington Northern and Santa Fe Railway Company and that entity is requested to advise the Board within 10 days of service of this decision if it perceives its ownership interest to be different from that which is described in this decision.

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

STB Docket No. AB-391 (Sub-No. 3X)

Vernon A. Williams
Secretary