

SERVICE DATE - JANUARY 20, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-55 (Sub-No. 568X)

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

Decided: January 16, 2004

BACKGROUND

By decision and notice of interim trail use or abandonment (NITU) served on March 9, 1999 (March 1999 decision), the Board, under 49 U.S.C. 10502, exempted from the prior approval requirements of 49 U.S.C. 10903 the abandonment by CSX Transportation, Inc. (CSXT), of a 1.9-mile portion of its line of railroad known as the Baltimore Service Lane, Lurgan Subdivision (the line), extending between milepost BAV-20.5 at 4th Street and milepost BAV-22.4 at Commerce Street in Chambersburg, Franklin County, PA, subject to public use, trail use, and standard employee protective conditions. The line consists of three segments: Segment 1, which extends from 4th Street (Valuation Station 1083+20, at milepost BAV-20.5) to Main Street (Valuation Station 1096+20, at approximately milepost 20.8); Segment 2, which extends from Main Street (Valuation Station 1096+20, at approximately milepost 20.8) to South Street (Valuation Station 1122+30); and Segment 3, which extends from South Street (Valuation Station 1122+30) to Commerce Street (milepost BAV-22.4).

*The Offer Of Financial Assistance.* On March 12, 1999, Frederick A. Fox, Kaye A. Fox, and Frederick Armstrong Fox (collectively, the Foxes)<sup>1</sup> timely filed an offer of financial assistance (OFA) under 49 U.S.C. 10904 and 49 CFR 1152.27 to purchase Segment 2. By decision served May 7, 1999, the Foxes were authorized to acquire Segment 2. The time limit for exercising the previously issued OFA or abandonment authority has heretofore been extended to January 30, 2004, and the acquisition of Segment 2 has not yet occurred.<sup>2</sup>

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<sup>1</sup> From 1998 through 2001, the pleadings filed in this proceeding by the Foxes also included Karla M. Fox as an offeror. It would appear, however, that only Frederick A. Fox, Kaye A. Fox, and Frederick Armstrong Fox continue to have an interest in this proceeding.

<sup>2</sup> In January 2001, the Foxes asked to withdraw their OFA for Segment 2 because of a change in CSXT's plans for Segment 1. The Board permitted the withdrawal but, at the Foxes'

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On August 15, 2003, the Foxes filed a petition (the August 15 petition) seeking either the Board's acceptance of an amended OFA that would include not only Segment 2 but also Segment 1, or, alternatively, the reopening of the March 1999 decision to permit the nunc pro tunc filing of a new OFA that would include both segments. On September 11, 2003, the Foxes filed a motion for an order staying CSXT's right to exercise its abandonment authority for Segment 1, pending the Board's disposition of the August 15 petition. On September 12, 2003, the Borough of Chambersburg (Borough) filed two replies (one to the petition, the other to the motion) in opposition to the Foxes' requests. In its various pleadings, the Borough indicates that it has an interest in obtaining portions of the line approved for abandonment.

By decision served on September 17, 2003, CSXT was ordered not to consummate the abandonment of Segment 1 or to take any action that would alter the present status of that segment, pending further order of the Board. On September 23, 2003, New Franklin Properties, LLC (NFP), a limited liability company wholly owned by Frederick Armstrong Fox, filed a petition (the September 23 petition) seeking permission to intervene as a party in this proceeding, and requesting that the Board either grant the relief requested in the Foxes' August 15 petition, or, alternatively, reopen the March 1999 decision to afford NFP the opportunity to file its own OFA for Segment 1.<sup>3</sup> On October 14, 2003, the Borough filed a reply (the October 14 reply) to the September 23 petition, advising that, although the Borough does not object to NFP's intervention, the Borough believes that the August 15 petition should be denied.<sup>4</sup>

The Foxes have indicated that they now seek to acquire both Segment 1 and Segment 2 to facilitate the development of various properties that they either own or have options to purchase, or that have been recently purchased by NFP. They have indicated that they want to preserve rail service to Segments 1 and 2 to attract tenants to a planned industrial park and also to enable the Foxes to achieve economies of scale for their own businesses (Gaumer's Chassis Engineering and Gaumer Industries). The Foxes claim (and the Borough has neither confirmed nor denied) that the Borough has no "legitimate railroad use" for Segment 1 but wants to acquire Segment 1 to use as leverage in extracting

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<sup>2</sup>(...continued)

request, allowed reinstatement of that OFA when CSXT's plans again changed. See decisions served March 30 and September 10, 2001.

<sup>3</sup> By letter filed October 20, 2003, the Foxes join in the petition to intervene.

<sup>4</sup> NFP will be allowed to intervene in this proceeding because its ownership of property adjacent to Segment 1 gives it an interest in the disposition of that segment, and because intervention by NFP will neither broaden the issues raised in this proceeding nor prejudice the rights of any other party.

concessions from the Foxes. The Foxes state that the Borough apparently intends to offer to sell Segment 1 to the Foxes in exchange for Segment 2 and other consideration.<sup>5</sup>

In its original reply to the Foxes' petition, the Borough justified its proposed acquisition of Segment 1 as a way to continue rail service to Chambersburg Engineering Company (CECO) over Segment 1, which was to be reclassified by CSXT as industrial sidetrack. According to the Foxes, that justification no longer remains operative because, in December 2001 or January 2002, CECO ceased operations and went out of business. It should be noted that, although the Borough filed, on November 23, 1998, a request for interim trail use/rail banking for Segments 2 and 3 of the 1.9-mile line, it has never filed a request for interim trail use/rail banking for Segment 1.

*Expiration Date For Abandonment Authority And The NITU Negotiating Period.* The March 1999 decision authorized the Borough of Chambersburg to negotiate an interim trail use/rail banking agreement with CSXT for the portion of the line between Main Street at approximately milepost BAV-20.8 and Commerce Street at approximately milepost BAV-22.4, a distance of 1.6 miles. CSXT's requests for extensions of time to exercise abandonment authority (for the entire line, not just for the portion of the line subject to interim trail use negotiations) were granted by decisions served March 22, 2000, January 8, 2001, March 30, 2001, June 19, 2001, September 10, 2001, December 28, 2001, June 24, 2002, September 30, 2002, January 31, 2003, and July 29, 2003. Its requests to extend the NITU negotiating period were granted by decisions served January 8, 2001, March 30, 2001, June 19, 2001, September 10, 2001, December 28, 2001, June 24, 2002, September 30, 2002, January 31, 2003, and July 29, 2003. Both the abandonment authority and the NITU negotiating period are now scheduled to expire on January 30, 2004.

On December 10, 2003, CSXT filed a request to extend, until July 30, 2004, the time to consummate the abandonment and file its notice of consummation. CSXT also requests that the NITU negotiating period be extended until the same date.

## DISCUSSION AND CONCLUSIONS

*The Offer Of Financial Assistance.* Through the OFA program, Congress sought to preserve rail service for the shipping public over a rail line that would otherwise be authorized for abandonment, while allowing an owner that is losing money on the line to sell it for fair market value, by conferring upon financially responsible parties a right to acquire such a rail line for the constitutional minimum value of the property. See Consolidated Rail Corp. v. ICC, 29 F.3d 706, 712 (D.C. Cir. 1994) and S. Rep. No. 96-470, 96th Cong., 1st Sess. 40 (1979). However, to protect the selling/abandoning

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<sup>5</sup> In its October 14 reply, the Borough made a related claim that the Foxes wish to sell the land they own that is adjacent to Segment 2. In view of this claim, the Borough argues that it would be advantageous for a government entity to control the right-of-way.

railroad from bearing the financial burden of holding and operating the rail line for an extended period of time, Congress established time frames for conducting the OFA process, including the time for making offers to purchase or subsidize the line. See H. R. Rep. No. 96-1430, 96th Cong., 1st Sess. 125, reprinted in 1980 U.S. Code Cong. & Admin. News 4110, 4157 (the OFA provisions will “assist shippers who are sincerely interested in improving rail service, while at the same time protecting carriers from protracted legal proceedings which are calculated merely to tediously extend the abandonment process”). In interpreting and administering the OFA provisions, including the time frame for submitting an OFA, the Board seeks to accommodate and harmonize Congress’ dual objectives of preserving rail service where possible, while protecting the owning railroad from bearing the costs associated with unreasonable delay.

As the history of this case illustrates, there can be situations in which allowing a late-filed OFA may be consistent with both of Congress’ objectives. Although the Foxes had timely filed an OFA for Segment 2 in 1999, they later withdrew the OFA because CSXT had changed its plans for the disposition of Segment 1, which was needed to connect Segment 2 to the national rail network. When CSXT changed its plans again and decided to retain the connection, the Foxes asked to revive the OFA 2 years after the time set by the statute for filing such an offer. Under these unique circumstances, the Board allowed the OFA to be revived because the owning railroad (CSXT) did not object and the public interest was furthered by allowing the OFA to proceed.<sup>6</sup>

Now, some 4 years after the allotted time for filing OFAs, the status of Segment 1 has changed yet again, causing the Foxes to seek, for the first time, to submit an OFA for that line segment. CSXT does not object, but the Borough does, citing the statutory time frame and the Borough’s own plans for Segment 1. Given the continually changing status of the property, and the sparse record that has been presented on the issue, the Board does not have an adequate basis upon which to determine whether permitting a late-filed OFA for Segment 1 here would be consistent with Congress’ intent. The current record provides only terse statements, without supporting evidence, of the parties’ respective plans for this segment. Accordingly, the parties are directed to provide additional evidence about their respective plans for Segment 1 and how they intend to pursue those plans if afforded the opportunity, so that the Board will have a sufficient record upon which to assess the public interest in this situation.

*Expiration Date For Abandonment Authority And The NITU Negotiating Period.* CSXT has shown good cause to extend the time to consummate the abandonment and for filing a notice of

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<sup>6</sup> See decisions served March 30 and September 10, 2001.

consummation in this proceeding. Also, because CSXT is willing to continue negotiations, the NITU negotiating period may be extended.<sup>7</sup> The extension requests will therefore be granted.<sup>8</sup>

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

It is ordered:

1. NFP is permitted to intervene in this proceeding.
2. The parties should submit, by no later than February 9, 2004, evidence in accordance with this decision.
3. Each party may submit a reply by no later than February 19, 2004.
4. CSXT's request for an extension of time to exercise the abandonment authority and its request to extend the NITU negotiating period are granted.
5. The authority to abandon must be exercised on or before July 30, 2004.
6. The negotiating period under the NITU is extended until July 30, 2004.
7. This decision is effective on its date of service.

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

Vernon A. Williams  
Secretary

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<sup>7</sup> See Rail Abandonments — Supplemental Trails Act Procedures, 4 I.C.C.2d 152 (1987).

<sup>8</sup> Although the request slightly exceeds the customary request of 180 days for trail use negotiations, the Board has granted such requests in the past. See, e.g., Southern Pacific Transportation Company — Abandonment Exemption — In Jackson, Victoria and Wharton Counties, TX, Docket No. AB-12 (Sub-No. 162X) (STB served May 29, 1996).