

SERVICE DATE – JUNE 8, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-857X

GREAT WESTERN RAILWAY OF COLORADO, LLC.—ABANDONMENT
EXEMPTION—IN WELD COUNTY, CO

Decided: June 7, 2007

Great Western Railway of Colorado, LLC (GWRC) filed a notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments to abandon its Eaton Subdivision located between milepost 30.8 near Windsor, and milepost 42.5 near Eaton, a distance of approximately 11.7 miles, in Weld County, CO. Notice of the exemption was served and published in the Federal Register on November 10, 2003 (68 FR 63846-47).¹ The exemption was scheduled to become effective on December 10, 2003. On November 14, 2003, however, a formal expression of intent to file an offer of financial assistance (OFA) was timely filed by the Windsor, Severance & Eaton Railroad, LLC (WS&E) to purchase all or a portion of the Eaton Subdivision. The filing of that notice of intent had the effect of automatically staying the effective date of the exemption for 10 days, until December 20, 2003.

On March 24, 2004, WS&E filed a request for permission to withdraw its notice of intent to file an OFA. By a decision and notice of interim trail use or abandonment (NITU) served on April 7, 2004: (1) the proceeding was reopened; (2) WS&E's withdrawal request was granted and the OFA process was terminated; (3) the exemption became effective on the decision's service date, subject to conditions; and (4) a 180-day period was authorized, providing time for the Municipalities of Eaton, Severance, and Windsor, CO (Municipalities), to negotiate an interim trail use/rail banking agreement under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), with GWRC for the right-of-way. The negotiating period under the NITU issued to those parties was extended by decisions served on October 27, 2004, April 14, 2005, September 22, 2005, and March 28, 2006.

As pertinent here, the March 28 decision made reference to Steve and Colleen Nealy, landowners in the vicinity of the subject right-of-way. The Nealys had objected to any further extensions of the trail use negotiating period on grounds that: (1) the parties had had ample time to conclude an agreement, but had failed to do so; and (2) these extensions were improperly

¹ By decision served November 24, 2003, the proceeding was reopened and the exemption was made subject to two environmental conditions – a historic preservation condition and a National Geodetic Survey (NGS) notification condition. By decision served May 26, 2004, the historic preservation condition was removed. The NGS condition remains in effect.

delaying full abandonment of the right-of-way to the prejudice of the Nealys and other adjacent landowners. In granting the sought extension, however, the Board pointed out that an extension would promote the establishment of rail banking and trails, consistent with the Trails Act, and that the evidence indicated that the railroad agreed to the further extension, and that the parties were attempting to complete their negotiations.

On September 22, 2006, the Municipalities and the Great Western Trail Authority (Trail Authority) filed a request for substitution of the latter for the former as the trail proponent.² See 49 CFR 1152.29(f). By decision served on October 24, 2006, the Board reopened the proceeding, vacated the prior NITU, issued a replacement NITU designating the Trail Authority as the new trail proponent, and set a new NITU negotiating period to run from the decision's service date to April 22, 2007.

On November 3, 2006, Mr. and Mrs. Nealy filed a letter in opposition to the October 24 decision. The Nealys claim that they were not served with a copy of the September 22 filing by the Municipalities and the Trail Authority, despite being listed as a party of record in this case. Therefore, the Nealys argue, they were improperly deprived of notice of that filing and an opportunity to respond. The Nealys also object to the latest extension granted in the October 24 decision, and to any future extensions, as futile, unwarranted, and prejudicial to their interests and those of other adjacent property owners.

On November 21, 2006, the Trail Authority filed a letter stating that it has concluded its negotiations with GWRC and that, on November 13, 2006, the parties had reached an agreement for the rail banking and interim trail use pursuant to the Trails Act. The Trail Authority indicates that, accordingly, no further extension of the NITU negotiating period will be needed. The Trail Authority also states that, as a new party, it was unaware of the Nealys' prior participation in the proceeding.

The Nealys are correct in their claim that they did not receive notice of the September 22 filing by the Municipalities and the Trail Authority. As parties of record, they should have been served with that filing. Because the Trail Authority is controlled by the Municipalities, and the September 22 filing was made jointly by all of those entities, the Trail Authority cannot successfully argue that it was a new party unaware of the Nealys' participation.³

Accordingly, the Nealys' objections to the October 24 extension will now be considered. The arguments are essentially the same as those made and rejected in the March 28 decision. Those arguments, therefore, are not a basis for the agency to have denied the October 24 extension. At that time, the railroad had not consummated the abandonment and expressed a willingness to continue negotiations. Moreover, the replacement trail proponent was new and

² The filers stated that, in August 2006, by Intergovernmental Agreement, the Municipalities formed a separate governmental entity, the Trail Authority, to be a replacement trail proponent for themselves.

³ The Nealys were served with the November 21 Trail Authority letter.

had included a statement of willingness to assume responsibility for the right-of-way, and agreed to rail banking as required by the Board's regulations. In these circumstances, the Nealys fail to show that the October 24 NITU extension providing time for the new party to continue ongoing Trails Act negotiations was improperly granted, or that the decision should be reopened or reconsidered. See Birt v. STB, 90 F.3d 580 (D.C. Cir. 1996); Grantwood Village v. Missouri Pac. R.R. Co., 95 F.3d 654 (8th Cir. 1996).

The Nealys' argument in opposition to any further extensions has now been mooted by the agreement reached by GWRC and the Trail Authority.

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

It is ordered:

1. The petition in opposition is denied.
2. This decision is effective on its service date.

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

Vernon A. Williams
Secretary