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SERVICE DATE – MARCH 12, 2010

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-55 (Sub-No. 696X)

CSX TRANSPORTATION, INC.—ABANDONMENT EXEMPTION—IN LUCAS
COUNTY, OH

Decided: March 11, 2010

CSX Transportation, Inc. (CSXT), filed a verified notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments to abandon approximately 4.15 miles of rail line on its Northern Region, Chicago Division, Toledo Terminal Subdivision, between Temperance (milepost CTT 5.0) and Vulcan (milepost CTT 9.15), in Lucas County, OH. Notice of the exemption was served on February 11, 2010, and published in the Federal Register on February 17, 2010 (75 FR 7151-52). The exemption is scheduled to become effective on March 13, 2010.

The Board's Section of Environmental Analysis (SEA) served an environmental assessment (EA) in this proceeding on February 16, 2010. In the EA, SEA states that the National Geodetic Survey (NGS) has indicated that the area of the proposed abandonment may contain 2 geodetic station markers. Therefore, SEA recommends that CSXT be required to consult with NGS and notify NGS at least 90 days prior to the beginning of salvage activities that will disturb or destroy the 2 geodetic station markers that may be located along the line proposed for abandonment.

Comments to the EA were due by March 3, 2010. On February 19, 2010, CSXT filed with SEA a letter (CSXT letter) and a copy of a comment from the Ohio Department of Natural Resources (ODNR) dated February 16, 2010 (ODNR comment). In its comment, ODNR submitted information from its Division of Natural Areas and Preserves (DNAP) and Division of Wildlife (DOW). DNAP stated that its Natural Heritage Database indicated that the peregrine falcon (Falco peregrinus), a state threatened species, and the creek heelsplitter (Lasmigona compressa), a state species of concern, are located within the vicinity of the proposed abandonment. DOW states that, due to the state level status of both of these species, the project is unlikely to impact either species.

In the ODNR comment, DOW indicated that the project also is within the range of the Indiana bat (Myotis sodalis), a state and Federally endangered species. DOW noted that several trees known to grow in the area provide important roosting areas for the Indiana bat and that such trees should not be damaged or cut down during salvage operations. DOW explains that, if the trees must be cut, cutting should occur between September 30 and April 1 and that a survey must be conducted if cutting is to occur between April 2 and September 29. In addition, DOW

warned that the project is within the range of the bald eagle (Haliaeetus leucocephalus), a state threatened species. DOW noted that the location of bald eagles changes frequently and recommended that CSXT obtain an updated status from DOW as the date of any planned salvage operations nears. In the CSXT letter, CSXT states that, in a February 17, 2010 phone call between Brian Mitch of ODNR and CSXT, CSXT confirmed that it will not be removing any trees in the salvage process and, therefore, no negative effect is anticipated to the Indiana bat or its habitat. Also in the CSXT letter, CSXT states that, in a February 19, 2010 phone call with Dave Sherman of DOW, Mr. Sherman confirmed that the closest bald eagle nest was approximately 5 miles from the area of the proposed abandonment. Therefore, CSXT contends that the project should have no impact on the bald eagle or its habitat.

After reviewing all of the correspondence, SEA believes that there will be no impact to Federally listed or endangered species pursuant to section 7 of the Endangered Species Act. SEA indicates that it had noted in the EA that the Fish and Wildlife Service (FWS) had previously commented that no significant adverse impacts are anticipated from the proposed abandonment and that no further consultation with FWS pursuant to section 7 of the ESA was required. No other comments were filed. Accordingly, SEA does not recommend any additional conditions; the condition recommended by SEA in the EA will be imposed.

In the EA, SEA indicated that the right-of-way (ROW) may be suitable for other public use following abandonment of the line. On February 19, 2010, Metroparks of the Toledo Area (Metroparks), an Ohio political subdivision interested in natural resource conservation, education, and recreation, filed a request for the issuance of a notice of interim trail use (NITU) for the 4.15-mile line under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act) and 49 CFR 1152.29, and for the issuance of a public use condition under 49 U.S.C. 10905, to negotiate with CSXT for acquisition of the ROW for use as a recreational trail. Metroparks requests that CSXT be prohibited from disposing of the corridor, other than the tracks, ties, signal equipment, and other related equipment, except for public use on reasonable terms, and that CSXT be barred from removing or destroying any potential trail-related structures, such as bridges, trestles, culverts, and tunnels, for a 180-day period from the effective date of the abandonment exemption. Metroparks states that the corridor provides numerous transportation benefits, including a pedestrian and bicycle corridor. Metroparks indicates that this corridor would connect with the existing University Parks Trail, the University of Toledo Main Campus, Ottawa Park, and Bowman Park, would provide an alternative transportation corridor for University of Toledo students and employees, and would become an important recreational asset for the City of Toledo and the Toledo Metroparks' system. Metroparks states that the 180-day period is needed to assemble and review title information, survey information, and environmental reports, and to finalize negotiations with CSXT.

Metroparks has 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, and for the payment of any and all taxes that may be levied or assessed against, the ROW, as required at 49 CFR 1152.29, and has acknowledged that the use of the ROW for trail purposes is subject to

future reconstruction and reactivation for rail service. By letter filed on February 22, 2010, CSXT states that it agrees to negotiate interim trail use with Metroparks.

Because Metroparks' request complies with the requirements of 49 CFR 1152.29 and CSXT 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, CSXT may fully abandon the line, subject to any outstanding conditions. See 49 CFR 1152.29(d)(1). Use of the ROW for trail purposes is subject to any future use of the property for restoration of railroad operations.

As an alternative to interim trail use under the Trails Act, the ROW may be acquired for public 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 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 Metroparks has satisfied these requirements, a 180-day public use condition will be imposed, commencing from the March 13, 2010 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. Here, however, while both conditions will be imposed at this time, the public use condition will expire on September 9, 2010, while the trail use negotiating period will run 180 days from the service date of this decision and notice (until September 8, 2010). If a trail use agreement is reached on a portion of the ROW, CSXT must keep the remaining portion intact for the remainder of the 180-day public use 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 ROW that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, CSXT is not required to deal exclusively with Metroparks, but may engage in negotiations with other interested persons.

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. Upon reconsideration, the notice served on February 11, 2010, and published in the Federal Register on February 17, 2010, exempting the abandonment of the line described above, is modified to the extent necessary: (1) to implement interim trail use/rail banking as set forth below to permit Metroparks to negotiate with CSXT for trail use of the subject line, for a period of 180 days from the service date of this decision and notice (until September 8, 2010); and (2) to permit public use negotiations as set forth below, for a period of 180 days commencing from the March 13, 2010 effective date of the exemption (until September 9, 2010). It also is subject to the condition that CSXT shall consult with NGS and notify NGS at least 90 days prior to the beginning of salvage activities that will disturb or destroy the 2 geodetic station markers that may be located along the line proposed for abandonment.
3. Consistent with the public use and interim trail use/rail banking conditions imposed in this decision and notice, CSXT may discontinue service and salvage track and related materials. CSXT shall keep intact the ROW, including bridges, trestles, culverts, and tunnels, for a period of 180 days commencing from the March 13, 2010 effective date of the abandonment exemption (until September 9, 2010), 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 September 9, 2010, the public use condition will expire to the extent the trail use/rail banking agreement covers the same line.
4. 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 ROW.
5. Use of the ROW for interim trail use/rail banking is subject to any future use of the property for restoration of railroad operations and to the user's continuing to meet the financial obligations for the ROW.
6. 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.

7. If an agreement for interim trail use/rail banking is reached by September 8, 2010, interim trail use may be implemented. If no agreement is reached by that time, CSXT may fully abandon the line provided the other conditions imposed in this proceeding are met. See 49 CFR 1152.29(d)(1).

8. This decision is effective on its service date.

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