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SERVICE DATE – APRIL 8, 2009

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-290 (Sub-No. 300X)

NORFOLK SOUTHERN RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN
WISE COUNTY, VA

Decided: April 7, 2009

Norfolk Southern Railway Company (NSR) filed a verified notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments to abandon a 1.81-mile line of railroad between milepost CV 277.30 (Big Stone Gap) and milepost CV 279.11 (Appalachia), in Wise County, VA. Notice of the exemption was served and published in the Federal Register on March 11, 2009 (74 FR 10645-46). The exemption is scheduled to become effective on April 10, 2009.

The Board's Section of Environmental Analysis (SEA) served an environmental assessment (EA) in this proceeding on March 16, 2009. In the EA, SEA states that it was advised by the National Geodetic Survey (NGS) that six geodetic station markers have been identified that may be affected by the proposed abandonment. Therefore, SEA recommends that NSR be required to consult with and notify NGS at least 90 days prior to beginning salvage activities that could disturb or destroy any geodetic station markers.

No comments to the EA were received by the March 31, 2009 due date. Therefore, the condition recommended by SEA in the EA will be imposed.

SEA has indicated in its EA that the right-of-way may be appropriate for other public use, after abandonment and salvage of the line.¹ On March 4, 2009, the Lenowisco Planning District Commission (LPDC), a political subdivision of the Commonwealth of Virginia, filed a request for the issuance of a notice of interim trail use (NITU) for the subject line under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act) and 49 CFR 1152.29, and for a public use condition under 49 U.S.C. 10905. LPDC 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 the 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 has acknowledged that

¹ In the EA, SEA indicates that NSR did not provide any opinion regarding the suitability of the right-of-way for any future public use following abandonment. SEA also notes that NSR was unsure as to whether it has fee title to the entire right-of-way, and therefore may not have a contiguous corridor available for a trail or other public use.

the use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation for rail service. LPDC states that it plans to be a short-term land holder of the proposed trail project because the long-term owner will be the Southwest Virginia Recreational Authority (Spearhead Trails Initiative) once that authority is fully operational and functional. By letter filed on March 10, 2009, NSR consents to negotiating with LPDC for interim trail use.

Because LPDC's request complies with the requirements of 49 CFR 1152.29 and NSR 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, NSR may fully abandon the line, subject to any outstanding conditions. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes. See 49 CFR 1152.29(d)(2).

As noted, LPDC also requested the imposition of a 180-day public use condition. LPDC requests that NSR be prohibited from disposing of the corridor, other than tracks, ties, and signal equipment, except for public use on reasonable terms, and that NSR be barred from the removal or destruction of potential trail-related structures, such as bridges, trestles, culverts, and tunnels, for a 180-day period from the effective date of the abandonment exemption. LPDC states that the time period is needed to engage in further trail planning and to explore funding possibilities for the trail.

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 LPDC has met these requirements, a 180-day public use condition will be imposed, commencing from the April 10, 2009 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, NSR 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, NSR is not required to deal exclusively with LPDC, but may engage in negotiations with other interested persons.

As conditioned, this action 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 of exemption served and published in the Federal Register on March 11, 2009, exempting the abandonment of the line described above, is modified to the extent necessary to implement interim trail use/rail banking as set forth below, for a period of 180 days from the service date of this decision and notice (until October 5, 2009), and to permit public use negotiations as set forth below, for a period of 180 days commencing from the April 10, 2009 effective date of the exemption (until October 7, 2009). The notice of exemption is also subject to the condition that NSR shall consult with and notify NGS at least 90 days prior to beginning salvage activities that could disturb or destroy any geodetic station markers.
3. Consistent with the public use and interim trail use/rail banking conditions imposed in this decision and notice, NSR may discontinue service and salvage track and related materials. NSR shall keep intact the right-of-way, including bridges, trestles, culverts, and tunnels, for a period of 180 days commencing from the effective date of the exemption, 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 October 7, 2009, the public use condition will expire to the extent the trail use/rail banking agreement covers the same line or line segment.
4. If an interim trail use/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.
5. 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.
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 October 5, 2009, interim trail use may be implemented. If no agreement is reached by that time, NSR may fully abandon the line, provided that the environmental condition imposed in this decision is met. See 49 CFR 1152.29(d)(1).

8. This decision is effective on its service date.

By the Board, Joseph H. Dettmar, Acting Director, Office of Proceedings.

Anne K. Quinlan
Acting Secretary