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SERVICE DATE – DECEMBER 11, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-32 (Sub-No. 85X)

BOSTON AND MAINE CORPORATION–ABANDONMENT EXEMPTION–IN
MIDDLESEX COUNTY, MA

Decided: December 10, 2008

The Boston and Maine Corporation (B&M) filed a notice of exemption under 49 CFR 1152 Subpart F–Exempt Abandonments to abandon a 1.27-mile portion of the Lowell Industrial Track between station 1304+77, and station 1372+00 in Lowell, Middlesex County, MA.¹ Notice of the exemption was served and published in the Federal Register on November 13, 2008 (73 FR 67251). The exemption is scheduled to become effective on December 13, 2008.

The Board’s Section of Environmental Analysis (SEA) served an environmental assessment (EA) in this proceeding on November 18, 2008. In the EA, SEA notes that the National Geodetic Survey (NGS) has identified one geodetic station marker in the vicinity of the proposed line. Therefore, SEA recommends a condition requiring B&M to consult with NGS and notify NGS at least 90 days prior to beginning any salvage activities that would disturb or destroy any geodetic station markers.

SEA also states in the EA that the Massachusetts State Historic Preservation Office (SHPO) has provided comments regarding the proposed abandonment indicating that B&M should conduct research concerning the presence of any inventoried historic and archaeological properties located within the project’s right-of-way or area of potential effect which could be impacted by the proposed action. The SHPO has requested that the results of the inventory be provided to them as well as the Lowell Historic Board, and the Board for review and comment. Therefore, SEA recommends a condition requiring that B&M: (1) retain its interest in and take no steps to alter the historic integrity of all historic properties including sites, buildings, structures, and objects within the project right-of-way that are eligible for listing or listed in the National Register of Historic Places until the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f, has been completed; (2) report back to SEA regarding any consultations with the SHPO and the public; and (3) not file its consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties) until the section 106 process has been completed and the Board has removed this condition.

¹ Springfield Terminal Railway Company (ST) joined in filing this notice of exemption to obtain Board authorization for ST to discontinue service over the same line in STB Docket No. AB-355 (Sub-No. 37X), Springfield Terminal Railway Company–Discontinuance of Service Exemption–in Middlesex County, MA.

Comments to the EA were due by December 3, 2008. In a letter filed on November 28, 2008, Alan French, Chairman of the Bay Circuit Alliance, Inc., urges the Board to support use of the line proposed for abandonment as a recreational trail. He also argues that approval of the proposed action would result in a serious cultural historical and environmental loss for the citizens of Lowell and the Boston area. Because Mr. French's comments are concerned with the use of the line as a recreational trail and he does not seek additional environmental conditions, SEA recommends no change to the conditions previously recommended in the EA.

On November 20, 2008, the Executive Office of Transportation and Public Works (EOTPW), a government agency of the Commonwealth of Massachusetts, filed a request for the issuance of a 180-day public use condition under 49 U.S.C. 10905 and for the issuance of a notice of interim trail use (NITU) under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and 49 CFR 1152.29. EOTPW 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 (unless the user is immune from liability, in which case the user 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 the use of the right-of-way for trail purposes is subject to future reactivation for rail service.

In response, Pan Am Railways on behalf of B&M states that B&M does not intend to negotiate a trail use agreement with EOTPW. Because 16 U.S.C. 1247(d) permits only voluntary interim trail use, the Board cannot issue a NITU in this proceeding. The Board's trail use authority is limited because the trail use program is voluntary and consensual between the railroad and the trail user. See Rail Abandonments—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 598 (1986). As such, it applies only if the abandoning railroad agrees to negotiate. Accordingly, EOTPW's trail use request will be denied.

As an alternative to interim trail use under the Trails Act, the right-of-way may be acquired for public use under 49 U.S.C. 10905. *Id.* at 609. 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 EOTPW has met these requirements, a 180-day public use condition will be imposed, commencing from the December 13, 2008 effective date of the exemption. 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, B&M is not required to deal exclusively with EOTPW, but may engage in negotiation 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 and published in the Federal Register on November 13, 2008, exempting the abandonment of the line described above, is modified to require that B&M keep intact the right-of-way, including bridges, trestles, culverts and tunnels, for a period of 180 days commencing from the December 13, 2008 effective date of the exemption (until June 11, 2009), to enable any state or local government agency, or other interested person, to negotiate the acquisition of the line for public use, and subject to the conditions that B&M shall: (1) consult with NGS and notify NGS at least 90 days prior to beginning salvage activities that could disturb or destroy any geodetic station markers; and (2) (a) retain its interest in and take no steps to alter the historic integrity of all historic properties including sites, buildings, structures, and objects within the project right-of-way that are eligible for listing or listed in the National Register of Historic Places until the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f, has been completed; (b) report back to SEA regarding any consultations with the SHPO and the public; and (c) not file its consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties) until the section 106 process has been completed and the Board has removed this condition.
3. EOTPW's request for issuance of a notice of interim trail use is denied.
4. This decision is effective on its date of service.

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

Anne K. Quinlan
Acting Secretary