

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-55 (Sub-No. 547X)

CSX TRANSPORTATION, INC.--ABANDONMENT
EXEMPTION--IN MUSKEGON COUNTY, MI

Decided: August 8, 1997

By petition filed on April 29, 1997, CSX Transportation, Inc. (CSXT) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a 10.13-mile portion of its Detroit Division, Montague Subdivision, extending from railroad milepost 62.12 at Berry to railroad milepost 72.25 at the end of track at Montague, including a 3.5-mile industrial lead track at Montague, a total of 13.63 miles, traversing U.S. Postal Service Zip Codes 49445, 49461, and 49437, in Muskegon County, MI.¹ The United Transportation Union (UTU) requests imposition of labor protective conditions. The Michigan Department of Natural Resources (MDNR) requests issuance of a notice of interim trail use (NITU) and a public use condition. We will grant the petition subject to labor protective conditions and a public use condition, and issue a NITU.

BACKGROUND

CSXT states that only one shipper, DuPont Chemical Company (DuPont), has used the line proposed for abandonment in recent years. DuPont's facility is located at the end of the 3.5-mile industrial lead track in Montague. Traffic shipped or received for DuPont consisted of 348 carloads of chemicals in 1995 and 144 carloads in 1996. According to CSXT, DuPont is closing its Montague operation and expects to complete demolition of its facility by September 1997. To accommodate DuPont, CSXT has agreed not to abandon this line until all operations at the facility have ceased.

The City of Montague supports abandonment and MDNR's intentions to acquire the right-of-way for extension of a trail already developed by proponent. No one has appeared in this proceeding to oppose the proposed abandonment.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without prior approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative time and expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. Moreover, by allowing CSXT to avoid the expenses of owning and maintaining an unused line of railroad and to apply its assets more productively elsewhere on its rail system, an exemption will promote safe and efficient rail transportation, foster sound economic conditions, and encourage efficient management [49 U.S.C. 10101(3), (5), and (9)]. Other aspects of the rail transportation policy are not affected adversely.

Because the line's only shipper will permanently cease using the line this fall and there appear to be no prospects to attract new shippers, we find that regulation is not necessary to protect shippers from an abuse of market power. Nevertheless, to ensure that the shipper is informed of our action, we will require CSXT to serve a copy of this decision on DuPont within 5 days of the service

¹ Pursuant to 49 U.S.C. 10502(b), the Board served and published a notice in the *Federal Register* [62 FR 26849] on May 15, 1997, instituting an exemption proceeding.

date of this decision and certify to us that it has done so. Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

UTU requests the imposition of labor protective conditions. Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a carrier of a statutory obligation to protect the interests of its employees. Accordingly, we will impose the employee protective conditions in *Oregon Short Line R. Co.--Abandonment--Goshen*, 360 I.C.C. 91 (1979), as a condition to granting this exemption.

CSXT has submitted an environmental report with its petition and has notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed abandonment. *See* 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified its data, and analyzed the probable effect of the proposed action on the quality of the human environment. SEA served an environmental assessment (EA) on July 2, 1997, recommending that no environmental or historic conditions be imposed on the abandonment. No comments have been received in response to the EA. Based on SEA's recommendation, we conclude that the proposed abandonment, if implemented, will not significantly affect either the quality of the human environment or conservation of energy resources.

As noted, MDNR requests issuance of a NITU under the National Trails System Act, 16 U.S.C. 1247(d), for the right-of-way involved in this proceeding. Acquisition of the rail corridor would allow MDNR to extend a trail it has already developed. MDNR submitted a statement of willingness to assume financial responsibility for the right-of-way and acknowledged that use of the right-of-way is subject to possible future reconstruction and reactivation of the right-of-way for rail service in compliance with 49 CFR 1152.29. By letter dated July 3, 1997, CSXT indicated that it was willing to negotiate with MDNR.

The criteria for imposing trail use and rail banking have been met. Accordingly, we will accept the trail use request and CSXT's response and issue a NITU. The parties may negotiate an agreement during the 180-day period prescribed below. If the parties reach a mutually acceptable final agreement, further Board approval is not necessary. If no agreement is reached within 180 days, CSXT may fully abandon the line, provided the conditions imposed in this proceeding are met. 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

The parties should note that operation of the trail use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in *Rail Abandonments--Use of Rights-of-Ways as Trails*, 2 I.C.C.2d 591 (1986) (*Trails*), offers of financial assistance (OFA) to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking and public use. Accordingly, if an OFA is timely filed under 49 CFR 1152.27(c)(1), the effective date of this decision and notice will be postponed beyond the effective date indicated here. *See* 49 CFR 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. *See* 49 CFR 1152.27(f). Finally, if the line is sold under the OFA procedures, the petition for abandonment exemption will be dismissed and trail use precluded. Alternatively, if a sale under the OFA procedures does not occur, trail use may proceed.

SEA indicates in its environmental assessment that the right-of-way may be suitable for other public use after abandonment. MDNR also requests imposition of a 180-day public use condition precluding CSXT from disposing of trail-related structures (e.g., bridges, trestles, culverts and tunnels, but not tracks, ties and signal equipment) on the right-of-way that are suitable for trail use. MDNR submits that 180 days is required for it to conduct appraisal and title review and begin negotiations with the carrier.

Persons who file under the Trails Act may also file for public use under 49 U.S.C. 10905. When the need for both is established, it is our policy to impose them concurrently, subject to the execution of a trail use agreement. *See Trails*, 2 I.C.C.2d at 609. MDNR has met the criteria for imposing a public use condition by specifying: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) justification for the time period. 49 CFR 1152.28(a)(2). Accordingly, a 180-day public use condition also will be imposed. If a trail use agreement is reached on a portion of the right-of-way, CSXT must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, we note that 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 a right-of-way 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 MDNR but may engage in negotiations with other interested persons.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903 the abandonment by CSXT of the above-described 13.63-mile rail line, subject to: (a) the employee protective conditions in *Oregon Short Line R. Co.--Abandonment--Goshen*, 360 I.C.C. 91 (1979); (b) the condition that CSXT leave intact all of the right-of-way underlying the track, including bridges, trestles, culverts, and tunnels (but not track or track materials), for a period of 180 days from the effective date of this decision, to enable any state or local government agency or any other interested person to negotiate the acquisition of the line for public use; and (c) the requirement that CSXT comply with the terms and conditions for implementing interim trail use/rail banking, as set forth below.
2. 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, 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 from any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.
3. 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 for the right-of-way.
4. 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.
5. If an agreement for interim trail use/rail banking is reached by the 180th day after service of this decision and notice, interim trail use may be implemented. If no agreement is reached by that time, CSXT may fully abandon the line, provided the conditions imposed in this proceeding are met.
6. An OFA to allow rail service to continue must be received by the railroad and the Board by August 22, 1997, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). Each OFA must be accompanied by the filing fee, which currently is set at \$900. The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1).
7. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: "**Office of Proceedings, AB-OFA.**"
8. CSXT is directed to serve a copy of this decision on DuPont within 5 days after service of this decision and to certify to us that it has done so.

9. Provided no OFA has been received, this exemption will be effective on September 13, 1997.

10. Petitions to stay must be filed by August 29, 1997. Petitions to reopen must be filed by September 8, 1997.

11. Pursuant to the provisions of 49 CFR 1152.29(e)(2), CSXT shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by CSXT's filing of a notice of consummation by August 14, 1998, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If any legal or regulatory barrier to consummation exists at the end of the one-year period, the notice of consummation must be filed not later than 60 days after satisfaction, expiration or removal of the legal or regulatory barrier.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary