

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-55 (Sub-No. 643X)

CSX TRANSPORTATION, INC.–ABANDONMENT EXEMPTION–IN LAPORTE, PORTER  
AND STARKE COUNTIES, IN

Decided: February 20, 2004

By petition filed on November 3, 2003, 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 an approximately 32.97-mile line of railroad, in CSXT's Western Region, Chicago Division, Wabash Subdivision, extending from milepost CF 0.63, at LaCrosse, to milepost CF 15.23, at Wellsboro, and from milepost CI 212.55, at North Judson, to milepost CI 230.92, at Malden, in LaPorte, Porter and Starke Counties, IN. Notice of the filing was served and published in the Federal Register on November 21, 2003 (68 FR 65759-60). A request for imposition of a public use condition and issuance of a notice of interim trail use (NITU) was filed on December 8, 2003, by the Indiana Trails Fund (ITF) and the Northwestern Indiana Regional Planning Commission (NIRPC). The exemption will be granted, subject to trail use, public use, historic preservation, and standard employee protective conditions.

BACKGROUND

CSXT previously interchanged traffic with the Toledo, Peoria, and Western Railroad (TPW) at North Judson. According to CSXT, TPW ceased interchanging traffic at this location because of a decline in rail traffic, which led TPW to file for discontinuance authority.<sup>1</sup> There are currently two shippers located on the line: Bruder Fertilizer, Inc. (Bruder), and LaPorte County Farm Bureau (Bureau). CSXT states that Bruder shipped 14 carloads of chemicals in 2001, 24 carloads in 2002, and 16 carloads in 2003. Because the Bruder facility at LaCrosse is not adjacent to the CSXT track, Bruder currently uses a sidetrack to transload goods to its facility. Bruder is exploring an alternate transload location and has motor carrier transportation available as an alternative. The Bureau's facilities are located at Wellsboro and Malden. The Wellsboro facility will not be affected by the proposed abandonment because CSXT will continue to serve that facility from CSXT's main line. If an

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<sup>1</sup> See Toledo, Peoria & Western Railway Corporation–Discontinuance Exemption–in Starke and Pulaski Counties, IN, STB Docket No. AB-847 (Sub-No. 1X) et al. (STB served Nov. 18, 2003).

abandonment exemption is granted here, CSXT is willing to consider leasing a portion of the line near Wellsboro, approximately 4,000 feet, to the Bureau for use as an industrial track and a super-loading facility. The Bureau's facility at Malden received 476 carloads of corn, soybeans, chemicals, and fly ash in 2001, 447 carloads in 2002, and 107 carloads in 2003. CSXT indicates that the main alternative transportation option available to the Bureau at Malden is motor carrier transportation. CSXT states that Bruder and Bureau have been notified of this abandonment filing.

CSXT asserts that the line is in extremely poor condition and is classified as Federal Railroad Administration excepted track. According to CSXT, to continue to operate on the line, it would need to make a significant capital expenditure in the very near future. CSXT submits, as Exhibit G to its petition, a verified statement by CSXT engineer of track, Bruce A. Fowler, who states that, to keep the line in service, it will require a major tie replacement program within the next 2 years and renewal of the 61 grade crossings on the line over the next 3 years. Mr. Fowler's 3-year plan for grade crossing renewal is estimated to cost \$801,336. However, he expects that CSXT will need to spend approximately \$453,550 in 2004, on 41 grade crossings that will require replacement in the first year. CSXT also submits, as Exhibit H to its petition, a verified statement by CSXT's assistant chief engineer for bridge maintenance, Richard P. Garro, Jr., who reviewed the most current bridge inspection report and concluded that, out of the 15 bridges on the line, 5 require immediate replacement at a cost of approximately \$1,114,500, and the remaining 10 require continued maintenance and rehabilitation. In total, CSXT estimates the cost of immediate grade crossing and bridge replacement and repair at \$1,568,050. CSXT asserts that the nominal traffic on the line does not justify this expenditure.

CSXT provides the following economic analysis of the line, which is set forth in more detail in Exhibit F to its petition:

	<b>Base Year (ending 6/30/03)</b>	<b>Forecast Year (beginning 10/1/03)</b>	<b>Subsidy Year (ending 12/31/04)</b>
Revenues Attributable	\$628,110	\$652,784	\$658,953
Avoidable Costs	\$637,055	\$648,278	\$650,635
Subsidization Costs	-	-	\$316,746
Return on Value	-	\$175,286	\$175,286
Avoidable Loss	\$ 8,945	\$ (4,506)	\$ (8,318)
Avoidable Loss and Opportunity Costs	-	\$170,780	-
Subsidy Year Loss	-	-	\$483,715

#### DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without the Board's prior approval. Under 49 U.S.C. 10502, however, the Board must exempt a transaction or service from regulation when it finds 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 expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will also foster sound economic conditions and encourage efficient management by relieving CSXT of the cost of owning and maintaining a line that is in need of substantial repair and allowing it to use its assets more productively elsewhere on its system [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be affected adversely.

Regulation of the transaction is not necessary to protect shippers from the abuse of market power. Bruder and the Bureau apparently have viable motor carrier alternatives and have not objected to the proposed abandonment. Nevertheless, to ensure that Bruder and the Bureau are informed of the Board's action, CSXT will be required to serve a copy of this decision and notice on these shippers

within 5 days of the service date and certify to the Board that it has done so. Given this market power finding, the Board need not determine whether the proposed transaction is limited in scope.

Under 49 U.S.C. 10502(g), the Board's exemption authority may not be used to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, the employee protective conditions set forth in Oregon Short Line R. Co. – Abandonment – Goshen, 360 I.C.C. 91 (1979) will be imposed.

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 action. See 49 CFR 1105.11. The Board's Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment. SEA served an environmental assessment (EA) on January 2, 2004, and requested comments.

In the EA, SEA indicates that the National Geodetic Survey (NGS) has identified two geodetic station markers that could be affected by the proposed abandonment. Therefore, SEA recommends that CSXT notify NGS 90 days before beginning salvage activities in order to plan for the potential relocation of the geodetic station markers.

SEA also indicates in the EA that the U.S. Environmental Protection Agency (EPA), Region 5, has expressed concerns regarding the salvage methods to be used by CSXT during the abandonment process. Accordingly, SEA recommends that, before beginning any salvage activities on the line, CSXT contact the EPA, Region 5, concerning removal and salvage methods, final disposition of crossties preserved with creosote, procedures for storing and fueling of construction equipment, procedures for the prevention and/or control of spills, and stormwater runoff mitigation practices to be used during abandonment activities.

Additionally, to address the concerns raised by the U.S. Fish and Wildlife Service, Bloomington Field Office (USFWS), SEA recommends in the EA that: (a) CSXT consult with USFWS before beginning any salvage activities that may adversely affect the Kankakee River and adjacent wetlands in Starke and LaPorte Counties, and the high quality sand prairie habitat in Starke County; (b) CSXT avoid any tree cutting activities, except between September 15 and April 15, to protect the Federally listed endangered Indiana bat (*Myotis sodalis*); (c) CSXT consult with USFWS, pursuant to the Endangered Species Act, 16 U.S.C. 1531 et seq., if Mitchell's satyr butterfly (*Neonympha mitchelli*), Karner blue butterfly (*Lycaeides melissa samuelis*), bald eagle (*Haliaeetus leucocephalus*), and Pitcher's Thistle (*Cirsium pitcheri*) are encountered during salvage operations; and (d) CSXT consult with USFWS to determine the protected status of the eastern massasauga rattlesnake (*Sistrurus catenatus catenatus*) that is a candidate for possible listing as either a threatened

or endangered species before beginning salvage activities and evaluate any possible impacts on this species.

Comments on the EA were due by February 2, 2004. Based on additional information supplied by USFWS, regarding the maintenance of bridges and culverts, SEA recommends that CSXT consult with USFWS before salvaging the right-of-way. The Board concludes that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

As indicated, ITF and NIRPC timely filed a request for the issuance of a NITU under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and a request for a public use condition under 49 U.S.C. 10905. ITF and NIRPC submitted a statement of willingness to assume financial responsibility for the management of, for any legal liability arising from the transfer or use of, and for payment of any and all taxes that may be levied or assessed against, the right-of-way, and acknowledged that use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation for rail service, as required under 49 CFR 1152.29. By letter filed on January 8, 2004, CSXT states that it is willing to negotiate with ITF and NIRPC for interim trail use. Because the request complies with the requirements of 49 CFR 1152.29, and CSXT is willing to enter into negotiations, a NITU will be issued as requested. The parties may negotiate an agreement during the 180-day period prescribed below. If an agreement is executed, no further Board action is necessary. If no agreement is reached within 180 days, CSXT may fully abandon the line, subject to the conditions imposed below. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

SEA has indicated in the EA that, if abandonment and salvage of the line does take place, the right-of-way may be suitable for other public use. ITF and NIRPC state that the line would provide important links in the northwestern Indiana trail system. ITF and NIRPC request imposition of a 180-day public use condition to commence negotiations with CSXT. Specifically, ITF and NIRPC request that CSXT be precluded from: (1) disposing of the corridor, other than the tracks, ties, and signal equipment, except for public use on reasonable terms; and (2) removing or destroying potential trail-related structures such as bridges, trestles, culverts, and tunnels.

Persons who file under the Trails Act may also file 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) (Trails). When the need for both conditions has been established, it is the Board's policy to impose them concurrently, subject to the execution of a trail use agreement. ITF and NIRPC have met the public use criteria prescribed at 49 CFR 1152.28(a)(2) 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 period of time requested. Accordingly, a 180-day public use condition will be imposed on the

rail line to be abandoned, commencing from the effective date of this decision and notice, to enable any state or local government agency or other interested person to negotiate the acquisition of the line for public use. A public use condition is not imposed for the benefit of any one potential purchaser. Rather, it provides 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 ITF and NIRPC, but may engage in negotiations with other interested persons.

The parties should note that operation of the trail use and public use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in Trails, 2 I.C.C.2d at 608, 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 and public use precluded. Alternatively, if a sale under the OFA procedures does not occur, the trail use and public use processes may proceed.

It is ordered:

1. Under 49 U.S.C. 10502, an exemption from the prior approval requirements of 49 U.S.C. 10903 for the abandonment by CSXT of the above-described line is granted, subject to the employee protective conditions set forth in Oregon Short Line R. Co. – Abandonment – Goshen, 360 I.C.C. 91 (1979), and subject to the conditions that CSXT shall: (1) provide NGS with at least 90 days' notice before beginning salvage activities that may disturb or destroy any geodetic station markers so that plans can be made for their relocation; (2) contact the EPA, Region 5, concerning removal and salvage methods, final disposition of crossties preserved with creosote, procedures for storing and fueling of construction equipment, procedures for the prevention and/or control of spills, and stormwater runoff mitigation practices to be used during abandonment activities; (3) consult with USFWS (a) before beginning any salvage activities that may adversely affect the Kankakee River and adjacent wetlands in Starke and LaPorte Counties, the high quality sand prairie habitat in Starke County, or the maintenance of bridges and culverts; (b) pursuant to the Endangered Species Act, 16 U.S.C. 1531 et seq., if Mitchell's satyr butterfly, Karner blue butterfly, bald eagle, and Pitcher's Thistle are encountered during salvage operations; and (c) to determine the protected status of the eastern massasauga rattlesnake that is listed as a candidate for possible listing as either a threatened or endangered species before beginning salvage activities and evaluate any possible impacts on this species; (4) regarding the Federally listed endangered Indiana bat that may be within the area, restrict tree cutting activities to the period between September 15 and April 15, in order to protect this species; (5) leave intact all of the right-of-way,

including bridges, trestles, culverts, and tunnels (except for track, ties, and signal equipment) for a period of 180 days from the effective date of this decision and notice, to enable any state or local government agency or any other interested person to negotiate the acquisition of the line for public use; and (6) comply with the terms and conditions for implementing interim trail use/rail banking as set forth below.

2. CSXT is directed to serve a copy of this decision and notice on Bruder and the Bureau within 5 days after the service date of this decision and notice and to certify to the Board that it has done so.

3. 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 the 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 against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

4. 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.

5. 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.

6. 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 above are met.

7. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by March 1, 2004, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by the filing fee, which currently is set at \$1,100. See 49 CFR 1002.2(f)(25).

8. 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.”**

9. Provided no OFA has been received, this exemption will be effective on March 22, 2004. Petitions to stay must be filed by March 8, 2004, petitions to reopen must be filed by March 16, 2004.

10. 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 February 20, 2005, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Nober.

Vernon A. Williams  
Secretary