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SERVICE DATE – JULY 8, 2003

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-156 (Sub-No. 23X)

DELAWARE AND HUDSON RAILWAY COMPANY, INC. D/B/A CANADIAN PACIFIC  
RAILWAY COMPANY–ABANDONMENT EXEMPTION–IN ALBANY COUNTY, NY

Decided: July 2, 2003

Delaware and Hudson Railway Company, Inc., d/b/a Canadian Pacific Railway Company (D&H) filed a notice of exemption under 49 CFR 1152 Subpart F-Exempt Abandonments to abandon a 9.14 +/- mile portion of railroad known as the Albany Main or the Voorheesville Running Track, between milepost 10.94 +/- and milepost 1.8 +/- in Albany County, NY. Notice of the exemption was served and published in the Federal Register on June 16, 2003 (68 FR 35774-75). The exemption is scheduled to become effective on July 16, 2003.

The Board's Section of Environmental Analysis (SEA) issued an environmental assessment (EA) in this proceeding which was served on June 20, 2003. In the EA, SEA indicated that the New York State Office of Parks, Recreation and Historic Preservation-Historic Preservation Field Services Bureau (NY SHPO), has not yet completed its assessment of the potential impact of this project on historic resources. Accordingly, SEA recommends a condition requiring D&H to retain its interest in and take no steps to alter the historic integrity of all sites and structures on the right-of-way that are 50 years old or older until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f.

SEA also stated that the New York Department of State, Division of Coastal Resources has indicated that, because a segment of the proposed abandonment falls within the boundary of a Coastal Zone Management Area, review pursuant to the Coastal Zone Management Act (CZMA) consistency provisions is required. SEA further stated that a Coastal Zone Consistency Determination must be sought by D&H to ensure that the project is consistent with the Coastal Zone Policies of the State of New York. Also, a Federal Consistency Assessment Form, which constitutes a consistency certification when completed, must be submitted by D&H to the Division of Coastal Resources, which will review the proposed activity and the consistency certification. Accordingly, to address these concerns, SEA recommends a condition requiring D&H to comply with the above requirements of the New York Department of State, Division of Coastal Resources, prior to any salvage activities.

Finally, SEA stated that the New York State Department of Environmental Conservation, Division of Environmental Permits, Region 4 (NY DEC) has indicated that there are three stream

crossings along the route proposed for abandonment. SEA states that Vly Creek, at milepost 10.55, is a protected stream and that a permit will be required if there will be any disturbance of the bed or banks of the stream. SEA also stated that water quality standards in all waters of the State of New York must be maintained at all times during salvage activities. Accordingly, to address the concerns raised by NY DEC, SEA recommends a condition requiring D&H to contact NY DEC concerning possible impacts on water quality and any water quality permitting requirements prior to any salvage activities.

On June 18, 2003, the County of Albany, NY (County), timely filed a request for the issuance of a notice of interim trail use (NITU) for the line under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and for a public use condition under 49 U.S.C. 10905,<sup>1</sup> in order to negotiate with D&H for acquisition of the right-of-way for use as a recreational trail. The County requests that D&H be prohibited from disposing of the corridor, other than the tracks, ties, and signal equipment, except for public use on reasonable terms, and that D&H be barred from removing or destroying any trail-related structures, such as bridges, trestles, culverts and tunnels, for a 180-day period from the effective date of the abandonment exemption. The County indicates that the 180-day period is needed because it has not had an opportunity to assemble/review title information, complete a trail plan, or commence negotiations with D&H.

The County also 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 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 acknowledged that the use of the right-of-way for trail purposes is subject to possible future reactivation for rail service. In a letter filed on June 25, 2003, D&H indicated its willingness to negotiate with the County for interim trail use.

Because the County's request complies with the requirements of 49 CFR 1152.29 and D&H 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, D&H may fully abandon the line. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

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

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<sup>1</sup> The EA indicated that the right-of-way may be suitable for other public use following abandonment.

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 the County has satisfied these requirements, a 180-day public use condition will be imposed, commencing from the July 16, 2003 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, D&H 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, D&H is not required to deal exclusively with the County, but may engage in negotiations with other interested persons.

As conditioned, this decision and notice 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 June 16, 2003, exempting the abandonment of the line described above is modified to the extent necessary to implement interim trail use/rail banking and to permit public use negotiations as set forth below, for a period of 180 days commencing from the July 16, 2003 effective date of the exemption (until January 12, 2004), and subject to the conditions that: (1) D&H shall retain its interest in and take no steps to alter the historic integrity of all sites and structures on the right-of-way that are 50 years old or older until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f; (2) D&H shall comply with the requirements of the New York Department of State, Division of Coastal Resources, prior to any salvage activities; and (3) D&H shall contact the New York State Department of Environmental Conservation, Division of Environmental Permits, Region 4, concerning possible impacts on water quality and any water quality permitting requirements prior to any salvage activities.

3. Consistent with the public use and interim trail/rail banking conditions imposed in this decision and notice, D&H may discontinue service and salvage track and related materials. D&H shall otherwise keep intact the right-of-way underlying the tracks, including bridges, trestles, culverts, and tunnels, for a period of 180 days 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 expiration of the 180-day period specified above, 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 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 for 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 January 12, 2004, interim trail use may be implemented. If no agreement is reached by that time, D&H may fully abandon the line.

8. This decision and notice is effective on its date of service.

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

Vernon A. Williams  
Secretary