

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 290 (Sub-No. 326X)

NORFOLK SOUTHERN RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN
HENRY COUNTY, IND.

Decided: August 29, 2013

Norfolk Southern Railway Company (NSR) filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon approximately 0.88 miles of non-contiguous rail line segments in New Castle, in Henry County, Ind., as follows: (1) approximately 0.12 miles of rail line extending between milepost R 0.00 (near Broad Street) and milepost R 0.1205 (near the intersection of S. 16th St. and Indiana Ave.); and (2) approximately 0.76 miles of rail line extending between milepost R 1.1629 (near the intersection of Cherrywood Avenue and M Avenue) and milepost R 1.92 (near the intersection of Cherrywood Avenue and Riley Road).¹ Notice of the exemption was served and published in the Federal Register on July 31, 2013 (78 Fed. Reg. 46,412).² The exemption is scheduled to become effective on August 30, 2013.

The Board's Office of Environmental Analysis (OEA) served an environmental assessment (EA) in this proceeding on August 5, 2013. In the EA, OEA states that the National Geodetic Survey (NGS) has not submitted comments regarding the potential impact of the proposed abandonment on any geodetic station markers that may be present in the project area. Accordingly, OEA recommends that a condition be imposed requiring NSR to consult with NGS and notify NGS at least 90 days prior to beginning any salvage activities that could disturb or destroy any geodetic station markers in order to plan for the possible relocation of the geodetic station markers by NGS.

Additionally, OEA states that NSR has requested comments from the Division of Historic Preservation and Archaeology of the Indiana Department of Natural Resources (State Historic Preservation Office or SHPO), but has received no response. OEA states that it has therefore not been able to consider the SHPO's opinion before determining if the line segments may be

¹ According to applicants, the line segments are part of the same rail line but are separated by an approximately 1.04-mile middle line segment, which will not be abandoned and which will continue to connect with other rail lines.

² C&NC Railroad Corporation (CNUR) joined in filing this notice of exemption to obtain Board authorization to discontinue service over the same rail line segments. C&NC R.R.—Discontinuance of Service Exemption—in Henry Cnty., Ind., AB 1093X.

potentially eligible for listing in the National Register of Historic Places (National Register). Accordingly, OEA recommends that a condition be imposed requiring NSR to 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 (the Area of Potential Effect) that are eligible for listing or listed in the National Register until completion of the Section 106 process of the National Historic Preservation Act, 16 U.S.C. § 470f. As part of this recommended condition, NSR shall report to OEA regarding any consultations with the SHPO and the public; and NSR may 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 the condition.

Comments to the EA were due August 20, 2013. No comments were received. Accordingly, the conditions recommended by OEA in the EA will be imposed. Based on OEA's recommendation, the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

In the EA, OEA also states that the right-of-way may be suitable for other public use following abandonment and salvage of the line segments. On July 1, 2013, Indiana Trails Fund, Inc. (ITF) filed a request for the issuance of a notice of interim trail use (NITU) to negotiate with NSR for acquisition of one segment of the right-of-way for use as a trail under the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d), and 49 C.F.R. § 1152.29. The segment for which ITF seeks an NITU is comprised of approximately 0.76 miles of rail line extending between milepost R 1.1629 (near the intersection of Cherrywood Avenue and M Avenue) and milepost R 1.92 (near the intersection of Cherrywood Avenue and Riley Road). Pursuant to 49 C.F.R. § 1152.29, ITF has submitted a statement of its willingness to assume financial responsibility for the segment of the right-of-way, and has acknowledged that the use of the segment of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the segment of the right-of-way for rail service. By response filed on July 17, 2013, NSR has indicated its willingness to negotiate with ITF for interim trail use.³

Because ITF's request complies with the requirements of 49 C.F.R. § 1152.29 and NSR is willing to negotiate for trail use, a NITU will be issued. The parties may negotiate an agreement for the segment of the right-of-way during the 180-day period prescribed below. If an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2) and (h); Nat'l Trails Sys. Act & R.R. Rights-of-Way, EP 702 (STB served Apr. 30, 2012). If no agreement is reached within 180 days, NSR may fully abandon the line.

³ On July 26, 2013, the City of New Castle (City) also filed a request for the issuance of a NITU and for imposition of a public use condition for the same segment of the right-of-way as ITF. On July 29, 2013, NSR agreed to the City's request. By letter filed on August 22, 2013, NSR states that it has learned that ITF has had recent discussions with the City concerning trail use negotiations, and that the City is allowing ITF to assume the lead role in negotiating with NSR. Therefore, NSR states that it has elected to negotiate with ITF for interim trail use.

49 C.F.R. § 1152.29(d)(1). Use of the segment of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the segment of the right-of-way for rail service.

ITF and the City have also requested imposition of a public use condition under 49 U.S.C. § 10905 for the 0.76-mile segment of the right-of-way. ITF and the City ask 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 authorization. Their justification for this request is that these structures have considerable value for recreational trail purposes. ITF and the City state that the 180-day period is needed to begin negotiations with NSR.

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 Abans.—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986). Under § 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. 49 C.F.R. § 1152.28(a)(2). Because ITF and the City have satisfied these requirements, a 180-day public use condition will be imposed, requiring NSR to keep intact the segment of the right-of-way (including trail-related structures such as bridges, trestles, culverts, and tunnels) and to refrain from disposing of the segment of the corridor (other than tracks, ties, and signal equipment), commencing from the August 30, 2013 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. Here, however, while trail use and public use conditions will be imposed at this time, the public use condition will expire on February 26, 2014, while the trail use negotiating period will run 180 days from the service date of this decision and notice, until February 25, 2014. If a trail use agreement is reached on a portion of the segment of the right-of-way prior to February 25, 2014, NSR must keep the remaining segment of the right-of-way intact for the remainder of the 180-day public use condition 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 ITF or the City, 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 served and published in the Federal Register on July 31, 2013, exempting the abandonment of the line segments described above is modified to the extent necessary to implement interim trail use/rail banking as set forth below to permit ITF to negotiate with NSR for trail use for the above-described segment of the right-of-way, for a period of 180 days from the service date of this decision and notice, until February 25, 2014, and to permit public use negotiations as set forth below, for a period of 180 days commencing from the August 30, 2013 effective date of the exemption, until February 26, 2014. The abandonment is also subject to the conditions that NSR shall: (1) consult with NGS and notify NGS at least 90 days prior to beginning any salvage activities that could disturb or destroy any geodetic station markers in order to plan for the possible relocation of the geodetic station markers by NGS; and (2) 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 (the Area of Potential Effect) that are eligible for listing or listed in the National Register until the Section 106 process of the National Historic Preservation Act, 16 U.S.C. § 470f, has been completed. NSR shall report to OEA regarding any consultations with the SHPO and the public. NSR may 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 the condition.

3. Consistent with the public use and interim trail use/rail banking conditions imposed on the above-described segment of the right-of-way in this decision and notice, NSR may discontinue service and salvage track and related materials. NSR shall otherwise keep intact the segment of the right-of-way, including potential trail-related structures such as bridges, trestles, culverts, and tunnels, for a period of 180 days until February 26, 2014, to enable any state or local government agency, or other interested person, to negotiate the acquisition of the segment of the right-of-way for public use. If an interim trail use/rail banking agreement is executed before expiration of the 180-day public use condition period, the public use condition will expire to the extent the trail use/rail banking agreement covers the same portion of the right-of-way.

4. If an interim trail use/rail banking agreement is reached, it must require the trail sponsor to assume, for the term of the agreement, full responsibility for: (i) managing the segment of the right-of-way; (ii) any legal liability arising out of the transfer or use of the segment of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability); and (iii) the payment of any and all taxes that may be levied or assessed against the segment of the right-of-way.

5. Interim trail use/rail banking is subject to possible future reconstruction and reactivation of the segment of the right-of-way for rail service and to the trail sponsor's continuing to meet its responsibilities for the segment of the right-of-way described in ordering paragraph 4 above.

6. If an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2) and (h).

7. If interim trail use is implemented, and subsequently the trail sponsor intends to terminate trail use on all or any portion of the segment of the right-of-way covered by the interim trail use agreement, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

8. If an agreement for interim trail use/rail banking is reached by February 25, 2014, for the segment of the right-of-way, interim trail use may be implemented. If no agreement is reached, NSR may fully abandon the line segment.

9. This decision and notice is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.