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SERVICE DATE – APRIL 26, 2010

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 290 (Sub-No. 266X)

NORFOLK SOUTHERN RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN
MCDOWELL COUNTY, N.C.

Decided: April 23, 2010

Norfolk Southern Railway Company (NSR) filed a notice of exemption under 49 C.F.R. § 1152 Subpart F—Exempt Abandonments to abandon approximately 3.5 miles of railroad between milepost SB 205.0 and milepost SB 208.5, near Marion, in McDowell County, N.C. Notice of the exemption was served and published in the Federal Register on June 8, 2006 (71 Fed. Reg. 33,334). The exemption was scheduled to become effective on July 8, 2006.

By decision and notice of interim trail use or abandonment (NITU) served on July 7, 2006, the proceeding was reopened and a 180-day period was authorized for the City of Marion, N.C. (City), to negotiate an agreement with NSR for interim trail use/rail banking and for a public use condition.¹ In the same decision, the Board imposed four environmental conditions: two stormwater conditions, an archaeological condition, and a National Geodetic Survey (NGS) consultation condition.² The negotiating period under the NITU was extended several times, with the latest extension expiring on April 1, 2010.

On March 29, 2010, the City filed another request to extend the NITU negotiating period, until October 1, 2010.³ The City states that it and its designated representatives have attempted with due diligence and in a timely manner to secure an interim trail use agreement with NSR. The City adds that NSR has performed an appraisal for the property on which an agreement hinges and that an initial and subsequent meetings have been held. The City further states that in light of the approaching deadline and the need for further negotiations, another extension of the negotiating period is needed. On March 30, 2010, NSR filed a letter stating that it has not

¹ The public use condition expired on January 4, 2007.

² By decision served on November 1, 2006, the stormwater conditions and the archaeological condition were removed. The NGS consultation condition, however, remained in effect.

³ Although the request slightly exceeds the customary request of 180 days, the Board has granted such requests in the past. See, e.g., Union Pacific Railroad Company—Abandonment Exemption—In Lancaster County, NE, Docket No. AB 33 (Sub-No. 181X) (STB served June 14, 2002).

consummated the abandonment, that it continues to negotiate with the City for an interim trail use agreement, and that it consents to the extension. Additionally, NSR requests an extension of the consummation notice filing deadline until 60 days after the expiration of the extended NITU negotiating period (until November 30, 2010).⁴

Where, as here, the carrier has not consummated the abandonment at the end of the previously imposed negotiating period and has indicated its willingness to continue negotiations, the Board retains jurisdiction, and the NITU negotiating period may be extended. Under the circumstances, further extension of the negotiating period is warranted. See Birt v. STB, 90 F.3d 580, 588-90 (D.C. Cir. 1996); Grantwood Village v. Missouri Pac. R.R. Co., 95 F.3d 654, 659 (8th Cir. 1996). Accordingly, the NITU negotiating period will be extended until October 1, 2010. The deadline for NSR to file a notice of consummation will be extended until November 30, 2010 pursuant to 49 C.F.R. § 1152.29(e)(2).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The City's request to extend the NITU negotiating period is granted.
2. NSR's request to extend the time to exercise the abandonment authority is granted.
3. The negotiating period under the NITU is extended to October 1, 2010.
4. The authority to abandon must be exercised on or before November 30, 2010.
5. This decision is effective on its date of service.

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

⁴ Under 49 C.F.R. § 1152.29(e) (2), a railroad may, for good cause shown, file a request for an extension of time to file a notice of consummation in abandonment proceedings. Because the same provision permits the railroad to file a notice of consummation within 60 days after expiration of a legal or regulatory barrier, such as a trail use condition, it is not clear that NSR needs a separate extension of the deadline for filing a notice of consummation in this situation. NSR's request for that extension will nonetheless be granted.