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SERVICE DATE – LATE RELEASE DECEMBER 29, 2011

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 565 (Sub-No. 17X)

NEW YORK CENTRAL LINES, LLC—ABANDONMENT EXEMPTION—IN DUTCHESS  
COUNTY, N.Y.

Decided: December 27, 2011

This decision reopens this proceeding and issues a new notice of interim trail use for a portion of the line sought to be abandoned.

By decision and notice of interim trail use or abandonment (NITU) served on October 15, 2004 (October 2004 decision), the Board, under 49 U.S.C. § 10502, exempted from the prior approval requirements of 49 U.S.C. § 10903 the abandonment by New York Central Lines, LLC (NYC), of approximately 4.7 miles of railroad line between milepost QCO 0.0 and milepost QCO 3.2 and between milepost QCK 29.5 and milepost QCK 31.0, in the City and Town of Poughkeepsie, Dutchess County, N.Y. (the line).<sup>1</sup> The October 2004 decision included a NITU under the National Trails System Act, 16 U.S.C. § 1247(d), and 49 C.F.R. § 1152.29 authorizing a 180-day period for Dutchess County to negotiate an interim trail use/rail banking agreement with NYC for the right-of-way (ROW) (October 2004 NITU). The October 2004 decision also imposed several environmental conditions.

By decision and NITU served on August 26, 2009, a second NITU was issued for Poughkeepsie-Highland Bridge Co., Inc., d/b/a Walkway Over the Hudson (Walkway) to negotiate an interim trail use/rail banking agreement with CSXT<sup>2</sup> for a 0.5-mile portion of the 4.7-mile ROW between milepost QCK 29.5 and milepost QCK 30.0. By letter filed on September 10, 2009, CSXT stated that Walkway and CSXT had entered into a Purchase and Sale Agreement for the 0.5-mile portion to be transferred to Walkway.

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<sup>1</sup> The October 2004 decision also embraced Docket No. AB 873X, New York & Eastern Railway, LLC—Discontinuance Exemption—in Dutchess County, N.Y., and Docket No. AB 55 (Sub-No. 652X), CSX Transportation, Inc.—Discontinuance Exemption—in Dutchess County, N.Y., in which New York and Eastern Railway, LLC, and CSX Transportation, Inc. (CSXT), sought an exemption to discontinue service over the line.

<sup>2</sup> CSXT is the successor to NYC. See CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc., FD 33388 (Sub-No. 94) (STB served Nov. 7, 2003) (authorizing consolidation of NYC within CSXT).

Meanwhile, the NITU negotiating period for the remaining 4.2 miles of the ROW (between milepost QCO 0.0 and milepost QCO 3.2 and between milepost QCK 30.0 and milepost QCK 31.0) under the original October 2004 NITU was extended several times, most recently until September 14, 2010.<sup>3</sup>

On December 5, 2011, Walkway late filed a request for issuance of a NITU for an approximately 1.0 mile-long segment of the line between milepost QCK 30.0 and QCK 31.0.<sup>4</sup> In support of its request, Walkway asserts that CSXT has not complied with certain environmental conditions imposed in the October 2004 decision, and that one of the conditions required CSXT to complete the NYDS Coastal Management Program Federal Consistency Assessment (NYDS Coastal Management condition), which Walkway asserts CSXT has not done. Walkway contends that this condition is a regulatory or legal barrier to consummation and that the consummation deadline therefore will not occur until 60 days after CSXT complies with the condition. Walkway thus argues that the abandonment authority is still in effect, that CSXT has not consummated the abandonment, and that the 1.0-mile line segment remains eligible for the issuance of a NITU.

In a response filed on December 6, 2011, CSXT concurs that it has not complied with the conditions imposed in the October 2004 decision and has not consummated the abandonment of the rail line between milepost QCO 0.0 and milepost QCO 3.2 and between milepost QCK 30.0 and milepost QCK 31.0. Additionally, CSXT agrees to negotiate interim trail use/rail banking with Walkway for the 1.0-mile segment between milepost QCK 30.0 and milepost QCK 31.0.

Trail use requests may be accepted as long as the Board retains jurisdiction over the ROW and the carrier is willing to enter into negotiations. That is the case here. Although many consultation conditions typically are not regulatory barriers to consummation, the NYDS Coastal Management condition, which requires consultation with the New York Department of State, Coastal Management Program, may affect land or water uses within a coastal zone (49 U.S.C. § 1105.9)), and thus is a barrier to consummation in this case. See Puget Sound & Pac. R.R.—Aban. Exemption—in Grays Harbor Cnty, Wash., AB 1023 (Sub-No. 1X), slip op. at 4

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<sup>3</sup> See N.Y. Central Lines, LLC—Aban. Exemption—in Dutchess Cnty, N.Y., AB 565 (Sub-No. 17X) (STB served April 5, 2010).

<sup>4</sup> The notice instituting an exemption proceeding, which was served and published in the Federal Register on July 19, 2004 (69 Fed. Reg. 43,054), provided that requests for trail use/rail banking were to be filed by August 9, 2004. However, in Abandonment & Discontinuance Of Rail Lines & Transportation Under 49 U.S.C. § 10903, 1 S.T.B. 894 (1996) and 2 S.T.B. 311 (1997), the Board retained the policy of accepting filings after the due date when good cause is shown. Because there is no indication that Walkway's late-filed request will prejudice any party, it will be accepted. See Wheeling & Lake Erie Ry.—Aban. Exemption—in Starke Cnty., Ohio, AB 227 (Sub-No. 10X), slip op. at 1 n.1. (STB served Nov. 7, 1997).

(STB served Sept. 13, 2011). Because CSXT has not yet complied with that condition, the abandonment authority remains in effect and cannot yet be consummated, and the Board retains jurisdiction over the line. And, as noted above, CSXT has agreed to negotiate with Walkway regarding the 1.0-mile segment.

In its request, Walkway has included a statement of willingness to assume full financial responsibility for the management of, for any legal liability arising out of the transfer or use of, and for the payment of any and all taxes that may be levied or assessed against, the ROW, as required at 49 C.F.R. § 1152.29, and has acknowledged that the use of the ROW for trail purposes is subject to possible future reconstruction and reactivation of the line for rail service.

Because CSXT agrees to Walkway's request for a new NITU and Walkway's request complies with the requirements of 49 C.F.R. § 1152.29, a new 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, CSXT may fully abandon the 1.0-mile line segment. See 49 C.F.R. § 1152.29(d)(1). Use of the ROW for trail purposes is subject to any future use of the property for restoration of railroad operations.

This action will no significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened.
2. Walkway's late-filed request for a NITU under 16 U.S.C. § 1247(d) is granted.
3. Upon reconsideration, the October 2004 decision exempting the abandonment of the line described above is modified to the extent necessary to implement interim trail use/rail banking as set forth below to permit Walkway to negotiate with CSXT for a period of 180 days commencing from the service date of this decision and notice (until June 26, 2012) for trail use for the 1.0-mile segment of the line between milepost QCK 30.0 and QCK 31.0.
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 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 the payment of any and all taxes that may be levied or assessed against, the ROW.
5. Interim trail use/rail banking is subject to any future use of the property for restoration of railroad operations and to the user's continuing to meet the financial obligations for the ROW.

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 June 26, 2012, interim trail use may be implemented. If no agreement is reached by that time and there are no legal or regulatory barriers to consummation, CSXT may fully abandon the 1.0 line segment between milepost QCK 30.0 and QCK 31.0. See 49 C.F.R. § 1152.29(d)(1).

8. This decision is effective on its service date.

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