12 March 2007
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Memorandum to Secretary (for e-filing)
Surface Transportation Board

Re: Chillicothe-Brunswick Rail Maintenance)
Authority -- Discontinuance Exemption --) AB 1001X
Livingston, Linn and Chariton Counties, MO)

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Enclosed for e-filing please find a Joint Motion to Issue Notice of Interim Trail Use on behalf of CBRMA, Motive Rail and City of Chillicothe. The motion seeks timely reconsideration of a statement at slip. op. 2 n.3 in the Board's February 23, 2007, decision in this proceeding, and issuance of a NITU.

BEFORE THE SURFACE TRANSPORTATION BOARD

Chillicothe-Brunswick Rail Maintenance Authority -- Discontinuance Exemption -- Livingston, Linn and Chariton Counties, MO	)))	AB 1001X

Joint Motion
to Issue Notice of Interim Trail Use

Chillicothe-Brunswick Rail Maintenance Authority (CBRMA), Motive Rail,[1] and City of Chillicothe (City) jointly move for issuance of a Notice of Interim Trail Use (NITU) in the above-captioned AB 1001X proceeding for the railroad line involved in this proceeding from Milepost 226 (City of Chillicothe) to Milepost 188.7 (near Brunswick). In the alternative, CBRMA, Motive Rail and City move for such relief in AB 1001X as to MP 218.25 to MP 188.7, and issuance of a condition providing that the Board reserves jurisdiction in AB 1001X to authorize railbanking of MP 226 to MP 218.25 when and if Motive Rail discontinues service over that portion.

This motion is tendered within the time frame for timely motions for reconsideration (expiring March 15), for the limited purpose solely of issuing a NITU. City of Chillicothe previously submitted its "statement of willingness" and both CBRMA and Motive Rail have previously stated their consent. For the reasons stated below, all parties concur that a NITU should be issued. In light

[1] Motive Rail participates in this motion to show its support for the relief sought. Motive Rail sought discontinuance of operating rights over MP 218.25 to MP 188.7 in AB 993X, filed coterminously with CBRMA's AB 1001X proceeding.

of the clear precedent supporting such an action, the parties further request that the NITU be issued expeditiously so that the rail corridor may be managed efficiently commencing with the imminent spring construction season.

1. Issuance of NITU in Discontinuance Proceeding

In this Board's Notices in AB 993X and AB 1001X granting exemption authority for the two discontinuances, this Board included some customary language in discontinuance exemption proceedings to the effect that railbanking conditions and environmental documentation are not "appropriate."[2] CBRMA, Motive Rail and City do not take umbrage with that representation as applied in most discontinuance situations.[3] However, in the

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[2] E.g., CBRMA Decision in AB 1001X, served Feb. 23, 2007, slip op. p. 2, n.3 ("[b]ecause this is a discontinuance proceeding and not an abandonment, trail use/railbanking and public use conditions are not appropriate. Likewise no environmental or historical documentation is required ...."). As to environmental and historical documentation, see note 3 infra.

[3] Although the Board's decisions in AB 993X and AB 1001X served February 3 suggest that no environmental or historical documentation "is required here" (e.g. AB 1001X decision, slip at 2 n.3), full environmental and historical documentation in fact was required. This Board's Section on Environmental Analysis (SEA) "determined that an [Environmental Assessment] is appropriate here because the line will pass out of the Board's jurisdiction as a result of the proposed discontinuances, if approved." Environmental Assessment in STB Dkts. AB 993X and AB 1001X, served Feb. 27, 2007, p. 2 n.4. Because the Office of Proceedings directed CBRMA and Motive Rail to SEA for a determination on whether to prepare environmental and historic documentation, and because SEA advised that CBRMA and Motive Rail do so in accordance with SEA's determination manifest in the subsequent Environmental Assessment, Motive Rail and CBRMA

circumstances here, the relevant precedent clearly supports issuance of a NITU. It follows that the statement in AB 1001X, slip op. at p. 2 n. 3, suggesting railbanking is not "appropriate" should be removed and a NITU issued.

The leading case construing 16 U.S.C. § 1247(d) is State of Vermont and Vermont Railway, Inc. -- Discontinuance of Service Exemption -- in Chittenden County, VT, AB-265 (Sub-no. 1X), 3 ICC 2d 903, served July 7, 1987, aff'd, Preseault v. ICC, 853 F.2d 145 (2d Cir. 1988), aff'd, 494 U.S. 1, 110 S.Ct. 914 (1990). In that case, Rutland Railway Corporation obtained ICC abandonment authority for its rail properties in 1962. In 1964, State of Vermont acquired those properties but not as a common carrier (i.e., not subject to ICC's prior approval for entry or exit). At the same time, ICC approved Vermont Railway's application to lease and to operate the line. Rail use ceased in 1975. Disputes subsequently broke out concerning use and title to the right of way. Several adjoining landowners sought an adverse abandonment determination in respect to the railroad corridor. State of Vermont and Vermont Railway responded in part by filing a notice of exemption for discontinuance of Vermont Railway's operating rights. ICC authorized discontinuance, but in the same decision [see 51 Fed. Reg. 454 (Jan. 6, 1986)] authorized application of the Trails

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prepared environmental and historic reports, and complied with all relevant notification requirements specified in Part 1105.

Act, 16 U.S.C. § 1247(d).

The agency very clearly held that the Trails Act could be applied in the kind of discontinuance proceeding involved in the State of Vermont and Vermont Railway case. In light of ICC's 1964 determination that State of Vermont was properly a non-common carrier owner, ICC specifically concluded that "the only authority necessary ... to abandon the line is authority for Vermont Railway to discontinue its operations." State of Vermont and Vermont Railway, supra, AB-265 (Sub.-no. 1X) served July 7, 1987, at note 1. But City of Burlington (Vermont) sought use of the right of way for a trail. The State of Vermont agreed to lease it to the City for that purpose. The parties accordingly sought application of 16 U.S.C. § 1247(d). In response, ICC authorized trails use when it issued the initial discontinuance authorization. See 51 Fed.Reg. 454 (Jan. 6, 1986). Adjacent property owners claiming reversionary interests frustrated by application of 16 U.S.C. § 1247(d) petitioned for a stay, arguing among other things that Trails Act should not be applied in a discontinuance exemption proceeding. This Board's predecessor denied the stay request in a decision in AB 265 (Sub-no. 1X), served Feb. 7, 1986. ICC explained that

> "[t]he State of Vermont was not issued a certificate of public convenience and necessity and did not become a common carrier. Therefore the Commission will not issue another abandonment

> certificate for this line, but may approve an application or exemption to discontinue service. Under the unusual circumstances of this case then, an exemption to discontinue service is the equivalent of an abandonment exemption for purposes of imposing a Trails Act condition. The Commission therefore properly considered the Trails Act in this proceeding."

Decision, AB 266 (Sub-No. 1X), served Feb. 7, 1986, slip. op. at 2. ICC reached the same result on further reconsideration. 3 ICC 2d 903. The Second Circuit and then the Supreme Court subsequently upheld this result. Subsequent precedent applies this result. E.g., State of Vermont and Vermont Railway -- Discontinuance Exemption -- over North Burlington Branch, AB 265 (Sub-no. 3X), 58 Fed.Reg. 36993 (July 9, 1993) (NITU in discontinuance proceeding under similar circumstances).

In the case at bar, the facts are strikingly similar in all material ways to that in State of Vermont and Vermont Railway. As set forth in footnote 1 of the Notice of Exemption filed by Motive Rail in AB 993X and by CBRMA in AB 1001X, Norfolk & Western obtained abandonment authority for its entire Omaha Branch (including the portion at issue here) in 1983. Green Hills Regional Planning Commission[4] purchased the line through its not-

[4] Green Hills Regional Planning Commission is "a voluntary association of local governments" that "works on projects intended to foster improved quality of life throughout all

for-profit development arm (Green Hills Rural Development, Inc.), but not as a common carrier. ICC ruled that it was therefore not subject to prior approval requirements, in the same fashion as State of Vermont. See Green Hills Rural Development, Inc. and Chillicothe Southern Railroad Co. -- Exemption from 49 U.S.C. § 10901, et al., F.D. 30657, served Jan. 10, 1986.

Green Hills leased the line to an operator (originally Northern Missouri Railroad, but those rights were assigned to Chillicothe Southern Railroad). In a fashion similar to ICC's authorization of Vermont Railway's lease, the CSR lease rights were authorized by ICC in the above-referenced Decision in F.D. 30657. CSR subsequently assigned its rights to CBRMA, in a transaction authorized by ICC in CBRMA -- Lease and Operation Exemption -- Green Hills Rural Development, Inc., F.D. 34902, served Jan. 23, 1987. City of Chillicothe acquired all Green Hills interests in the property (but not as common carrier) in a deed issued on December 31, 2003.

It follows that City of Chillicothe stands in the same position as State of Vermont in State of Vermont and Vermont Railway, Inc., supra. Both acquired rail property after abandonment authorization but not as common carriers. Similarly, CBRMA stands in the same position as Vermont Railway -- as an

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communities within the 11 county 'Green Hills' area." See www.ghrpc.org.

operator pursuant to a lease subject to ICC (now STB) entry and exit jurisdiction. Like State of Vermont, City of Chillicothe as owner supports and seeks preservation of the right of way via issuance of a NITU. CBRMA and Motive Rail support and consent to issuance of a NITU. As in State of Vermont and Vermont Railway, Inc., a NITU should be issued.

In ICC's Policy Statement on Rails to Trails Conversions, Ex Parte No. 274 (Sub-no. 13B), served Jan. 29, 1990,[5] ICC explained that

> "The Commission has applied the Trails Act broadly. The Commission has read the Trails Act mandate broadly, [n.20] in light of Congress' direction to 'encourage the development of additional trails,'" citing H.R. Rep. No. 28, 98th Cong., 1st Sess. at 8 (1983).

The "note 20" referenced in the above quote from ICC's policy statement lists two examples of ICC action showing that the Commission applied the Trails Act mandate broadly. The two examples specifically include State of Vermont and Vermont Railway, Inc., supra, 3 ICC2d 903 (1987), and Wisconsin and Calumet Railroad Company, Inc. -- Notice to Terminate Modified Certificate and to Invoke Interim Trail Use, F.D. 30724 (Sub-no. 1), served August 8, 1989. ICC in its citation to State of Vermont and Vermont Railway

[5] The policy statement was issued in response to a directive from Congress.

was obviously underscoring the applicability of the Trails Act in discontinuances involving leasehold interests over railroads owned by non-common carriers. The policy statement accordingly supports application of the Trails Act in lease discontinuance situations involving non-common carrier railroad owners.

In response to arguments that interim "trails use" is only permissible in abandonment proceedings as opposed to discontinuance proceedings, the ICC has noted

> "that the trails use process has been permitted in a proceeding exempting the discontinuance of operations by a carrier over a leased line owned by a noncarrier."

Boston & Maine Corporation -- Exemption -- Discontinuance of Service in Essex County, MA, AB 32 (Sub-no. 37X), served June 17, 1987, citing State of Vermont and Vermont Railway, Inc., supra, notice served January 6, 1986. As already noted, ICC subsequently applied this precedent in AB 265 (Sub-no. 3X), 58 Fed. Reg. 36993 (July 9, 1993). This confirms that there is a recognized exception to the general statement that the Trails Act is not applied in discontinuances. That exception encompasses the "unusual" situation in which a leasehold operating right is being discontinued over a non-common carrier owner's railroad, and the non-common carrier owner consents to application of the Trails Act.

CBRMA's operating rights were pursuant to a lease arrangement for a line owned by such a non-common carrier as manifest in CBRMA

-- Lease and Operation Exemption -- Green Hills Rural Development, Inc., F.D. 34902, served Jan. 23, 1987. While the trails use process may not be applicable in run-of-the-mill discontinuance proceedings, the process is appropriately applied when the Board is entertaining the discontinuance of operations by a carrier over a leased line owned by a non-common carrier. It follows that STB has sufficient jurisdiction in the circumstances to issue a NITU based on CBRMA's discontinuance of its leasehold operating rights over a government non-carrier. Indeed, as ICC held in State of Vermont and Vermont Railway, supra, served Feb.7, 1996, in such situations, "an exemption to discontinue service is the equivalent of an abandonment exemption for purposes of imposing a Trails Act condition." As in the State of Vermont and Vermont Railway decisions, the owner as well as the operating railroad has consented to and supports issuance of a NITU. A NITU is therefore appropriate.[6]

This conclusion is also supported by ICC's policy statement reference (by way of the citation to Wisconsin and Calumet Railroad Company, Inc.) to its policy allowing NITU's to be issued upon termination of modified certificates. Modified certificates

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[6] Because Motive Rail's relationship to City of Chillicothe is in the form of a contract and is not denominated a lease, City, Motive Rail and CBRMA join in supporting issuance of a NITU in the CBRMA proceeding, which does involve a leasehold interest. This moots any need to consider whether the Trails Act may be applied to Motive Rail's contractual interest.

authorize operating rights over abandoned lines owned by state or local governments. Under the modified certificate regulations (49 C.F.R. § 1150.31, et seq.), the state and local government is not a common carrier and has no common carrier obligations. The main difference between a modified certificate situation and the case at bar is that under a modified certificate, the operator may condition discharge of its common carrier obligations upon payment of subsidies, whereas here, CBRMA's common carrier obligation was unconditional. In addition, termination of a modified certificate is automatic upon filing a 60-day notice, whereas discontinuance of a regulated service obligation requires a proceeding equivalent in most respects to an abandonment proceeding of some sort. But neither difference suggests a different result in terms of the Trails Act process; if any thing, the grounds for allowing the Trails Act process in discontinuances of unrestricted common carrier obligations under leases over non-carrier property are stronger than for notice termination of often restricted obligations over non-carrier property in the modified certificate context.

2. NITU for All or a Portion and Possible "Tillamook Condition"

CBRMA has sought discontinuance authority for all its obligations, from MP 226 (City of Chillicothe) to MP 188.56 (near Brunswick). Motive Rail continues to serve MP 226 to MP 218.25, and has sought discontinuance authority (in AB 993X) only for MP

218.25 to MP 188.7.

CBRMA's leasehold interest covered MP 226 to MP 188.56. If the Board applies past precedent allowing the trails act process to be applied to such leasehold interests, then there is one further question: whether and how to apply the process to the portion of line from MP 226 to MP 218.25 (where Motive Rail continues to operate).

Motive Rail, CBRMA, and the City believe that the Board may apply the Trails Act at this time to the portion from MP 226 to MP 218.25. This will not adversely impact Motive Rail's contract with the City, nor impact in any way Motive Rail's ability to discharge its common carrier obligation. Just as the Board has permitted rail operators to obtain modified certificates to operate on Trails Act rights of way,[7] there should be no obstacle to that outcome here. Just as in the modified certificate context, the government owner of the right of way has consented to both the Trails Act process, and (although itself not subject to common carrier obligations) has contracted with an operator providing such operations.

Nonetheless, there are numerous cases which indicate that the

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[7] For example, City of Seattle owns a railbanked right of way (see Sea Lion Railroad -- Abandonment Exemption petition -- in Ballard, City of Seattle, AB 554X, served Sept. 18, 1998) over which Ballard Terminal Railroad provides freight rail service via a modified certificate. See Ballard Terminal Railroad Company -- Modified Rail Certificate, F.D. 33594, served Feb. 26, 1999.

Trails Act process is premature until all rail operating rights have been discontinued. E.g., C&NW -- Abandonment Exemption -- in Hennepin County, MN, AB 1 (Sub-no. 231X), served June 19, 1990 (premature to consider Trails Act and other conditions since Soo Line still had trackage rights). Should the Board conclude that it is premature to apply 16 U.S.C. § 1247(d) to the line from MP 226 to MP 218.25, then thought should be given to ensuring that the Board has jurisdiction to impose Trails Act conditions on that portion of the line when and if Motive Rail's service over it should discontinue.

ICC when apprised would take steps to afford interested parties an opportunity to invoke the Trails Act when and if remaining operating rights were ever discontinued. One means to do this is to impose what we will call here "Tillamook conditions." These are conditions stating that the Board retains jurisdiction to impose Trails Act conditions when the last operating rights are discontinued. In Southern Pacific Transp. Co. -- Abandonment -- Tillamook Branch, AB 12, (Sub-no. 108), served August 28, 1986, Southern Pacific (SP) proposed abandonment of a line over which the Port of Tillamook held local trackage rights. SP represented that it planned to enter into a short term lease with the Port if granted abandonment authority, with the Port and State of Oregon having an option to purchase if operations worked out. It was unclear whether this lease itself would be exempt from regulation

or not, so Rails to Trails Conservancy requested that the Board reserve jurisdiction to apply the trails process should arrangements for continued rail service not work out. ICC agreed specifically to reserve jurisdiction to allow the Trails Act process to proceed, and such a condition would appear generally appropriate wherever the Board otherwise may lack authority at some future time despite current continuation of rail service.

Thus, if (1) the Board feels that it may not appropriately issue a NITU at this time for MP 226 to MP 218.25 due to Motive Rail's continued operation on that portion of the line, and if (2) the Board believes there is any chance that it may lack authority in the future to apply the trails process due to Motive Rail's operations being based on a contract rather than a lease, then the parties request that the Board issue a condition in AB 1001X reserving jurisdiction to apply the Trails Act to MP 226 to MP 218.25 should Motive Rail seek discontinuance authority.

In short, under applicable precedent, the AB 1001X proceeding is an appropriate situation in which to apply 16 U.S.C. § 1247(d). It also may be the last opportunity for application of the statute. It should be applied to all of MP 226 to MP 188.7 at this time, or at least to MP 218.25 to MP 188.7 with the Board reserving authority to apply it to MP 226 to MP 218.25 when and if Motive Rail seeks to discontinue operations on that segment.

3. National Transportation Policy

As this Board's precedents recognize, 16 U.S.C. § 1247(d) evinces a Congressional policy to 'encourage the development of additional trails,'" Policy Statement, supra, citing H.R. Rep. No. 28, 98th Cong., 1st Sess. at 8 (1983). More specifically, the Supreme Court has stated that application of 16 U.S.C. § 1247(d) serves two purposes: (1) it "assist[s] recreation[al] users by providing opportunities for trail use on an interim basis" and (2) it "preserve[s] established railroad rights-of-way for future reactivation of rail service" thus "serv[ing] to protect rail transportation corridors, and to encourage energy efficient transportation use." Preseault v. ICC, supra, 494 U.S. at 17-18, 110 S.Ct. at 925.

Both these objectives would be served by preserving the rail corridor at issue here pursuant to 16 U.S.C. § 1247(d). The rail corridor at issue trends southeast out of Chillicothe in the direction of Brunswick, passing through, adjacent to, or at least near to Swan Lake National Wildlife Refuge, Pershing State Park, Cordgrass Bottoms Natural Area, Fountain Grove Conservation Area, and other wildlife or conservation-worthy facilities.[8] Preservation of the rail corridor would provide not only a recreational or commuter trail, but also a corridor for wildlife to travel between some of the aforementioned conservation areas,

[8] See Appendix D to the Environmental Report served by Motive Rail and CBRMA in AB 993X and AB 1001X.

contributing to biological diversity.

But preservation of the railroad corridor for future use is justifiable purely on rail transportation grounds. City's rail corridor intersects a line now owned by Iowa, Chicago & Eastern (at Chillicothe), two BNSF lines (at Whitham and Sumner) and Norfolk Southern (at Brunswick). It is a plausible bridge carrier between those lines should traffic volumes build to the point that these carriers desire switching without running an additional several hundred miles into and out of Kansas City.

Although the high cost of rehabilitation (the latest available estimate was in excess of $ 8 million due to flood damage) makes such use uneconomic at this time, the strategic location of this rail corridor is well worth preserving for possible future use. Of course, "Congress ... believed that every line is a potentially valuable national asset that merits preservation even if no future rail use is currently foreseeable." Preseault, supra, 494 U.S. at 19, 110 S.Ct. at 926. Thus, the question on application of the trails process does not turn on whether reactivation is currently foreseeable or not. What one can say here is that this line makes sense to preserve, and application of 16 U.S.C. § 1247(d) is a well-established method to do so at minimum cost to current rail carriers and their customers.

Application of the trails process here is also fully compatible with national rail transportation policy. It will

promote a safe and efficient rail transportation system not only at this time, but also for the future. 49 U.S.C. § 10101(3). It will reduce regulatory barriers to use of the line for rail purposes in the future. Id. § 10101(7). It will promote energy conservation. Id. § 10101(14).

Finally, this is not a case of missed opportunity to railbank. The applicable and contemporaneous precedent[9] at the time Green Hills (the City's predecessor in interest) acquired the property by exemption indicated that the parties could apply 16 U.S.C. § 1247(d) to the line if and when the regulated leasehold operating interest that Green Hills had entered into with its rail operating company were discontinued. There was thus no reason -- no notice in fact or implied from then existing precedent -- that anyone could have or should have sought application of 16 U.S.C. § 1247(d) at any prior time. Now, however, the leasehold interest is being discontinued. The time is at hand for parties who wish to preserve the railroad corridor for future rail reactivation and for interim trail use. The City wishes to preserve the right of way and has sought the application of 16 U.S.C. § 1247(d) to that end.[10]

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[9] The relevant State of Vermont and Vermont Railway decision applying the Trails Act to discontinuance of a leasehold interest was issued on January 6, 1986. This predated the exemption decision under which Green Hills acquired its interest as a non-common carrier owner.

[10] City of Chillicothe is purchaser from Green Hills, which in turn was purchaser from Norfolk & Western (NS), owns the railroad corridor. However, the applicable title report only

Conclusion

For the reasons stated, applicable precedent confirms this agency's authority to apply 16 U.S.C. § 1247(d) to the line in question. The situation at bar is a previously recognized exception to the general rule in discontinuance proceedings. This Board should apply 16 U.S.C. § 1247(d) as requested by the parties.

Respectfully submitted,

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Certificate of Service

There are no parties other than the entities participating in this filing. Representatives of each entity have received a copy of this pleading as indicated.

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insures a railroad interest. It is therefore possible that there are reversionary interest holders who will claim easement extinguishments or base fee reversions immediately upon consummation of the discontinuance authorizations granted to Motive Rail and CBRMA, unless the Trails Act is applied. This is an instance where application of the Trails Act is needed, as apparently was the situation in State of Vermont and Vermont Railway, supra.