

SERVICE DATE – FEBRUARY 12, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 290 (Sub-No. 390X)

NORFOLK SOUTHERN RAILWAY COMPANY, L.L.C.—
ABANDONMENT EXEMPTION—IN DAYTON, MONTGOMERY COUNTY, OHIO

Decided: February 11, 2021

Norfolk Southern Railway Company (NSR) filed a verified notice of exemption under 49 C.F.R. part 1152 subpart F—Exempt Abandonments and Discontinuances of Service to abandon approximately 6.5 miles of rail line: (a) between milepost ZX 12.1 and milepost ZX 15.4; and (b) between milepost ZQ 0.0 and milepost ZQ 3.2 in Dayton, Montgomery County, Ohio (the Line). Notice of the exemption was served and published in the Federal Register on April 4, 2017 (82 Fed. Reg. 16,469).

By decision and notice of interim trail use or abandonment (NITU) served on May 3, 2017, the proceeding was reopened; two environmental conditions were imposed; a public use condition was imposed; and a 180-day period was prescribed for the City of Dayton to negotiate an interim trail use/rail banking agreement with NSR under the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d). By a series of later decisions, the negotiating period under the NITU was extended, most recently until April 6, 2021.¹

By letter filed on January 22, 2021, NSR advised the Board that it no longer wishes to continue trail use negotiations. (Ltr. 1.) NSR further states that it desires to preserve the Line for future rail service and that, to accomplish this objective, NSR wishes to exercise the lesser-included discontinuance authority for the Line rather than abandonment authority. (Id. at 2.)² NSR acknowledges that if it later decides to abandon the Line, it will have to refile for abandonment authority. (Id.)

¹ The public use condition, which is limited by statute to 180 days, expired on October 31, 2017.

² The letter stated that NSR wished to terminate NITU negotiations effective immediately and desired to make its discontinuance effective January 23, 2021. However, an outstanding condition under the Trails Act constitutes a “legal or regulatory barrier to consummation” that must expire or be satisfied or removed before abandonment authority is reinstated and the 60-day time period prescribed in 49 C.F.R. § 1152.29(e)(2) begins to run. Accordingly, because the NITU condition in this case does not expire until April 6, 2021, the condition must first be vacated.

Under the Trails Act, the trail use program is voluntary and consensual between the railroad and the trail sponsor.³ Here, NSR has advised that it no longer wishes to negotiate under the NITU. Therefore, the NITU will be vacated and NSR's abandonment authority will be reinstated. NSR may consummate abandonment of the Line by April 13, 2021, subject to the environmental conditions previously imposed. See 49 C.F.R. § 1152.29(e)(2).

NSR has also advised that it wishes to consummate only a discontinuance of service over the Line, rather than abandonment. If a rail carrier wishes to discontinue service over a rail line after it has been granted authority to abandon but before it has consummated abandonment, it may exercise the lesser-included authorization of discontinuance. See, e.g., BNSF Ry.—Aban. Exemption—in Hamilton & Merrick Cntys., Neb., AB 6 (Sub-No. 408X), slip op. at 2 (STB served Aug. 26, 2008); Cent. Tex. & Colo. River Ry.—Discontinuance Exemption—in McCulloch, San Saba, Mills, & Lampasas Cntys., Tex., AB 1272X, slip op. at 3 n.8 (STB served Nov. 20, 2020).

If NSR chooses to exercise the lesser-included discontinuance authority, it must file a notice of consummation to that effect. If NSR does not timely file a notice of consummation, either of abandonment or of discontinuance, by April 13, 2021, and there are no legal or regulatory barriers to consummation, the authority will automatically expire.

It is ordered:

1. This proceeding is reopened.
2. The NITU served on May 3, 2017 is vacated.
3. The abandonment authority issued on April 4, 2017 is reinstated. If NSR chooses to exercise that authority or the lesser-included discontinuance authority, it must file a notice of consummation by April 13, 2021.
4. This decision is effective on its service date.

By the Board, Allison C. Davis, Director, Office of Proceedings.

³ See 49 C.F.R. § 1152.29(c)(1) & (d)(1); Citizens Against Rails to Trails v. STB, 267 F.3d 1144, 1154 (D.C. Cir. 2001); Nat'l Wildlife Fed'n v. ICC, 850 F.2d 694, 699-702 (D.C. Cir. 1988); Rail Abans.—Use of Rights-of-Way as Trails, 2 I.C.C. 2d 591, 598 (1986).