

SERVICE DATE - OCTOBER 29, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-565 (Sub-No. 4X)¹

NEW YORK CENTRAL LINES, LLC—ABANDONMENT EXEMPTION—
IN VERMILLION AND WARREN COUNTIES, IN

Decided: October 26, 2001

New York Central Lines, LLC (NYC) and CSX Transportation, Inc. (CSXT) (collectively, applicants) filed a notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments and Discontinuances of Service for NYC to abandon and CSXT to discontinue service over approximately 6.12 miles of railroad between milepost QSO-5.18² near the Illinois/Indiana State line and milepost QS0-11.30 near Olin, in Vermillion and Warren Counties, IN. Notice of the exemption was served and published in the Federal Register on September 28, 2001 (66 FR 49741-42). The notice stated that the exemption would become effective on October 30, 2001, unless stayed by the Board or a formal expression of intent to file an offer of financial assistance (OFA) under 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1) was filed by October 9, 2001. On October 11, 2001, Flex-N-Gate Corporation (Flex) late-filed a formal expression of intent to file an OFA in order to purchase the entire line.³ While the Flex notice of intent was not filed on time, because applicants have not objected, Flex's late-filed notice of intent will be accepted. As a result of this filing, the effective date of the exemption was automatically stayed until November 9, 2001. On October 15, 2001, applicants filed a request for a 60-day extension in accordance with 49 CFR 1152.27(c)(2)(ii)(D), to develop and submit the required information requested by Flex. Applicants' filing has the effect of tolling the due date for filing an OFA for that period of time and similarly extending the effective date of the exemption.

The Board's Section of Environmental Analysis (SEA) served an environmental assessment (EA) in this proceeding on October 5, 2001. In the EA, SEA states that the U.S. Fish and Wildlife Service (FWS) has expressed several concerns about possible impacts during

¹ The notice of exemption served September 28, 2001, embraced STB Docket No. AB-55 (Sub-No. 597X), CSX Transportation, Inc.—Discontinuance of Service Exemption—in Vermillion and Warren Counties, IN.

² On October 1, 2001, a notice to the parties corrected the milepost designation to refer to "QSO-5.18."

³ The Board's rules state that a notice of intent to file an OFA is due 10 days after the publication of the notice of exemption in the Federal Register. 49 CFR 1152.27(c)(2).

salvage operations. FWS states that the area of the proposed abandonment contains forested and emergent wetlands at three locations, and that wetland impacts, such as draining, filling, tree-clearing, and disposal of debris, should be avoided. FWS also states that the proposed abandonment crosses Spring Creek, which is a perennial tributary of the Wabash River, and two intermittent streams, one called Spring Creek and the other unnamed, and recommends that in-channel work be avoided in the larger Spring Creek during the fish spawning season of April 1 to June 30. FWS also states that best management practices should be used to avoid or minimize runoff of sediment or toxic substances into the waterways. FWS further indicates that the Federally-listed endangered species, the Indiana bat and the bald eagle, inhabit the area of the proposed abandonment, and that tree clearing in the riparian areas should therefore be avoided during the period from April 15 to September 15. In response to FWS's concerns, SEA recommends that applicants: (1) be prohibited from conducting in-channel work in Spring Creek during the fish spawning season from April 1 to June 30, and use best management practices to avoid or minimize runoff of sediment or toxic substances into the waterways; and (2) be prohibited from conducting tree clearing in the riparian areas during the period from April 15 to September 15 to prevent adverse impacts to the Indiana bat and the bald eagle. SEA also recommends that applicants be required to avoid wetland impacts at the three forested and emergent wetland locations.

SEA states that the National Geodetic Survey (NGS) has identified three geodetic station markers that may be affected by the proposed abandonment and requests 90 days' notice to plan relocation of any markers that may be disturbed or destroyed. Therefore, SEA recommends that a condition be imposed requiring applicants to consult with the NGS and provide NGS with 90 days' notice prior to disturbing or destroying any geodetic station marker to plan for their relocation.

SEA further recommends that, in response to comments by the Natural Resources Conservation Service (NRCS), applicants be required to consult with NRCS prior to salvage operations to protect the prime farmland adjacent to the area of the proposed abandonment.

SEA initially recommended that applicants retain their interest in and take no steps to alter the historic integrity of Bridge No. 174 until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f. On October 10, 2001, applicants submitted a letter from the Indiana State Historic Preservation Officer, stating that there are no railroad related structures or archaeological resources eligible for listing in the National Register of Historic Places within the area affected. Therefore, according to SEA, the section 106 condition need not be imposed.

SEA indicated that the right-of-way may be suitable for other public use following abandonment. By petition filed on September 28, 2001, the Hoosier Rails to Trails Council, Inc. (Hoosier) filed a request for issuance of a notice of interim trail use (NITU) for the entire line under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and for a public use condition under 49 U.S.C. 10905, in order to negotiate with NYC for acquisition of the right-of-

way for use as recreational trail. Hoosier has submitted a statement of willingness to assume financial 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 payment of any and all taxes that may be levied or assessed against, the right-of-way, as required at 49 CFR 1152.29, and has acknowledged that the use of the right-of-way for trail purposes is subject to future reactivation for rail service. On October 10, 2001, applicants indicated willingness to negotiate with Hoosier for interim trail use.

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 Abandonments—Use of Rights-of-Way As Trails, 2. I.C.C.2d 591, 609 (1986). Under section 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 requested. See 49 CFR 1152.28(a)(2). Hoosier has satisfied the requirements for both a public use condition and a NITU and, therefore, imposition of both would be appropriate commencing with the effective date of the exemption. However, an OFA takes priority over any requests for a NITU or for a public use condition. Therefore, issuance and effectiveness of a NITU and a public use condition will be delayed until the OFA process has been completed. If agreement is reached on sale or subsidy of the line, public use and trail use conditions would be unnecessary and unavailable. If no OFA is filed or if no agreement is reached on the OFA, the appropriate decision and notice of interim trail use or abandonment will be issued.

As conditioned, this decision 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. Flex's late-filed notice of intent to file its OFA will be accepted.
3. Upon reconsideration of the abandonment of the line described above is subject to the conditions that applicants shall: (1) be prohibited from: (i) conducting in-channel work in Spring Creek during the fish-spawning season from April 1 to June 30; and (ii) conducting tree clearing in riparian areas between the period from April 15 to September 15 to prevent adverse impacts to the Indiana bat and the bald eagle located within the right-of-way; (2) use best management practices to avoid or minimize runoff of sediment or toxic substances into the waterways; (3) avoid wetland impacts at the three forested and emergent wetland locations; (4) consult with the NGS and provide NGS with 90 days' notice prior to disturbing or destroying any geodetic station

markers; and (5) consult with the NRCS prior to salvage operations concerning prime farmland adjacent to the area of the proposed abandonment.

4. The requests for issuance of a notice of interim trail use and for issuance of a public use condition are held in abeyance pending completion of the OFA process.

5. Applicants are directed to provide Flex with the requested information to enable FLEX to file an OFA. The deadline for Flex to file its OFA is tolled until December 28, 2001.

6. If the OFA process terminates, a decision effective on its service date will be issued to impose the notice of interim trail use and public use condition.

7. The effective date of the exemption is postponed until January 7, 2002.

8. This decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary