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SERVICE DATE - DECEMBER 10, 1999

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-563 (Sub-No. 1X)

KANSAS EASTERN RAILROAD, INC.--ABANDONMENT
EXEMPTION--IN BUTLER AND GREENWOOD COUNTIES, KS

Decided: December 6, 1999

Kansas Eastern Railroad, Inc. (KER) filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments to abandon a 44.5-mile line of railroad between milepost 438.5 at Severy, and milepost 483.0 near Augusta, in Butler and Greenwood Counties, KS. Notice of the exemption was served and published in the Federal Register on August 25, 1999 (64 FR 46471). The exemption became effective on September 24, 1999.

By decision served September 23, 1999, the exemption was made subject to the conditions that KER consult with the National Geodetic Survey (NGS) and provide NGS with 90 days' notice prior to disturbing or destroying any geodetic station markers; consult with the Kansas Department of Health and Environment in Topeka to determine if a permit is required under section 402; and retain its interest in and take no steps to alter the historic integrity of the Beaumont St. Louis and San Francisco Railroad Water Tank until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f.

By facsimile petition received on October 19, 1999, and letter petition filed October 22, 1999, Butler County (County) late-filed a request for the 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 KER for acquisition of the right-of-way for use as a recreational trail.¹ The County requests that KER be prohibited from disposing of the corridor, other than the tracks, ties, and signal equipment, except for public use on reasonable terms, and that KER be barred from removing or destroying any trail-related structures, such as bridges, trestles, culverts and tunnels, for a 180-day period from the effective date of the abandonment exemption. The County states that it needs the full 180-day

¹ The August 25 notice provided that trail use/rail banking requests had to be filed by September 7, 1999, and that requests for public use conditions had to be filed by September 14, 1999. However, in Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903, STB Ex Parte No. 537 (STB served Dec. 24, 1996, and June 27, 1997), it was stated that the Board would retain the policy of accepting filings after the due date when good cause is shown. Because there is no indication that the County's late-filed request will prejudice any party, it will be accepted. See Wheeling & Lake Erie Railway Company--Abandonment Exemption--In Starke County, OH, STB Docket No. AB-227 (Sub-No. 10X), slip op. at 1 n.1 (STB served Nov. 7, 1997).

period to review title information, complete a trail plan, and commence negotiations with KER. It 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 acknowledged that the use of the right-of-way for trail purposes is subject to future reactivation for rail service. By letter filed December 1, 1999, as supplemented by facsimile received on December 6, 1999, KER indicated its willingness to negotiate with the County for interim trail use for portions of the right-of-way between milepost 438.5 and milepost 476.4, and between milepost 476.65 and milepost 483.0. KER states that the remaining 0.25-mile segment between milepost 476.4 and milepost 476.65 is required by the State of Kansas for the reconstruction of a highway and that KER has entered into an agreement with the Secretary of the State of Kansas for the sale of that segment.

Because the County's request complies with the requirements of 49 CFR 1152.29 and KER is willing to negotiate for trail use, a NITU will be issued for the portions of the right-of-way: (a) between milepost 438.5 and milepost 476.4, and (b) between milepost 476.65 and milepost 483.0. 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, KER may fully abandon the line, provided the conditions imposed in the September 23, 1999 decision are met. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

Because KER is not willing to negotiate with the County with regard to the 0.25-mile segment between milepost 476.4 and milepost 476.65, the request for issuance of a NITU for that portion will be denied.

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 of time requested. See 49 CFR 1152.28(a)(2). The County has satisfied these requirements and, therefore, a 180-day public use condition will be imposed commencing with the effective date of the exemption.

When the need for interim trail use/rail banking and public use is shown, it is the Board's policy to impose both conditions concurrently, subject to the execution of a trail use agreement. Here, however, while both conditions will be imposed at this time, the public use condition may

extend only until March 22, 2000, while the trail use negotiation period will run until June 7, 2000. If a trail use agreement is reached on a portion of the right-of-way, KER must keep the remaining right-of-way intact for the remainder of the period for public use negotiations. Also, a public use condition is not imposed for the benefit of any one potential purchaser, but rather to provide an opportunity for any interested person to acquire the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, KER is not required to deal exclusively with the County, but may engage in negotiations with other interested persons.

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. Upon reconsideration, the notice of exemption served and published in the Federal Register on August 25, 1999, exempting the abandonment of the line described above is modified to the extent necessary to implement interim trail use/rail banking and to permit public use negotiations as set forth below, for portions of the line extending between milepost 438.5 and milepost 476.4, and between milepost 476.65 and milepost 483.0.
3. Subject to the conditions imposed in the decision served September 23, 1999, and consistent with the public use and interim trail use/rail banking conditions imposed in this decision, KER may discontinue service and salvage track and related materials. KER shall otherwise keep intact the right-of-way underlying the tracks, including bridges trestles, culverts and tunnels, until March 22, 2000, to enable any state or local government agency, or other interested person to negotiate the acquisition of the line for public use. If an interim trail use/rail banking agreement is executed before March 22, 2000, the public use condition will expire to the extent the trail use/rail banking agreement covers the same line segment.
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 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 right-of-way.
5. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligation for the right-of-way.
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.

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7. If an agreement for interim trail use/rail banking is reached by June 7, 2000, interim trail use may be implemented. If no agreement is reached by that time, KER may fully abandon the line.

8. This decision is effective on its service date.

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

Vernon A. Williams
Secretary