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SERVICE DATE - AUGUST 4, 1998

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-492 (Sub-No. 1X)

FILLMORE WESTERN RAILWAY COMPANY--ABANDONMENT EXEMPTION--
IN FILLMORE, JEFFERSON, SALINE, AND THAYER COUNTIES, NE

Decided: July 31, 1998

By decision served June 26, 1998, the Board granted Fillmore Western Railway Company (FWRY) an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon the following lines of railroad: (1) the Bruning Line, extending from milepost 10.0 near Geneva to milepost 24.5 near Bruning; (2) the Daykin Line, extending from milepost 35.8 at East Strang Junction to milepost 23.2/28.4 at Tobias and continuing to the end of the line at milepost 36.2 at Daykin; and (3) the Shickley Line, extending from milepost 37.5 near West Strang Junction to milepost 45.0 at Shickley, a total distance of 42.40 miles in Fillmore, Jefferson, Saline and Thayer Counties, NE. The exemption was scheduled to become effective on July 26, 1998.

On July 14, 1998, the Nebraska Trails Foundation, Inc. (NTF), filed a request for issuance of a notice of interim trail use (NITU) under the National Trails System Act (Trails Act), 16 U.S.C. 1247(d) and imposition of a 180-day public use condition under 49 U.S.C. 10905.¹

NTF requests that FWRY be prohibited from disposing of the corridor, other than the tracks, ties and signal equipment, except for public use on reasonable terms, and that FWRY 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. NTF states that the 180-day period is needed to assemble and review title information, and to complete a trail plan and commence negotiations with FWRY. NTF also submits a statement of willingness to assume financial responsibility for interim trail use and rail banking in compliance with 49 CFR 1152.29 and acknowledges that use of the right-of-way for trail purposes is subject to future reactivation for

¹ The notice pursuant to 49 U.S.C. 10502(b) that was served and published in the Federal Register on March 27, 1998 (63 FR 14999) provided that any request for a public use condition under 49 CFR 1152.28 or for trail use/rail banking under 49 CFR 1152.29 had to be filed no later than April 16, 1998. When good cause is shown, however, filings will be accepted after the due date. See 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). Because there is no indication that NTF's late-filed request would 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).

rail service. By facsimile transmitted July 24, 1998, FWRY indicates its willingness to negotiate with NTF for interim trail use for 120 days instead of 180 days.²

Because NTF's request complies with the requirements of 49 CFR 1152.29 and FWRY is willing to enter into negotiations, a NITU will be issued. The parties may negotiate an agreement during the 120-day period prescribed below. If the parties reach a mutually acceptable final agreement, no further Board action is necessary. Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

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.

NTF's submission meets the requirements for a public use condition prescribed at 49 CFR 1152.28(a)(2) by specifying: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) justification for the imposition of the time period requested. Accordingly, the requested 180-day public use condition will be imposed commencing from 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 execution of a trail use agreement. If no interim trail use agreement is reached within 120 days, FWRY must wait until the remainder of the 180-day public use condition has expired before it can fully abandon the lines. If a trail use agreement is reached on a portion of the right-of-way, FWRY must keep the remaining right-of-way intact for the remainder of the 180-day period to permit 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, FWRY is not required to deal exclusively with NTF, but may engage in negotiations with other interested persons.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

² The Trails Act permits only voluntary negotiations by the railroad, so a NITU can only be issued for the 120-day period agreed to by FWRY.

1. This proceeding is reopened.
2. Upon reconsideration, the decision served on June 26, 1998, exempting the abandonment of the lines described above, is modified to the extent necessary to implement interim trail use/rail banking as set forth below for a period of 120 days after the July 26, 1998 effective date (until November 23, 1998), and is subject to the condition that FWRY keep intact the right-of-way underlying the track, including bridges, trestles, culverts, and tunnels (but not track or track materials or signal equipment), for a period of 180 days after the July 26, 1998 effective date (until January 22, 1999) to enable any State or local government agency, or other interested person to negotiate for acquisition of the line for public use. If an interim trail use/rail banking agreement is executed before the 120-day expiration period specified above, the public use condition will expire to the extent the trail use/rail banking agreement covers the same line or lines.
3. 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.
4. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.
5. 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 specific date.
6. If an agreement for interim trail use/rail banking is reached by November 23, 1998, interim trail use may be implemented. However, if no agreement is reached by that time, FWRY may not fully abandon the lines until after January 22, 1999.
7. This decision is effective on the service date.

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

Vernon A. Williams
Secretary