

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 55 (Sub-No. 779X)

CSX TRANSPORTATION, INC.—ABANDONMENT EXEMPTION—  
IN TRUMBULL COUNTY, OHIO

Decided: July 6, 2018

CSX Transportation, Inc. (CSXT) filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon approximately 13.9 miles of rail line on its Newton Falls Subdivision, between milepost BGA 86.1 and milepost BGA 100.00, in Trumbull County, Ohio (the Line). Notice of the exemption was served and published in the Federal Register on May 30, 2018 (83 Fed. Reg. 24,837). The notice stated that the exemption was scheduled to become effective on June 29, 2018, unless stayed by the Board, or unless a formal expression of intent to file an offer of financial assistance (OFA) under 49 C.F.R. § 1152.27(c)(2) was filed by June 11, 2018.

On June 11, 2018, as supplemented on June 14, 2018, BDM Warren Steel Holdings, LLC (BDM) filed a notice of intent to file an OFA to purchase the Line, which automatically stayed the effective date of the exemption for 10 days, until July 9, 2018. 49 C.F.R. § 1152.27(c)(2)(i).<sup>1</sup> While the filing of the notice of intent extended the effective date of the notice of exemption by 10 days, the deadline for filing an OFA was not affected and remained June 29, 2018 (30 days from the publication of the notice of exemption). 49 C.F.R. § 1152.27(b)(2)(ii). An OFA was not filed by BDM by the June 29, 2018 deadline, see 49 C.F.R. § 1152.27(c)(2)(ii)(B), nor did BDM petition to toll the OFA deadline as permitted under 49 C.F.R. § 1152.27(c)(2)(ii)(C).

The Board's Office of Environmental Analysis (OEA) served an environmental assessment (EA) on June 4, 2018. In the EA, OEA recommended that the Board adopt a condition requiring CSXT to retain its interest in and take no steps to alter the historic integrity of all historic properties including sites, buildings, structures and objects within the project right-of-way (the Area of Potential Effect) eligible for listing or listed in the National Register of Historic Places (National Register) until the Section 106 process of the National Historic Preservation Act (NHPA), 54 U.S.C. § 306108, has been completed.

OEA issued its final EA on June 21, 2018. The final EA notes that four comments on the EA were received. First, OEA states that, by letter dated May 30, 2018, the U.S. Army Corps of

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<sup>1</sup> The City of Newton Falls, Ohio, also filed a notice of intent to file an OFA on June 11, 2018. By a decision served on June 21, 2018, however, the City's notice of intent was rejected for failing to comply with the requirements for such notices at 49 C.F.R. § 1152.27(c)(2)(i).

Engineers (the Corps) commented that it was not able to determine the number and type of aquatic resources within the area of the proposed abandonment and requested that CSXT hire a qualified wetland consultant to evaluate the area for potential jurisdictional waterways or wetlands. The Corps noted that a Section 404 permit under the Clean Water Act would be required if the salvage process resulted in any impacts to these resources. OEA states that it has since consulted with the Corps and it was agreed that a permit would not be required for the proposed abandonment if the salvage process does not result in the discharge of dredged or fill material into waters of the United States. However, because the Corps was not able to evaluate the proposed abandonment for the presence of aquatic resources, OEA recommends imposing a condition that would require CSXT to consult with the Corps prior to initiating salvage activity and comply with the Corps' reasonable requirements. Consistent with OEA's recommendation, the salvage condition recommended in the final EA and the Section 106 condition will be imposed.

OEA states that the remaining three comments were in opposition to the proposed abandonment and requested that the rail line remain in use. In response, OEA notes that filings have already been submitted to the Board either in support of continued rail service or conversion to trail use, and that CSXT has replied that it is not opposed to a 180-day public use condition and is willing to negotiate an interim trail use/rail banking arrangement, as discussed further below. In addition, two commenters referenced concerns about increased air pollution and truck traffic that they believe would occur as a result of the proposed abandonment. In response, OEA notes that the EA concludes that the proposed abandonment would not result in the diversion of rail traffic to truck traffic that could result in significant impacts to air quality or the local transportation network. (See EA at 2.)

In the EA, OEA also stated that the right-of-way may be suitable for other public use following abandonment and salvage of the Line. On May 31, 2018, the Trumbull County Commissioners (County) filed a request for issuance of a notice of interim trail use (NITU) for the Line under the National Trails System Act, 16 U.S.C. § 1247(d) (Trails Act), and 49 C.F.R. § 1152.29, and for a public use condition under 49 U.S.C. § 10905. Pursuant to 49 C.F.R. § 1152.29, the County submitted a statement of willingness to assume financial responsibility for the right-of-way and has acknowledged that the use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service. In a response filed on June 13, 2018, CSXT notified the Board that it is willing to negotiate an agreement for interim trail use/rail banking with the County.

Because the County's request complies with the requirements of 49 C.F.R. § 1152.29 and CSXT is willing to negotiate for trail use, a NITU will be issued. The parties may negotiate an agreement for the right-of-way during the 180-day period prescribed below. If an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2) and (h). If no agreement is reached within 180 days, CSXT may fully abandon the Line.

49 C.F.R. § 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service.

As noted above, the County has also requested imposition of a public use condition under 49 U.S.C. § 10905 for the Line. The County asks that CSXT be prohibited from disposing of the corridor (other than the tracks, ties, and signal equipment) except for public use on reasonable terms, for a 180-day period from the effective date of the abandonment authorization. The County also asks that CSXT be prohibited from removing or destroying potential trail-related structures such as bridges, trestles, and tunnels. The justification for their request is that these structures have considerable value for public purposes and that the 180-day period is needed to commence negotiations with CSXT.

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 Abans.—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986). Under § 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. 49 C.F.R. § 1152.28(a)(2). Because the County has satisfied these requirements, a 180-day public use condition will be imposed, requiring CSXT to keep intact the right-of-way (including trail-related structures such as bridges, trestles, culverts, and tunnels) on the Line and refrain from disposing of the corridor (other than tracks, ties, and signal equipment), commencing from July 9, 2018, the effective date of the exemption.

When proper requests for interim trail use/rail banking and public use conditions are made, 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 will expire on January 5, 2019, while the trail use negotiating period will run 180 days from the service date of this decision and notice, until January 2, 2019. If a trail use agreement is reached for a portion of the right-of-way prior to January 2, 2019, CSXT must keep the remaining right-of-way intact for the remainder of the 180-day public use condition 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, CSXT is not required to deal exclusively with the County but may engage in negotiations with other interested persons.

Finally, on June 19, 2018, the Mahoning Valley Economic Development Corporation (MVEDC) filed a letter requesting a "six-month extension of the deadlines associated with the

abandonment” in this docket. MVEDC states that it needs this time to organize a plan of action and lists potential shippers. On June 21, 2018, CSXT filed a response opposing MVEDC’s extension request. CSXT argues that the request is late-filed and does not satisfy the Board’s standard for a stay request or petition to reopen.

This decision issues a NITU and imposes, among other things, a Section 106 historic preservation condition, both of which are barriers to consummation. See Consummation of Rail Line Abans. That Are Subject to Historic Pres. & Other Env'tl. Conditions, EP 678, (STB served April 23, 2008). Therefore, notwithstanding the effectiveness of the exemption, CSXT cannot consummate the abandonment and the Line will stay under the Board’s jurisdiction while those conditions remain in place. As a result, the extension sought by MVEDC is unnecessary and will be denied as moot.

This decision, and the proposed abandonment if implemented as conditioned, 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 served on and published in the Federal Register on May 30, 2018, exempting the abandonment of the Line described above, is modified to the extent necessary to implement interim trail use/rail banking as set forth below to permit the County to negotiate with CSXT for trail use for the Line for a period of 180 days from the service date of this decision and notice, until January 2, 2019, and to permit public use negotiations as set forth below for a period of 180 days commencing from the effective date of the exemption, until January 5, 2019. The abandonment is also subject to the conditions that CSXT shall: (1) prior to commencement of any salvage activities, consult with the Corps regarding potential impacts to waters of the United States, including wetlands, and comply with the reasonable requirements of the Corps; and (2) retain its interest in and take no steps to alter the historic integrity of all historic properties including sites, buildings, structures, and objects within the project right-of-way (the Area of Potential Effect) that are eligible for listing or are listed in the National Register until completion of the section 106 process of the NHPA, report back to OEA regarding any consultations with the Ohio History Connection and the public, and not file its consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties) until the section 106 process has been completed and the Board has removed this condition.
3. Consistent with the public use and interim trail/rail banking conditions imposed in this decision and notice, CSXT may discontinue service. CSXT shall keep intact the right-of-way for the Line including potential trail-related structures on the Line such as bridges, trestles, culverts, and tunnels, for a period of 180 days, until January 5, 2019, to enable any state or local government agency, or other interested person, to negotiate the acquisition of the right-of-way

for public use. If an interim trail use/rail banking agreement is executed before expiration of the 180-day public use condition period, the public use condition will expire to the extent the trail use/rail banking agreement covers the same portion of the right-of-way.

4. If an interim trail use/rail banking agreement is reached, it must require the trail sponsor to assume, for the term of the agreement, full responsibility for: (i) managing the right-of-way; (ii) any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability); and (iii) 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 possible future reconstruction and reactivation of the right-of-way for rail service and to the trail sponsor's continuing to meet its responsibilities for the right-of-way described in paragraph 4 above.

6. If an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. See 49 C.F.R. § 1152.29(d)(2) and (h).

7. If interim trail use is implemented, and subsequently the trail sponsor intends to terminate trail use on all or any portion of the right-of-way covered by the interim trail use agreement, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

8. If an agreement for interim trail use/rail banking is reached by January 2, 2019, for the portion of the right-of-way subject to the NITU, interim trail use may be implemented. If no agreement is reached, CSXT may fully abandon the Line, subject to any outstanding conditions imposed above.

9. MVEDC's extension request is denied as moot.

10. This decision is effective on its date of service.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.