

SERVICE DATE – LATE RELEASE DECEMBER 28, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 290 (Sub-No. 394X)

NORFOLK SOUTHERN RAILWAY COMPANY—ABANDONMENT EXEMPTION—
IN AURORA, PORTAGE COUNTY, OHIO

Docket No. AB 1257X

CLEVELAND COMMERCIAL RAILROAD COMPANY, LLC—DISCONTINUANCE OF
LEASE AND OPERATION AUTHORITY—IN AURORA, PORTAGE COUNTY, OHIO

Digest:¹ This decision allows Norfolk Southern Railway Company to abandon, and Cleveland Commercial Railroad Company, LLC to discontinue service over, a line of railroad in Portage County, Ohio, subject to historic preservation and public use conditions. The decision also denies a stay request by the Ohio Association of Railroad Passengers.

Decided: December 28, 2017

On November 13, 2017, Norfolk Southern Railway Company (NSR) and Cleveland Commercial Railroad Company, LLC (CCR) (collectively, Applicants), jointly filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments and Discontinuances of Service for NSR to abandon, and for CCR to discontinue service over, approximately 5.5 miles of rail line between milepost RH 22.0 and milepost RH 27.5 in Aurora, Portage County, Ohio (the Line).² Notice of the exemption was served and published in the Federal Register on December 1, 2017 (82 Fed. Reg. 57,021). The exemption is scheduled to become effective on January 2, 2018.

The Board's Office of Environmental Analysis (OEA) served an Environmental Assessment (EA) in this proceeding on December 8, 2017. On December 11, 2017, the Ohio Association of Railroad Passengers (OARP), d/b/a All Aboard Ohio and d/b/a RESTORE, a

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² In 2009, CCR was authorized to lease and operate the Line as part of a longer, 25.3-mile line, pursuant to an agreement with NSR. See Cleveland Commercial R.R.—Lease & Operation Exemption—Norfolk S. Ry., FD 35251 (STB served May 29, 2009).

not-for profit association, requested that the Board stay the abandonment exemption, and moved to render the notice void ab initio, among other things.³ As discussed below, the Board will deny the stay request.⁴

DISCUSSION AND CONCLUSIONS

Historic and Environmental Review. In its December 8, 2017 EA, OEA recommended that a historic preservation condition be imposed on any decision granting abandonment authority. In the EA, OEA stated that Applicants served a historic report on the Ohio State Historic Preservation Officer (SHPO), pursuant to 49 C.F.C. § 1105.8(c). OEA also stated that the SHPO submitted comments stating that the Aurora Train Station is listed on the National Register of Historic Places (National Register) and is located in the Area of Potential Effect (APE). Additionally, as OEA noted, the SHPO commented that there are several buildings listed in the Ohio Historic Inventory located along the right-of-way, and within the APE, that may be eligible for listing on the National Register. OEA also stated that the SHPO determined that the proposed abandonment would have an adverse effect under 36 C.F.R. § 800.5 and, therefore, it recommended a condition requiring NSR to take no steps to alter the historic integrity of all historic properties including sites, buildings, structures, and objects (including track and track material) within the project right-of-way or APE eligible for listing or listed in the National Register until completion of the Section 106 process of the National Historic Preservation Act (NHPA). OEA also recommended that NSR be required to report back to OEA regarding any consultation with the SHPO, any other Section 106 consulting parties, and the public, and that NSR be prohibited from filing its consummation notice or initiating 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.

OEA issued its final EA on December 28, 2017, noting that no comments to the EA were received. OEA therefore concludes that no changes to the initially recommended condition are required and that the historic preservation condition previously recommended in the EA be imposed. Consistent with OEA's recommendations, the Board will impose the historic preservation condition recommended in the EA and final EA.

Interim Trail Use. In the EA, OEA stated that the right-of-way may be suitable for other public use following abandonment and salvage of the Line. On December 7, 2017, and December 8, 2017, the Portage Park District and the City of Aurora (collectively, Proponents), respectively, filed requests for issuance of a notice of interim trail use (NITU) to negotiate with NSR for acquisition of the Line for use as a trail under the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d), and 49 C.F.R. § 1152.29. In a response filed on December 11, 2017,

³ The merits of OARP's arguments on its motions to void the notice ab initio, for a financial fitness review, and to disclose certain information and survey results will be addressed in a later decision.

⁴ Because this decision addresses a stay and abandonment conditions, which are typically delegated to the Chairman and the Director of the Office of Proceedings, respectively, the Board is waiving the delegation authority here and addressing the issues itself.

NSR notified the Board that it is not willing to negotiate an interim trail use agreement for the Line.

Under the Trails Act, the trails use program is voluntary and consensual between the railroad and the trail sponsor. See 49 C.F.R. § 1152.29; Citizens Against Rails-to-Trails v. STB, 267 F.3d 1144 (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). Because NSR does not consent to negotiate for interim trail use, the Board cannot issue a NITU, and Proponents' request for a NITU will be denied.

Public Use. On December 7, 2017 and December 8, 2017, Proponents also requested imposition of a public use condition under 49 U.S.C. § 10905 for the right-of-way. Proponents ask that NSR be prohibited from disposing of the corridor, other than tracks, ties, and signal equipment, except for public use on reasonable terms, and that NSR be barred from removing or destroying potential trail-related structures such as bridges, trestles, culverts, and tunnels for 180 days from the effective date of the abandonment. In support of this request, Proponents argue that these structures have considerable value for recreational trail purposes and explain that converting the rail line to a trail is a goal of the 2017 City of Aurora Master Plan and the 2010 Parks and Recreation Master Plan. Proponents state that they need a minimum of 180 days to coordinate efforts with local and state agencies, and to negotiate with the carrier.

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., 2 I.C.C.2d at 609. 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 Proponents have satisfied these requirements, a 180-day public use condition will be imposed, requiring NSR to keep intact the right-of-way (including trail-related structures such as bridges, trestles, culverts, and tunnels) and to refrain from disposing of the corridor, other than tracks, ties, and signal equipment, commencing from January 2, 2018, the effective date of the exemption. 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, NSR is not required to deal exclusively with Proponents but may engage in negotiations with other interested persons.

OARP Motion to Stay. On December 11, 2017, OARP asked the Board for a stay because, as best can be discerned, it believes that the current and prior owners of the Line have intentionally neglected the corridor to restrain competition and discourage development of intercity/commuter passenger rail service and it believes there exists a strong, untapped market for developing rail freight and passenger traffic on the right-of-way. The standards governing disposition of a petition for stay are: (1) whether petitioner is likely to prevail on the merits; (2) whether petitioner will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay would be in

the public interest. Wash. Metro. Area Transit Comm. v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); Va. Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C. Cir. 1958). The party seeking a stay carries the burden of persuasion on all of the elements required for stay. Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974).⁵ The Board typically does not grant a stay unless it is necessary to prevent irreparable harm. See, e.g., Eighteen Thirty Group, LLC—Acquis. Exemption—in Allegany Cty., Md., FD 35438 et al. (STB served Nov. 17, 2010). OARP has failed to demonstrate that it will be irreparably harmed if the notice goes into effect under the circumstances present here. Therefore, the Board will permit the notice to become effective.

Nonetheless, because the Board is imposing a Section 106 historic preservation condition, NSR will be prohibited from beginning any salvage activities (including removing any tracks or ties), or consummating the abandonment until the historic review process is complete and the Board has removed the condition. Moreover, the Board is also imposing a 180-day public use condition requiring NSR to keep the right-of-way intact until July 1, 2018. While the Section 106 process proceeds, the Board will consider and issue a separate decision addressing the arguments OARP has raised on the merits of this discontinuance and abandonment.

Based on OEA's recommendation, the proposed discontinuance and 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. Proponents' request for issuance of a notice of interim trail use is denied.
3. OARP's motion to stay the abandonment exemption is denied.
4. Upon reconsideration, the notice served and published in the Federal Register on December 1, 2017, exempting the abandonment of the Line described above, is subject to the conditions that NSR shall: (1) retain its interest in and take no steps to alter the historic integrity of all sites, buildings, structures, and objects within the project right-of-way that are eligible for listing or listed in the National Register (generally, 50 years old or older) until the Section 106 process of the NHPA has been completed; (2) report back to the OEA regarding any consultations with the SHPO, any other Section 106 consulting parties, and the public; and (3) 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.

⁵ OARP does not address the criteria for a stay in its motion nor does it ever expressly state why it is entitled to one.

5. Proponents' request for imposition of a public use condition is granted. Consistent with the public use condition imposed in this decision, CCR may discontinue service and NSR may salvage track and related materials, but salvage may only occur once the Section 106 process has been completed and the Board has removed the Section 106 condition. NSR shall keep intact the right-of-way, including bridges, trestles, culverts, and tunnels, for a period of 180 days commencing from the January 2, 2018 effective date of the exemption, until July 1, 2018, to enable any state or local government agency, or other interested person, to negotiate the acquisition of the right-of-way for public use.

6. This decision is effective on its service date.

By the Board, Board Members Begeman and Miller.