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SERVICE DATE – NOVEMBER 28, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 6 (Sub-No. 494X)

BNSF RAILWAY COMPANY—ABANDONMENT EXEMPTION—
IN LARIMER COUNTY, COLO.

Decided: November 28, 2017

BNSF Railway Company (BNSF) filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon 0.5 miles of rail line, between milepost 74.5 and milepost 75.0, in Fort Collins, Larimer County, Colo. (the Line). Notice of the exemption was served and published in the Federal Register on October 30, 2017 (82 Fed. Reg. 50,220). The exemption is scheduled to become effective on November 29, 2017.

The Board's Office of Environmental Analysis (OEA) served an environmental assessment (EA) recommending that one condition be imposed on any decision granting abandonment authority. In the EA, OEA stated that the Colorado State Historic Preservation Office (SHPO) had commented that additional information is needed to complete its review of the proposed abandonment. Accordingly, OEA recommends that BNSF be required 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 until the Section 106 process of the National Historic Preservation Act, 54 U.S.C. § 306108, has been completed and the Board has removed this condition.

In its final EA, dated November 24, 2017, OEA noted that no comments to the EA were received by the November 20, 2017 due date and reiterated its recommendation that a Section 106 historic preservation be imposed. Accordingly, that condition will be imposed.

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 November 7, 2017, the City of Fort Collins (City) filed a request for the issuance of a notice of interim trail use or abandonment (NITU) to negotiate with BNSF 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.

The City's request for a NITU will be denied. In its statement of willingness to assume financial responsibility, the City agrees to indemnify BNSF "to the extent permitted by law" against any potential liability arising out of the transfer or use of the Line. The quoted qualification, however, is inconsistent with the Board's Trails Act regulations, which require a sponsor that is immune from legal liability to indemnify the railroad against any potential

liability without any such qualification. 49 C.F.R. § 1152.29(a); see Chesapeake R.R.—Certificate of Interim Trail Use & Termination of Modified Rail Certificate, FD 32609 (STB served Feb. 24, 2011), aff'd, Md. Transit Admin. v. STB, 700 F.3d 139 (4th Cir. 2012); see also Nat'l Trails System Act & R.R. Rights of Way, EP 702, slip op. at 8-11 (STB served April 30, 2012) (denying a request to add the qualification “to the fullest extent allowed under applicable state law” to the statement of willingness language at 49 C.F.R. § 1152.29(a)(2), (3)).

The City also requested imposition of a public use condition under 49 U.S.C. § 10905 for the right-of-way. The City asks that BNSF be prohibited from disposing of the Line, 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 City’s justification for its request is that the Line connects the downtown Civic Center and an existing on-street public transportation corridor with a City-owned park and adjacent City utility facility, and the Line connects to another portion of rail line which is already subject to a NITU.¹ The City states that the 180-day period is needed to assemble and review title information, fully evaluate the Line, and negotiate with BNSF.

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 City has satisfied these requirements, a 180-day public use condition will be imposed, requiring BNSF to keep intact the right-of-way (including trail-related structures such as bridges, trestles, culverts, and tunnels) and refrain from disposing of the corridor (other than tracks, ties, and signal equipment), commencing from November 29, 2017, the effective date of the exemption. 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, BNSF is not required to deal exclusively with the City but may engage in negotiations with other interested persons.

¹ The portion of the rail line from milepost 75.00 to milepost 75.82 is subject to a NITU applicable to the City. See BNSF Ry.—Aban. Exemption—Between Fort Collins & LaPorte, in Larimer Cty., Colo., AB 6 (Sub-No. 306X) (STB served Dec. 28, 2015).

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 and published in the Federal Register on October 30, 2017, exempting the abandonment of the Line described above is modified to the extent necessary to permit public use negotiations as set forth below, for a period of 180 days commencing from the effective date of the exemption, until May 28, 2018. The abandonment is also subject to the condition that BNSF shall be required 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 until the Section 106 process of the National Historic Preservation Act, 54 U.S.C. § 306108, has been completed and the Board has removed this condition.
3. Consistent with the public use condition imposed in this decision, BNSF may discontinue service. BNSF shall keep intact the right-of-way, including potential trail-related structures such as bridges, trestles, culverts, and tunnels, for a period of 180 days, until May 28, 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.
4. The City's request for issuance of a NITU is denied.
5. This decision is effective on its service date.

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