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SERVICE DATE – APRIL 3, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-32 (Sub-No. 101X)

BOSTON AND MAINE CORPORATION—ABANDONMENT EXEMPTION—IN
HARTFORD COUNTY, CT¹

Decided: April 2, 2008

Boston and Maine Corporation (B&M) and Springfield Terminal Railway Company (ST) (collectively, applicants) jointly filed a notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments and Discontinuances of Service for B&M to abandon, and for ST to discontinue service over, approximately 0.73 miles of railroad known as the Canal Branch, extending from milepost 24.00 to milepost 24.73 in Hartford County, CT. Notice of the exemption was served and published in the Federal Register on January 25, 2008 (73 FR 4669). As pertinent here, trail use/rail banking requests under 49 CFR 1152.29 were due by February 4, 2008, and public use requests under 49 CFR 1152.28 were due by February 14, 2008. The exemption was scheduled to become effective on February 26, 2008.²

On February 27, 2008 (as supplemented on March 4, and March 6, 2008), the Connecticut Department of Transportation (CDOT) late-filed requests for issuance of an interim trail use condition and a public use condition, accompanied by a request that the Board accept them. On March 7, 2008, applicants filed a response objecting to CDOT's various requests.

CDOT's interim trail use request will be denied. Rail banking/trail use is provided for under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act). Under the Trails Act, however, the trails use program is voluntary and consensual between the railroad and the trail

¹ Connecticut Department of Transportation filed its request for the imposition of a public use condition and its request for the imposition of a trail use condition in both the Boston and Maine abandonment proceeding and in the related discontinuance proceeding, STB Docket No. AB-355 (Sub-No. 35X), Springfield Terminal Railway Company—Discontinuance of Service Exemption—In Hartford County, CT. Because public use and trails use conditions may be imposed only in connection with a proposed abandonment, this decision is issued only in the abandonment docket.

² By decision served February 25, 2008, the exemption was made subject to a National Geodetic Survey consultation condition.

user. See 49 CFR 1152.29; Citizens Against Rails to Trails v. STB, 267 F.3d 1144 (D.C. Cir. 2001); National Wildlife Federation v. I.C.C., 850 F.2d 694, 699-702 (D.C. Cir. 1988); Rail Abandonments—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 598 (1986). Because applicants have made it clear that they will not consent to negotiate for trail use here, the agency cannot impose such an arrangement on an unwilling party. See, e.g., Consolidated Rail Corporation—Abandonment Exemption—Lancaster and Chester Counties, PA, STB Docket No. AB-167 (Sub-No. 1095X) (STB served June 3, 2004).

The imposition of a public use condition does not require the carrier's consent. The Board's Section of Environmental Analysis found in an environmental assessment served on February 1, 2008 that, following abandonment and salvage of the line, the right-of-way may be suitable for other public use. In support of public use here, CDOT asserts that the corridor serves as an important transportation and utility right-of-way which could be used for a recreational or bicycle trail and, eventually, for the restoration of rail service. CDOT'S submission meets the requirements for a public use condition prescribed at 49 CFR 1152.28(a)(2) by specifying: (i) the condition sought; (ii) the public importance of the condition; (iii) the period for time of which the condition would be effective; and (iv) justification for the imposition of the period of time requested. CDOT has, however, filed its request two weeks late. In support of its request that the Board accept its late-filed petition, CDOT stated that its request was unavoidably delayed because additional time was needed to complete its review process.

The Board has maintained a policy of accepting public use filings after the due date when good cause is shown and when no party will be prejudiced thereby. See Aban. and Discon. of R. Lines and Transp. Under 49 U.S.C. 10903, 1 S.T.B. 894 (1996) and 2 S.T.B. 311 (1997); Wheeling and Lake Erie Railway Company—Abandonment Exemption—In Stark County, OH, STB Docket No. AB-227 (Sub-No. 10X) (STB served Nov. 7, 1997). Applicants do not challenge CDOT's assertion that it could not complete its governmental review process in time to meet the Board's filing deadline. We accept CDOT's statement as a reasonable explanation of why it filed late. Applicants, however, assert that to allow public use now would be burdensome to them "as they have taken proper measures in conveying the property."

But the applicants do not even assert, much less demonstrate, that they would be prejudiced by the Board's accepting the late-filed petition. Specifically, the applicants do not claim that they transferred the property after the exemption became effective and before CDOT filed its petition. The exemption became effective on February 26, 2008, and CDOT filed its request for a public use condition on February 27, 2008. If the applicants transferred the Line before the exemption became effective on February 26, 2008, they would have effected an unauthorized transfer, and could not claim to be prejudiced by the Board's accepting CDOT's petition.³ If the applicants transferred the Line after receiving notice of CDOT's petition for the

³ In the January 7, 2008 notice they filed, the applicants, without further explanation, stated that, *prior* to the effective date of the exemption, "title to the line will be acquired by third parties." The Board therefore added a caution to the notice served on January 25, 2008, stating that "[a]pplicants are advised that they cannot transfer the title until the exemption becomes effective or until they obtain appropriate Board authority."

imposition of the condition,⁴ they would have gone forward despite having been put on notice that CDOT had sought the condition and despite knowing that the Board might impose it.

The applicants may only claim to have been prejudiced by CDOT's late-filing if they transferred the Line on or after February 26, 2008, and before they received notice of CDOT's petition on February 28, 2008. Applicant has offered no evidence that they transferred the Line within that narrow window. Their one-sentence conclusory statement about taking proper measures in conveying the property is inadequate to support their request that CDOT's petition be denied. Absent any indication that applicants relied on the notice becoming effective to convey the property before they learned of CDOT's petition—and the Board has received no such indication—there is no apparent harm to the applicants resulting from CDOT's filing late. Thus, CDOT's late-filed request for the imposition of a public use condition will be accepted.

Pursuant to the Board's public use procedures, applicants must keep the right-of-way intact for a period of 180 days to permit public use negotiations. Also, a public use condition is not imposed for the benefit of any one potential purchaser; rather, it provides an opportunity for any interested person to acquire a right-of-way that has been found suitable for public purposes. Therefore, with respect to the public use condition, applicants are not required to deal exclusively with CDOT, but may engage in negotiations with other interested persons. Finally, under 49 U.S.C. 10905 and 49 CFR 1152.28(b), the Board cannot impose a public use condition for more than 180 days after the effective date of the decision approving or exempting an abandonment (here, February 26, 2008). Consequently, the 180-day period imposed here will run from that date and may not be extended.

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. CDOT's request for a rail banking/trail use condition is denied.
3. CDOT's late-filed request for a public use condition is accepted and granted as above discussed.
4. Upon reconsideration, the notice served and published in the Federal Register on January 25, 2008, exempting the abandonment of the line described above is subject to the condition that applicants shall leave intact all of the right-of-way for the 180-day period from February 26, 2008, until August 24, 2008, to enable any state or local government agency, or any other interested persons, to negotiate the acquisition of the line for public use.

⁴ In its February 28, 2008 filing, CDOT recited that it had contacted counsel for applicants to determine if they would agree to acceptance of the petition for a public use condition as late-filed.

5. This decision is effective on its service date.

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

Anne K. Quinlan
Acting Secretary