

SERVICE DATE – JUNE 12, 2020

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 55 (Sub-No. 799X)

CSX TRANSPORTATION, INC.—ABANDONMENT EXEMPTION—IN DICKENSON
COUNTY, VA.

Decided: June 11, 2020

CSX Transportation, Inc. (CSXT) filed a verified note of exemption under 49 C.F.R. part 1152 subpart F—Exempt Abandonments to abandon an approximately 13.65-mile rail line on its Florence Division, Kingsport Subdivision, Fremont Branch extending between milepost ZF 0.0 and milepost ZF 13.65, in Dickenson County, Va. (the Line). Notice of the exemption was served and published in the Federal Register on May 15, 2020 (85 Fed. Reg. 29,501). The exemption is scheduled to become effective on June 14, 2020.

On June 5, 2020, the Dickenson County Board of Supervisors (the County) late-filed a request for issuance of a notice of interim trail use or abandonment (NITU) to negotiate with CSXT to establish interim trail use and railbanking on the Line under the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d), and imposition of a public use condition under 49 U.S.C. § 10905 for the right-of-way.¹ In a response filed on June 5, 2020, CSXT notified the Board that it is willing to negotiate an agreement for interim trail use with the County.

The Board's Office of Environmental Analysis (OEA) served a Draft Environmental Assessment (Draft EA) on May 22, 2020, recommending that three conditions be imposed on any decision granting abandonment authority. In the Draft EA, OEA stated that the Virginia Department of Conservation and Recreation (VADCR) submitted comments noting that three Stream Conservation Units are located within the project area and are all associated with the Big Sandy crayfish (*Cambarus callainus*), a heritage resource. To minimize adverse impacts to the local ecosystem, VADCR recommended implementation of and strict adherence to state and local sediment control/stormwater management laws and regulations, as well as coordination with the U.S. Fish and Wildlife Service (USFWS). VADCR also recommended the removal of all materials offsite that could result from rail abandonment and avoidance of in-stream work within Camp Creek, Cranes Nest River, and respective tributaries.

¹ In Abandonment & Discontinuance of Rail Lines & Transportation Under 49 U.S.C. 10903, 1 S.T.B. 894, 900 (1996), recons. denied 2 S.T.B. 311 (1997), the Board retained the policy of accepting requests for NITUs and public use conditions after the due date when good cause is shown. Because there is no indication that the County's late-filed public use request will prejudice any party, it will be accepted. However, for the reasons explained below, the County's request for issuance of a NITU will be denied.

In the Draft EA, OEA determined that the proposed abandonment could adversely affect the Big Sandy crayfish based on VADCR's concerns. OEA therefore recommended a condition requiring that, pursuant to Section 7 of the Endangered Species Act, 16 U.S.C. § 1535, CSXT consult with the USFWS² and OEA to address concerns about potential impacts to the Big Sandy crayfish and to develop appropriate mitigation measures, if necessary. OEA further recommended that CSXT be prohibited from filing its consummation notice or initiating any salvage activities related to abandonment (including removal of tracks and ties) until the Section 7 consultation process is complete and the Board has removed this condition.

The Draft EA stated that CSXT served its combined environmental and historic report on the Virginia Department of Historic Resources (the State Historic Preservation Office, or SHPO) pursuant to 49 C.F.R. § 1105.8(c), but that OEA was not able to consider the SHPO's opinion before determining if the rail line or bridges may be eligible for listing on the National Register of Historic Places (National Register). OEA accordingly recommended 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 (referred to as the Area of Potential Effect) eligible for listing or listed in the National Register until completion of the Section 106 process of the National Historic Preservation Act, 54 U.S.C. § 306108. OEA also recommended that CSXT be required to report back to OEA regarding any consultations with the SHPO and the public, and that CSXT 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 also stated in the Draft EA that the National Geodetic Survey (NGS) has indicated that four geodetic survey markers are present in the right-of-way and could be disturbed by the proposed abandonment. Accordingly, OEA recommended a condition requiring CSXT to notify NGS at least 90 days prior to beginning salvage activities to allow time for the geodetic survey markers to be preserved.

OEA issued its Final EA on June 11, 2020, noting that no new comments on the Draft EA were received and recommending again that the three previously recommended conditions be imposed. Accordingly, based on OEA's recommendations, the conditions proposed in the Draft EA and Final EA will be imposed.

Interim Trail Use. The County's NITU request does not meet the regulatory requirements at 49 C.F.R. § 1152.29(a)(2) and will therefore be denied. Under § 1152.29(a)(2), a NITU request must include a statement indicating the trail sponsor's willingness to assume full responsibility for: (i) managing the right-of-way, (ii) any legal liability arising out of the transfer

² OEA also noted that CSXT had requested comments from USFWS regarding the potential impact of the proposed abandonment to protected wildlife, but that, USFWS had not yet filed comments.

or use of the right-of-way (unless the trail sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability), and (iii) payment of any and all taxes that may be levied or assessed against the right-of-way.

Here, rather than accepting full responsibility for all three of the required elements under § 1152.29(a)(2), the County's statement of willingness refers to elements (i) and (ii) but does not refer to element (iii). In addition, the County's statement of willingness states that the County agrees to indemnify CSXT against any potential liability arising out of the transfer or use of the Line "[t]o the extent permitted by Virginia Law." The quoted qualification is inconsistent with § 1152.29(a)(2)(ii), which requires a trail sponsor that is immune from legal liability to "indemnify the railroad against any potential liability," without any such qualification. See Nat'l Trails Sys. Act & R.R. Rights-of-Way, EP 702, slip op. at 8-11 (STB served Apr. 30, 2012) (declining 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)); see also Chesapeake R.R.—Certificate of Interim Trail Use & Termination of Modified Rail Certificate, FD 32609, slip op. at 9-10 (STB served Feb. 24, 2011) (finding two statements of willingness, in which trail sponsors made indemnification promises with qualifying language such as "to the extent permitted by law" and "subject to requirements of [state] law," to be deficient), aff'd, Md. Transit Admin. v. STB, 700 F.3d 139 (4th Cir. 2012).

Public Use. 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 one-year 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, trestle, and tunnels. The County states that the corridor will make an excellent multi-use recreational trail and provide important wildlife habitat and greenspace and that the trail-related structures have considerable value for recreational trail purposes. According to the County, the one-year period is needed to assemble and review title information, complete a trail plan, and begin 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 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) and to refrain from disposing of the

corridor (other than tracks, ties, and signal equipment). The County has asked that this condition be imposed for a period of one year. However, as noted, under 49 U.S.C. § 10905 the Board may not impose a public use condition for a period of more than 180 days. Accordingly, the public use condition here will be imposed for a period of 180 days commencing from June 14, 2020, 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, CSXT is not required to deal exclusively with the County but may engage in negotiations with other interested persons.

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 May 15, 2020, exempting the abandonment of the Line described above is modified to the extent necessary to permit the public use negotiations as set forth below, for a period of 180 days commencing from the effective date of the exemption, until December 11, 2020. The abandonment is also subject to the following conditions:³

(a) Pursuant to Section 7 of the Endangered Species Act (16 U.S.C. § 1535), CSXT shall consult with the USFWS and OEA to address concerns about potential impacts to the Big Sandy crayfish (*Cambarus callainus*) and to develop appropriate mitigation measures, if necessary. CSXT may not file its consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties) until the Section 7 consultation process is complete and the Board has removed this condition.

(b) CSXT shall 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 listed in the National Register until the Section 106 process of the National Historic Preservation Act, 54 U.S.C. § 306108, has been completed. CSXT shall report back to OEA regarding any consultations with the SHPO

³ If an interim trail use agreement under 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29 were to be reached for the Line (or a portion thereof), compliance with these conditions would not be not required with respect to any portion of the Line covered by the interim trail use agreement for the duration of the agreement.

and the public. CSXT may 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.

(c) CSXT shall notify NGS at NGS.Infocenter@noaa.gov at least 90 days prior to beginning salvage activities.

3. CSXT 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 from the effective date of the exemption, until December 11, 2020, 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 County's request for a NITU is denied.

5. This decision is effective on its service date.

By the Board, Allison C. Davis, Director, Office of Proceedings.