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SERVICE DATE – NOVEMBER 14, 2006

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-290 (Sub-No. 267X)

NORFOLK SOUTHERN RAILWAY COMPANY–ABANDONMENT EXEMPTION–  
IN KANAWHA COUNTY, WV

Decided: November 13, 2006

Norfolk Southern Railway Company (NSR) filed a notice of exemption under 49 CFR 1152 Subpart F–Exempt Abandonments to abandon a 12.22-mile line of railroad between milepost TP 14.69 at Blue Creek, and milepost TP 26.91, at Acup (Sanderson), in Kanawha County, WV. Notice of the exemption was served and published in the Federal Register on August 15, 2006 (71 FR 46976). The exemption became effective on September 14, 2006.<sup>1</sup>

By a late-filed petition (filed on October 10, 2006), Elk River Rails-to-Trails Foundation (Elk River) requests the issuance of a 180-day public use condition under 49 U.S.C. 10905 and 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 CFR 1152.29.<sup>2</sup> Elk River has submitted a statement of willingness to assume financial responsibility for the management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way, as required at 49 CFR 1152.29, and acknowledged that the use of the right-of-way for trail purposes is subject to future reactivation for rail service. In a response submitted on October 23, 2006, NSR consents to the issuance of a NITU.

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<sup>1</sup> The Board's Section of Environmental Analysis (SEA) served an environmental assessment (EA) on August 18, 2006, recommending that certain environmental conditions and a historic preservation condition be imposed on the proposed abandonment. By decision served on September 13, 2006, the exemption was made subject to those conditions.

<sup>2</sup> In the EA, SEA indicated that the right-of-way may be suitable for other public use following abandonment. The August 15, 2006 notice provided that trail use/rail banking requests were to be filed by August 25, 2006, and that requests for public use conditions were to be filed by September 5, 2006. However, in 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), the Board retained the policy of accepting filings after the due date when good cause is shown. Because there is no indication that Elk River's late-filed request will prejudice any party, it will be accepted. See Wheeling & Lake Erie Railway Company–Abandonment Exemption–in Starke County, OH, STB Docket No. AB-227 (Sub-No. 10X), slip op. at 1 n.1 (STB served Nov. 7, 1997).

Because Elk River's request complies with the requirements of 49 CFR 1152.29 and NSR is willing to negotiate for trail use, a NITU will be issued. The parties may negotiate an agreement during the 180-day period prescribed below. If the parties reach a mutually acceptable final agreement, no further Board action is necessary. If no agreement is reached within that negotiation period, NSR may fully abandon the line subject to any outstanding conditions. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

As an alternative to interim trail use under the Trails Act, the right-of-way may be acquired for public use under 49 U.S.C. 10905. See Rail Abandonments--Use of Rights-of-Way As Trails, 2 I.C.C.2d 591, 609 (1986). Under section 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. See 49 CFR 1152.28(a)(2). Because Elk River has satisfied these requirements, a 180-day public use condition will be imposed, commencing from the September 14, 2006 effective date of the exemption.

When the need for interim rail use/rail banking and public use is shown, it is the Board's policy to impose both conditions concurrently, subject to the execution of a trail use agreement. If a trail use agreement is reached on a portion of the right-of-way, NSR must keep the remaining portion intact for the remainder of the 180-day 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 an 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 Elk River, but may engage in negotiation with other interested persons.

As conditioned, 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. The late-filed request for a NITU under 16 U.S.C. 1247(d) and for a public use condition under 49 U.S.C. 10905 is accepted.
3. Upon reconsideration, the notice of exemption served and published in the Federal Register on August 15, 2006, exempting NSR's abandonment of the above-described line, is modified to the extent necessary to implement interim trail use/rail banking and to permit public

use negotiations for a period of 180 days commencing from the September 14, 2006 effective date of the exemption (until March 13, 2007).

4. Consistent with the public use and interim trail use/rail banking conditions imposed in this decision and notice, NSR may discontinue service and salvage track and related materials. NSR shall keep intact the right-of-way, including bridges, trestles, culverts and tunnels, until March 13, 2007, to enable any state or local government agency, or other interested person, to negotiate the acquisition of the line for public use. If an interim trail use/rail banking agreement is executed before March 13, 2007, the public use condition will expire to the extent the trail use/rail banking agreement covers the same line.

5. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

6. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.

7. If interim trail use is implemented, and subsequently the user intends to terminate trail use, 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 March 13, 2007, interim trail use may be implemented. If no agreement is reached by that time, NSR may fully abandon the line provided the other conditions imposed in this proceeding are met. See 49 CFR 1152.29(d)(1).

9. This decision is effective on its service date.

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

Vernon A. Williams  
Secretary