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BEFORE THE SURFACE TRANSPORTATION BOARD

Norfolk Southern Railway Company)
-- Abandonment Exemption -- in)
Anderson and Woodford Counties, KY)

Docket No. AB-290 (Sub-No 192X)



Motion to Extend the Time Period for Negotiation
of an Interim Trail Use/Railbanking Agreement

Office of Proceedings

JUL 09 2002

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Public Record

Rails to Trails Conservancy (RTC) hereby moves the Surface Transportation Board (STB or Board) to extend the time period for negotiation of a mutually acceptable interim trail use/railbanking agreement in this proceeding for an additional 180 days, up to and including January 6, 2003. This motion has the consent of Norfolk Southern Railroad Corporation ("NS") (See Letter attached as Exhibit A).

By decision served February 7, 2001, the Rails to Trails Conservancy (RTC) was recognized as the negotiating party, under the National Trails System Act, 16 U.S.C. § 1247(d), to negotiate with NS for the use of the subject right-of-way, which extends from M.P. 0.7-LL at Lawrenceburg, to M.P. 3.5-LL, at Tyrone, in Anderson and Woodford Counties, KY, a distance of approximately 2.8 miles, pursuant to Section 8(d) of the National Trails Systems Act, 16 U.S.C. § 1247(d) (Trails Act).¹ A copy of this decision is attached as Exhibit B. By decisions served on July 13, 2001, and January 14, 2002, which are attached as Exhibits C and D, this Board extended the NITU until January 10, 2002, and July 10, 2002, respectively.

RTC has been actively negotiating with the railroad for the preservation of this corridor as an interim trail use under Section 8(d). However, the parties agree that Anderson County, Kentucky, which has expressed an interest in the corridor, would be the optimal long-term

¹ Norfolk Southern Railway Company -- Abandonment Exemption -- in Anderson and Woodford Counties, KY, Dkt. No. AB-290 (Sub-No. 192X), served Feb. 7, 2001.

manager for the trail. The County has been delayed in its ability to commit to long-term management and maintenance of the Norfolk Southern Railroad corridor for use as a public trail due to the recent elections of the Anderson County magistrates (held on May 30, 2002). With the elections now over, both RTC and Norfolk Southern Railroad can continue to work with Anderson County to work out an arrangement under which the County can assume responsibility for the corridor as an interim trail manager pursuant to Section 8(d). In the meantime, RTC wishes to extend the interim trail use negotiating period in order to preserve the ability of Anderson County to continue negotiations for the transfer of the corridor under Section 8(d), or to enter into an interim trail use/railbanking agreement itself with the railroad in the event that Anderson County ultimately determines that it is not willing to assume legal and financial responsibility for the corridor as an interim trail. Under either of these scenarios, it is necessary for the negotiation period under the NITU to be extended up to and including January 6, 2003, in order to successfully preserve this corridor for interim trail use and railbanking under section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d). See Policy Statement on Rails to Trails Conversions, Ex Parte No. 274 (Sub-No. 13B) (ICC served Feb. 5, 1990) (extensions of time promote the establishment of trails and railbanking consistent with the National Trails System Act).

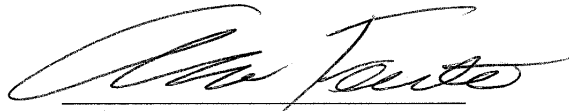
Since the issuance of the NITU, NS at all points has maintained an intent to transfer the line in question intact for interim trail use. The railroad has not sold, or offered for sale, any parcels of land that would interfere with interim trail use and railbanking of the portion of the corridor that is covered by the NITU. The line remains intact and throughout the period, the railroad has been negotiating with the railroad for the sale of the corridor intact. Accordingly, the

Board retains jurisdiction to further extend the NITU to continue bona fide and active negotiations for interim trail use of the line.

In similar instances, this Board has reopened proceedings to permit the issuance of orders implementing section 8(d) for rail lines.² The STB's authority to extend a NITU was upheld in Birt v. STB, 90 F.3d 580 (D.C. Cir. 1996). Here the parties merely seek an extension in the period for negotiation provided in a previously-issued NITU. Such an extension will promote and further the purposes of the Trails Act.

For the reasons stated, RTC requests that an 180-day extension of the NITU negotiation period be granted through January 6, 2003.

Respectfully submitted,



Andrea C. Ferster
General Counsel
Rails to Trails Conservancy
1100 17th Street, N.W., 10th Fl.
Washington, D.C. 20036
(202) 974-5142

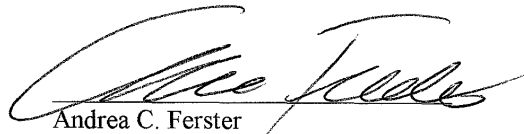
July 8, 2002

² See, e.g., Missouri-Kansas-Texas Railroad--Abandonment--in Pettis and Henry Counties, MO, Dkt. No. AB-102 (Sub-No. 16) (ICC served Apr. 26, 1991).

CERTIFICATE OF SERVICE

I hereby certify that on this 8 day of July, 2002, I have served a true and accurate copy of the foregoing motion on the following party by first-class mail, postage pre-paid:

James R. Paschall, General Attorney
Norfolk Southern Corporation
Law Department
Three Commercial Place
Norfolk, VA 23510-9241



Andrea C. Ferster



Norfolk Southern Corporation
Law Department
Three Commercial Place
Norfolk, Virginia 23510-9241

James R. Paschall
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July 3, 2002

via fax 202-331-9680
Andrea C. Ferster, General Counsel
Rails to Trails Conservancy
1100 17th Street, N.W. 10th Fl.
Washington, D.C. 20036

Re: STB Docket No. AB-290 (Sub-No. 192X), Norfolk Southern Railway
Company--Abandonment Exemption--in Anderson and Woodford Counties, KY

Dear Ms. Ferster:

Norfolk Southern Railway Company consents to the request of the Rails to Trails Conservancy to the Surface Transportation Board, to be presented this week, for a 180-day extension of time for the Trail Use Negotiation Condition in this matter. We authorize you to notify the STB of our consent, along with your request.

Norfolk Southern Railway Company (NSR), has not consummated the abandonment of the line that is the subject of this proceeding and has continued to negotiate with the Rails to Trails Conservancy on an agreement to transfer the line for interim trail use. Although we expect to reach an agreement, NSR's consent to extend the negotiation condition alone does not guarantee that a final agreement must be reached.

Very truly yours,

A handwritten signature in dark ink, appearing to read "J R Paschall".
James R. Paschall

cc: Mr. John T. Moon
cc via fax: 202-565-9002
Honorable Vernon A. Williams, Secretary
Surface Transportation Board

Operating Subsidiary: Norfolk Southern Railway Company.

Exhibit A

31617
DO

SERVICE DATE - FEBRUARY 7, 2001

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-290 (Sub-No. 192X)

NORFOLK SOUTHERN RAILWAY COMPANY—ABANDONMENT EXEMPTION—
IN ANDERSON AND WOODFORD COUNTIES, KY

Decided: February 6, 2001

The Norfolk Southern Railway Company (NSR) and the Rails to Trails Conservancy (RTC) (collectively petitioners) have filed a joint petition to reopen the abandonment proceeding and issue a notice of interim trail use/rail banking (NITU) under section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and if necessary, to extend the deadline for the filing of a notice of consummation of the abandonment authority. The petition will be granted for the reasons discussed in this decision.

BACKGROUND

NSR filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments to abandon its line of railroad between milepost 0.7-LL, at Lawrenceburg, and milepost 3.5-LL, at Tyrone, in Anderson and Woodford Counties, KY, a distance of approximately 2.8 miles (line). The notice was served and published in the Federal Register on December 27, 1999 (64 FR 72376). The notice stated that, if consummation had not been effected by NSR's filing of a notice of consummation by December 27, 2000, and there were no legal or regulatory barriers to consummation, the authority to abandon would automatically expire.

By decision served January 25, 2000 (January 25 decision), the Board reopened the proceeding. The January 25 decision denied a request made by the Anderson County Fiscal Court (Anderson County) for issuance of a NITU,¹ but granted the request for imposition of a public use condition for a period of 180 days until July 24, 2000, and imposed the condition that NSR retain its interest in and take no steps to alter the historic integrity of the entire rail line until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f. By decision served November 13, 2000 (November 13 decision), the Board again reopened the

¹ By letter to the Board dated January 19, 2000, NSR indicated that it was unwilling to negotiate with Anderson County, as it had agreed to convey its interest in the line to the Tyrone Rail & Bridge Society, Inc. (TRBS). However, NSR also indicated in its letter that, "[i]n the unforeseen event that the transaction is not consummated, NSR will reconsider whether it should negotiate for interim trail use, should the offer still be outstanding."

proceeding and, based on a recommendation from the Kentucky State Historic Preservation Officer (SHPO), removed the section 106 historic preservation condition imposed in the January 25 decision.²

On January 11, 2001, petitioners requested that the Board reopen the proceeding and issue a NITU pursuant to the Trails Act to permit interim trail use/rail banking negotiations on the right-of-way. Petitioners further requested that, if necessary, the Board's regulations at 49 CFR 1152.29(e)(2)³ prescribing a deadline for filing a notice of consummation of the abandonment be waived and that the deadline be extended to January 12, 2001, or a later date, if required to permit issuance of a NITU.⁴

DISCUSSION AND CONCLUSIONS

In the petition, NSR states that it had entered into an agreement to transfer the property to TRBS, including an agreement that TRBS would accept the historic preservation covenants discussed above. NSR further states that, at the time the Board issued its November 13 decision, the transaction with TRBS had not yet closed but notes that it had every reason to believe that TRBS would complete the transaction and anticipated that the closing would take place promptly and certainly prior to December 27, 2000, much less January 12, 2001. NSR states that it

² The November 13 decision anticipated that the entire right-of-way would be deeded to TRBS, which had evidently agreed to retain and maintain the entire rail line, including all bridges and trestles eligible for inclusion in the National Register of Historic Places.

³ Under 49 CFR 1152.29(e)(2), a railroad has 1 year from the service of the date of the decision permitting abandonment to file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. Notices will be deemed conclusive on the point of consummation if there are no legal or regulatory barriers to consummation.

⁴ As further discussed below, petitioners state that NSR did not learn that TRBS would be unable to accept the property until December 26, 2000, one day before expiration of the 1-year period for filing a notice of consummation set forth in 49 CFR 1152.29(e)(2). Nonetheless, NSR was of the opinion that the deadline for providing notice of consummation here was January 12, 2001 (60 days after service of the Board's November 13 decision removing the historic preservation condition). Because of confusion regarding whether the notice of consummation deadline was December 27, 2000, or January 12, 2001, petitioners request an extension or waiver of the deadline for filing a notice of consummation if it is determined that the deadline has just passed.

intended to issue its notice of consummation of abandonment at the time the transaction closed.⁵ On December 26, 2000, however, NSR learned that TRBS was permitting its non-profit corporation charter to lapse and would no longer exist as a corporate entity. Thus, TRBS could not accept ownership of the line. NSR also learned that Anderson County was no longer interested in acquiring the property for interim trail use. NSR indicates that it was faced with a choice between exercising the abandonment at the last minute (but being unable to convey the property subject to the historic preservation covenants) or finding another transferee, presumably a trail sponsor, who would be willing to accept the property and adhere to the covenants.

According to NSR, after the negotiations with TRBS ended, it promptly contacted RTC as an alternative trail sponsor, offering the property for interim trail use/rail banking. Petitioners state that they are willing to negotiate an interim trail use/rail banking agreement. RTC has provided a statement of willingness to assume full responsibility for management of, for any legal liability arising out of the transfer or use of the right-of-way (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 all taxes assessed against the right-of-way.

It is not necessary to determine whether the notice of consummation deadline was December 27, 2000, or January 12, 2001, because under the facts described by petitioners, an extension of the deadline is warranted. It is clear that NSR had no intent to consummate the abandonment prior to satisfying the concerns of the SHPO, and there is no apparent public benefit in finding that the abandonment authorization has lapsed. The deadline for filing a notice of consummation will therefore be extended to the date of service of this decision to allow acceptance of the trail use request and statement of willingness and issuance of a NITU. Good cause exists to accept the late-filed trail use statement. Trail use requests may be accepted as long as the Board retains jurisdiction over the right-of-way⁶ and the carrier is willing to enter into negotiations. Because NSR has not consummated the abandonment and is willing to negotiate for interim trail/rail banking use, a NITU will be issued under 49 CFR 1152.29. The parties may negotiate an interim trail use/rail banking agreement during the 180-day period, commencing on January 12, 2001. If the parties reach a mutually acceptable final agreement, further Board approval will not be necessary. If no agreement is reached within the 180 days, NSR may fully abandon the line. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for rail purposes.

⁵ Because that transaction would not have taken place under the Trails Act, a notice of consummation would have been required.

⁶ See Rail Abandonments--Supplemental Trails Act Procedures, 4 I.C.C.2d 152, 157-58 (1987); Soo Line Railroad Company--Exemption--Abandonment in Waukesha County, WI, Docket No. AB-57 (Sub-No. 23X) (ICC served May 14, 1987); and Missouri-Kansas-Texas Railroad Company--Abandonment--in Pettis and Henry Counties, MO, Docket No. AB-102 (Sub-No. 16) (ICC served Apr. 26, 1991).

This action 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 deadline for the filing of a notice of consummation of the abandonment authorization in this proceeding is extended to the service date of this decision to allow acceptance of the trail use request and issuance of a NITU in the present decision.
3. The decision served and published in the Federal Register on December 27, 1999, exempting the abandonment by NSR of the line described above, is modified to the extent necessary to implement interim trail use/rail banking as set forth below, for a period of 180 days from January 12, 2001, or until July 11, 2001.
4. 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 imposed on the right-of-way.
5. Interim trail use/rail banking is subject to the future restoration of rail service and to the user continuing to meet the financial obligations for the right-of-way.
6. If the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that trail use be vacated on a specified date.
7. If an agreement for interim trail use/rail banking is reached by July 11, 2001, interim trail use may be implemented. If no agreement is reached by that date, NSR may fully abandon the line.
8. This decision is effective on its service date.

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

Vernon A. Williams
Secretary

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SERVICE DATE - JULY 13, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-290 (Sub-No. 192X)

NORFOLK SOUTHERN RAILWAY COMPANY—ABANDONMENT EXEMPTION—
IN ANDERSON AND WOODFORD COUNTIES, KY

Decided: July 12, 2001

By decision and notice of interim trail use or abandonment (NITU) served on February 7, 2001, a 180-day period was authorized for the Rails to Trails Conservancy (RTC) to negotiate an interim trail use/rail banking agreement (agreement) with the Norfolk Southern Railway Company (NS) for a line of railroad between milepost 0.7-LL, at Lawrenceburg, and milepost 3.5-LL, at Tyrone, in Anderson and Woodford Counties, KY, a distance of approximately 2.8 miles (line). The 180-day negotiating period was scheduled to expire on July 11, 2001.

On July 9, 2001, RTC filed a motion to extend the negotiating period through January 10, 2002. Counsel for RTC has also submitted a letter from NS indicating that the carrier has not consummated the abandonment and that it consents to the requested extension. RTC states that it has been actively negotiating with NS and is close to reaching an agreement but that several issues relating to an agreement have yet to be resolved.

Where, as here, the carrier has not consummated the proposed abandonment and is willing to continue trail use negotiations, the negotiating period may be extended.¹ RTC has shown that the additional time is necessary to complete negotiations. An extension of time will promote the establishment of trails and rail banking consistent with the National Trails System Act, 16 U.S.C. 1247(d). Accordingly, the NITU negotiating period will be extended through January 10, 2002.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

¹ See Rail Abandonments--Supplemental Trails Act Procedures, 4 I.C.C.2d 152, 157-58 (1987).

STB Docket No. AB-290 (Sub-No. 192X)

It is ordered:

1. RTC's request to extend the NITU negotiating period is granted.
2. The NITU negotiating period is extended through January 10, 2002.
3. This decision is effective on the date of service.

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

Vernon A. Williams
Secretary

32493
DO

SERVICE DATE - JANUARY 14, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-290 (Sub-No. 192X)

NORFOLK SOUTHERN RAILWAY COMPANY—ABANDONMENT EXEMPTION—
IN ANDERSON AND WOODFORD COUNTIES, KY

Decided: January 11, 2002

By decision and notice of interim trail use or abandonment (NITU) served on February 7, 2001, a 180-day period was authorized for the Rails to Trails Conservancy (RTC) to negotiate an interim trail use/rail banking agreement (agreement) with the Norfolk Southern Railway Company (NS) for a line of railroad between milepost 0.7-LL, at Lawrenceburg, and milepost 3.5-LL, at Tyrone, in Anderson and Woodford Counties, KY, a distance of approximately 2.8 miles (line). The 180-day negotiating period was scheduled to expire on July 11, 2001, but was extended through January 10, 2002, by decision served on July 13, 2001.

On January 10, 2002, RTC filed a further motion to extend the negotiating period through July 10, 2002. Counsel for RTC has also submitted a letter from NS indicating that the carrier has not consummated the abandonment and that it consents to the requested extension. RTC states that it has been actively negotiating with NS and is close to reaching an agreement but that several issues relating to an agreement have yet to be resolved.

Where, as here, the carrier has not consummated the proposed abandonment and is willing to continue trail use negotiations, the negotiating period may be extended.¹ RTC has shown that the additional time is necessary to complete negotiations. An extension of time will promote the establishment of trails and rail banking consistent with the National Trails System Act, 16 U.S.C. 1247(d). Accordingly, the NITU negotiating period will be extended through July 10, 2002.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

¹ See Rail Abandonments--Supplemental Trails Act Procedures, 4 I.C.C.2d 152, 157-58 (1987).

It is ordered:

1. RTC's request to extend the NITU negotiating period is granted.
2. The NITU negotiating period is extended through July 10, 2002.
3. This decision is effective on the date of service.

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

Vernon A. Williams
Secretary