

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-1067 (Sub-No. 2X)

GENERAL RAILWAY CORPORATION d/b/a IOWA NORTHWESTERN RAILROAD—
ABANDONMENT EXEMPTION—IN OSCEOLA AND DICKINSON COUNTIES, IA

Decided: October 24, 2008

In this decision: two motions concerning a late-filed notice are denied; a request for imposition of trail-use and public-use conditions is granted; and an historic-preservation condition is imposed.

General Railway Corporation d/b/a Iowa Northwestern Railroad (IANW) previously filed a notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments to abandon an approximately 36.9-mile line of railroad extending between milepost 215.4, west of Mackenzie Junction, and milepost 252.3, west of Braaksma, in Dickinson and Osceola Counties, IA (the rail line). Notice of the exemption was served and published in the Federal Register on September 25, 2008 (73 FR 55594-95). The exemption was scheduled to become effective on October 25, 2008, unless it was stayed by the Board or the offer of financial assistance (OFA) process under 49 U.S.C. 10904 was timely engaged.

1. Request to Late-File a Notice of Intent to File an OFA. Under the Board's regulation at 49 CFR 1152.27(c)(2), to engage the OFA process, formal expressions of intent to file an OFA must be filed within 10 days of the publication of a notice of exemption to abandon a rail line. On October 15, 2009, 9 days after the October 6 deadline had passed, Dickinson-Osceola Railroad Authority (Dickinson) submitted a motion to late file a Notice of Intent to File an OFA and a Notice of Intent.¹ Dickinson's counsel stated that he was unable to file the Notice of Intent by the due date because of his involvement in litigation and a consequent inability to finalize plans with Dickinson.

In a motion filed on October 22, 2008, IANW objects to granting leave for the late filing of the Notice of Intent and seeks dismissal of the notice. According to IANW, acceptance of the late-filed notice of intent would unnecessarily prolong IANW's exposure to potential liability and other risks and would cause it the significant expense of preparing the requested information despite the lack of any rail traffic on this line in many years.

¹ In its Notice of Intent, Dickinson requests that IANW provide the information set forth in 49 CFR 1152.27(a), which would assist it in formulating an offer. In addition, Dickinson asks that the Board toll the period for submitting OFAs for an additional 30 days to allow Dickinson time to review the material.

The motion to late file the Notice of Intent will be denied because Dickinson has not sufficiently justified its lateness and because IANW objects to the late filing and, thus, allowing additional time would be contrary to Congressional intent and Board precedent.

Dickinson's explanation for the lateness of its Notice of Intent is inadequate because there has been public notice since May 2008 that IANW likely would file a notice to abandon this line. See Iowa Northwestern Railroad—Abandonment Exemption—in Osceola and Dickinson Counties, IA, STB Docket No. AB-1067 (Sub-No. 1X) (STB served May 2, 2008) (stating that IANW, which already had obtained authority to discontinue rail operations, must separately seek abandonment authority for this line). Moreover, because counsel for Dickinson represented a different party in that proceeding, counsel would have had notice that IANW would file an abandonment notice. Therefore, counsel had adequate notice, and his involvement in litigation does not excuse Dickinson's failure to timely submit a Notice of Intent.

Allowing the late filing of an OFA over the owning rail carrier's objection would be contrary to Congress's direction to streamline the abandonment and OFA process. See Aban. and Discon. of R. Lines and Transp. Under 49 U.S.C. 10903, 1 S.T.B. 894, 909-10 (1996) (in enacting the Interstate Commerce Commission Termination Act of 1995, Congress shortened the time for the Board to process OFAs under 49 U.S.C. 10904); Railroad Ventures, Inc. v. STB, 299 F.3d 523, 531 (same). Thus, the Board does not normally allow extensions of time for filing OFAs when the rail-line owner objects. See, e.g., Mid-Michigan Railroad, Inc.—Abandonment Exemption—In Kent, Ionia, and Montcalm Counties, MI, STB Docket No. AB-364 (Sub-No. 14X) (STB served Sept. 26, 2008), slip op. at 5.

Accordingly, the motion for leave will be denied and the late-filed Notice of Intent will not be made part of the record. Because there will not be an OFA process, Dickinson's motion to toll the deadline for submitting an OFA until after the submission of requested material will be denied as moot.

2. Trail-Use and Public-Use Conditions. On October 3, 2008, Iowa Trails Council (the Council) filed a request for the issuance of: (1) a 180-day public-use condition under 49 CFR 10905; and (2) a notice of interim trail use (NITU) under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and 49 CFR 1152.29. In seeking these conditions, the Council represents the interests of the Dickinson Country Trails Board, the Osceola County Conservation Board, and the Cities of Allendorf and Lake Park (collectively, the governmental entities).

Concerning trail use, the Council states that the governmental entities are willing to assume the full financial responsibility for management of, for any legal liability arising out of the transfer of title (unless immune from liability), and for the payment of all taxes and assessments against, the right-of-way, as required by 49 CFR 1152.29. Also, the Council has acknowledged that use of the right-of-way as a trail is subject to future reconstruction and reactivation for rail service. In a letter filed October 23, 2008, IANW states its willingness to negotiate with the Council for trail use.

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: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) justification for the imposition of the time period requested. See 49 CFR 1152.28(a)(2).

Concerning public use, the Council requests that IANW be prohibited from disposing of structures such as bridges, trestles, culverts, tunnels, and ballast for a 180-day period from the effective date of the abandonment exemption. The Council states that use of the corridor as a trail would provide Iowans with needed recreational opportunities, help to improve citizens' health, and enhance Iowa's existing network of trails.² In addition, the Council states that public use would allow placement of utility lines within the corridor and thus preserve valuable crop land that otherwise would be taken for that purpose. The Council states that, in its experience, negotiating for trail use often requires more than 180 days, which led the Council to request the statutory 180-day maximum for a public-use condition.

The Council has satisfied the requirements for both a public-use condition and a NITU. When the need for interim trail use/rail banking and public use is shown, the Board imposes 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, IANW must keep the remaining right-of-way 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 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, IANW is not required to deal exclusively with the Council, but may engage in negotiations with other interested persons.

3. Historic-preservation Condition. IANW prepared environmental and historic reports concerning this line. The historic report was served on the Iowa State Historical Society (SHPO) pursuant to 49 CFR 1105.8(c). The Board's Section of Environmental Analysis (SEA) served an environmental assessment (EA) in this proceeding on September 30, 2008, in which SEA stated that it has not heard from the Iowa SHPO and therefore has not been able to consider the SHPO's opinion prior to determining if the rail line may be potentially eligible for listing on the National Register of Historic Places (National Register). Accordingly, SEA recommended a condition requiring IANW to retain its interest in and take no steps to alter the historic integrity of all

² In its own behalf, Dickinson County Trails Board submitted a letter indicating that a trail along the segment would enable the completion of a trail around Silver Lake and a connection to the rest of Iowa Great Lakes Trails in the Lakes Economic Corridor.

historic properties including sites, buildings, structures, and objects within the line's right-of-way eligible for listing or listed in the National Register until completion of the section 106 process.

Comments to the EA were due by October 13, 2008, but none were received by the due date. Accordingly, the condition that SEA recommended in the EA will be imposed.

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. Upon reconsideration, the notice served and published in the Federal Register on September 25, 2008, exempting the abandonment of the line described above is subject to the conditions that: (1) IANW shall retain its interest in and take no steps to alter the historic integrity of all sites, buildings, and structures within the line's right-of-way that are eligible for listing or listed in the National Register of Historic Places (generally, 50 years old or older) until the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f, has been completed. IANW shall report back to the Section of Environmental Analysis regarding any consultations with the SHPO and any other section 106 consulting parties. IANW 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; and (2) IANW shall keep intact the right-of-way, including bridges, culverts, tunnels, ballast, and objects, for a period of 180 days after the October 25, 2008 effective date (until April 23, 2009) to enable any state or local government agency, or any other interested person, to negotiate the acquisition of the line for public use. Also, the notice is modified to the extent necessary to implement interim trail use/rail banking as set forth below, for a period of 180 days after October 25, 2008 (until April 23, 2009).
3. Dickinson's motions for leave to late file a Notice of Intent to file an OFA and to toll the deadline for submitting an OFA are denied.
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 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 payment of any and all taxes that may be levied or assessed against, the right-of-way.
5. 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.

6. If interim trail use is implemented and subsequently the user intends to terminate trail use, IANW must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

7. If an agreement for interim trail use/rail banking is reached by April 23, 2009 (the 180th day after October 25, 2008), interim trail use may be implemented. If no trail use agreement is reached by that time, IANW may fully abandon the line, provided the conditions imposed above are met.

8. This decision is effective on its service date.

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

Anne K. Quinlan
Acting Secretary