

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. FD 36210¹

VERMONT RAILWAY, INC.—ABANDONMENT AND DISCONTINUANCE OF SERVICE
EXEMPTION—IN BENNINGTON COUNTY, VT

Decided: September 14, 2018

On July 5, 2018, Vermont Railway, Inc. (VTR), a Class III rail carrier, filed a verified notice of exemption under 49 C.F.R. 1152.50 to discontinue service over approximately 1.57 miles of rail line in Bennington County, Vt., between approximately Chatham Subdivision milepost 57.35 (River Street) at valuation station 3028+08 and Chatham Subdivision milepost 58.93 (northerly abutment of Bridge No. 56 over Furnace Brook) at valuation station 3111+30 (the Line).² However, because the Line is operated under a modified certificate of public convenience and necessity (modified certificate), a different procedure applies. See generally 49 C.F.R. pt. 1150 subpart C. Operators under a modified certificate are exempt from the requirements in 49 U.S.C. § 10903 governing termination of operations. Instead, railroads operating pursuant to a modified certificate may terminate service after providing 60 days' notice to the state, the Board, and all persons that have used the line within the six months preceding the date of the notice. See 49 C.F.R. § 1150.22, .24; see also Common Carrier Status of States, 363 I.C.C. 132, 136 (1980), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982).

In this case, VTR's July 5 filing will be accepted as notice of VTR's intent to terminate service over the Line under 49 C.F.R. § 1150.24. By letter dated August 29, 2018,³ VTR certified that there are no persons who have used the Line within the last six months and are entitled to notice under 49 C.F.R. § 1150.24.

¹ This proceeding was originally docketed as Docket No. AB 265 (Sub-No. 4X). Because the matter pertains to discontinuance of service under a modified certificate of public convenience and necessity, it was re-docketed as Docket No. FD 36210.

² The Line is part of a larger, 131-mile segment of rail line that was authorized for abandonment in 1962. See Rutland Ry. Aban. of Entire Line, 317 I.C.C. 393 (1962). The following year, the ICC authorized acquisition of that line by the State of Vermont and operation by VTR. See Vt. Acquis. & Operation in Vt., 320 I.C.C. 330 (1963), as modified at 320 I.C.C. 609 (1964). In 2004, VTR was authorized to operate on the 131-mile line under a modified certificate. See Vermont Ry.—Modified Rail Certificate, FD 34455 (STB served Jan. 27, 2004).

³ VTR's August 29 letter was included in the Town of Bennington's August 31 filing.

On August 31, 2018, the Town of Bennington (Bennington), a municipal corporation in the State of Vermont, filed a request for issuance of a public use condition under 49 U.S.C. § 10905 and a notice of interim trail use (NITU) for the Line under § 8(d) of the National Trails System Act, 16 U.S.C. § 1247(d), and 49 C.F.R. § 1152.29(a). Pursuant to § 1152.29(a), Bennington also submitted: (1) the required map; (2) a statement indicating its willingness to assume full responsibility for the right-of-way; and (3) an acknowledgment that the use of the right-of-way for trail purposes is subject to future reactivation for rail service.⁴

The Board has jurisdiction to impose interim trail use in a proceeding where a notice is filed under 49 C.F.R. § 1150.24 to terminate operations under a modified certificate. See Wis. & Calumet R.R.—Notice of Interim Trail Use & Termination of Modified Certificate, FD 30724 (Sub-No. 1) (ICC served Aug. 8, 1989); Sammamish Transp. Co.—Notice of Interim Trail Use & Termination of Modified Certificate, FD 33398 (Sub-No. 1) (STB served Feb. 26, 1998); Beaufort R.R.—Modified Rail Certificate, FD 34943, slip op. at 8 (STB served May 20, 2009); Port of Tillamook Bay R.R.—Modified Rail Certificate, FD 31676 (STB served July 26, 2016).

Because Bennington’s request complies with the requirements of 49 C.F.R. § 1152.29 and the parties agree to negotiate for interim trail use, a NITU will be issued for the Line. The parties are free to negotiate an agreement during the 180-day period prescribed below. If an interim trail use agreement is reached (and, thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2), (h). Because VTR has already filed its termination notice under 49 C.F.R. § 1150.24, if no interim trail use agreement is reached, the modified certificate shall be considered terminated as of the end of the NITU negotiating period. Use of the right-of-way for trail purposes is subject to future restoration of rail service. See 49 C.F.R. § 1152.29(d)(2).

Bennington also requested that the Board “find that [the] property is suitable for other public use, specifically trail use,” and impose a public use condition under 49 U.S.C. § 10905 prohibiting VTR from disposing of the corridor (other than tracks, ties, and signal equipment) except for public use on reasonable terms and barring removal or destruction of potential trail-related structures.

Bennington’s request for a public use condition will be denied. Public use conditions under 49 U.S.C. § 10905 are available under certain circumstances where the Board authorizes abandonment of a rail line, either by application or through an exemption. See 49 U.S.C. § 10905; 49 C.F.R. § 1152.28. However, under 49 C.F.R. § 1150.22, carriers operating under a modified certificate after a line has been approved for abandonment are exempt from the statutory requirement to seek Board authority to abandon the operated line. See Common

⁴ Along with its NITU request, Bennington submitted an executed agreement among Vermont Agency of Transportation, VTR, and Bennington indicating their willingness to negotiate an interim trail use/rail banking agreement during the NITU period.

Carrier Status of States, State Agencies & Instrumentalities, & Political Subdivisions, 363 I.C.C. 132 (1980), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). While granting a NITU is consistent with agency precedent, Bennington has not shown that a public use condition is appropriate in modified certificate proceedings.

It is ordered:

1. The request for a NITU under 16 U.S.C. § 1247(d) is accepted. VTR may negotiate with Bennington for interim trail use of the Line for a period of 180 days from the service date of this decision, until March 13, 2019.

2. 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: (i) managing the right-of-way; (ii) 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 (iii) the payment of any and all taxes that may be levied against the right-of-way.

3. Interim trail use/rail banking is subject to any future use of the property for restoration of railroad operations and to the trail sponsor's continuing to meet the financial obligations for the right-of-way described in paragraph 2 above.

4. 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.

5. If an interim trail use agreement is reached by March 13, 2019 (and, thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2), (h). If no interim trail use agreement is reached, the modified certificate shall be considered terminated as of the end of the NITU negotiating period.

6. Bennington's request for public use condition is denied.

7. This decision is effective on its service date.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.