

Appendix A

Legal Ownership Analysis Detail

This appendix provides supplemental information to section four, the Legal Ownership Evaluation. First, a description of the negotiation process for acquiring a railroad is provided. Then, terms and their definitions are listed, followed by sources for additional information on this topic. Next, maps are provided showing the spatial distribution of the property descriptions presented in the Legal Ownership Evaluation. Finally, the 1990 abandonment application submitted by Norfolk Southern to the Interstate Commerce Commission to abandon a portion of their rail line in Transylvania County is included.

How to Acquire a Rail Corridor

While negotiating with the rail, designate one individual as the point of contact for your organization throughout the process. Typically a lead negotiator has experience in structuring and closing deals. If a staff attorney or park director does not have experience handling real estate negotiations, private, professional negotiators contract out land acquisition services. The following is summarized from the document "Acquiring Rail Corridors: A How to Manual."

Pre-Abandonment Acquisition

If one is attempting to acquire a line that has not yet been abandoned, first contact the railroad's legal department or the asset management department. The following steps should be followed for early contact with the rail:

- Notify the railroad of your agency's interest in the corridor;
- Demonstrate your agency's credibility and commitment to making a deal;
- Distinguish your agency from other buyers;
- Learn more about the railroad and its representatives;
- Determine who has authority to negotiate on the railroad's behalf; and
- Establish an acquisition process and timeline.

Each railroad reviews its transportation network on a regular basis to determine whether a line is profitable and, therefore, worth keeping. Even on profitable lines, railroads must weigh the profits generated from such lines against the value of the assets that can be recouped through liquidation. In most cases, the ultimate decision about whether to abandon a line rests with the Asset Management Department. Once a line has been identified for abandonment, the railroad's



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1990 Abandonment Application*

Legal Department files the formal abandonment application with the Surface Transportation Board (STB). Once abandonment has been approved by the STB, railbanking is no longer an option.

Preliminary Agreements

No one wants to devote time and energy to acquiring a rail corridor, only to see the corridor sold to a competing interest. Unfortunately, failure to act quickly to acquire a corridor may result in it being dismantled or sold. To prevent this from happening, one needs to negotiate an initial agreement with the railroad to ensure the corridor's availability for trail use, as well as gain additional time to complete corridor research. Negotiating a preliminary agreement with a railroad is the best way to accomplish this. There are three elements to a preliminary agreement:

- Gaining site access;
- Setting a purchase price; and
- Establishing an acquisition process and timeline.

If a preliminary agreement is developed with the railroad which guarantees the corridor's availability until due diligence requirements are completed (under terms you may negotiate), risks associated with corridor acquisition will be minimized.

Corridor Research and Assessment

As described in the Legal Ownership Evaluation, most railroads acquired their corridors in one of three ways: through easements, through an outright purchase, or through land grants from local, state and/or federal governments. Oftentimes, a corridor was created by using all three methods. The way in which property is held has implications for its value.

The Legal Ownership Evaluation showed that some sections of the Ecusta corridor may be held in easement. Pay only for property for which the railroad has good title. While railbanking preserves easements, the railroad would not be able to realize any return on easement property in the absence of railbanking. This is because the railroad's control over the property would be extinguished upon abandonment. A railroad may ask for payment for railbanked property that it holds only as easements; however this is unwarranted. Point out that, absent railbanking, the railroad would be unable to sell any of the parcels it holds as easements.

In addition to understanding who owns the property and how it is held, it is important to understand the physical and structural characteristics of the land. If the rail line is inactive or used only infrequently, encroachments, trespassing, and illegal uses of the corridor may be an issue. Inventory existing improvements, and determine their condition (for liability purposes) and value. Bridges, tunnels, culverts, rails and ballast, ties, and any buildings owned by the railroad may be useful for trail development and use. However, the rail may also see value in these items in terms of salvage opportunity. By investigating the corridor prior to acquisition, issues and points of negotiation will be realized.

NC General Statute 136: Transportation

Article 2D: Railroad Revitalization

§ 136-44.35. Railroad revitalization and corridor preservation a public purpose.

The General Assembly hereby finds that programs for railroad revitalization which assure the maintenance of safe, adequate, and efficient rail transportation services and that programs for railway corridor preservation which assure the availability of such corridors in the future are vital to the continued growth and prosperity of the State and serve the public purpose. (1979, c. 658, s. 1; 1989, c. 600, s. 1.)

§ 136-44.36. Department of Transportation designated as agency to administer federal and State railroad revitalization programs.

- a. The General Assembly hereby designates the Department of Transportation as the agency of the State of North Carolina responsible for administering all State and federal railroad revitalization programs. The Department of Transportation is authorized to develop, and the Board of Transportation is authorized to adopt, a State railroad plan, and the Department of Transportation is authorized to do all things necessary under applicable State and federal legislation to properly administer State and federal railroad revitalization programs within the State. Such authority shall include, but shall not be limited to, the power to receive federal funds and distribute and expend federal and State funds for rail programs designed to cover the costs of acquiring, by purchase, lease or other manner as the department considers appropriate, a railroad line or other rail property to maintain existing or to provide

future rail service; the costs of rehabilitating and improving rail property on railroad lines to the extent necessary to permit safe, adequate and efficient rail service on such lines; and the costs of constructing rail or rail related facilities for the purpose of improving the quality, efficiency and safety of rail service. The Department shall also have the authority to preserve railroad corridors for future railroad use and interim compatible uses and may lease such corridors for interim compatible uses. Such authority shall also include the power to receive and administer federal financial assistance without State financial participation to railroad companies to cover the costs of local rail service continuation payments, of rail line rehabilitation, and of rail line construction as listed above. This Article shall not be construed to grant to the department the power or authority to operate directly any rail line or rail facilities.

- b. Notwithstanding subsection (a) of this section, the acceptance of federal funds by the Department of Transportation for rail programs shall be subject to the following:
 - 1. Report.— For any project under subsection (a) of this section, the Department of Transportation shall report the project details, including the amounts of federal funds and any State matching funds, as well as the expected annual maintenance and operational costs to the State of the project for the next 25 years, to the Joint Legislative Transportation Oversight Committee if the General Assembly is not in session, or to the House Appropriations Subcommittee on Transportation and the Senate Committee on Appropriations

on Department of Transportation if the General Assembly is in session.

- 2. Consultation. – If either the amount of State matching funds required by the federal grant or the amount of future annual maintenance and operational costs of the project are reasonably expected to exceed three million dollars (\$3,000,000), then the Department shall not accept the federal funds prior to consultation with the Joint Legislative Transportation Oversight Committee if the General Assembly is not in session, or with the House Appropriations Subcommittee on Transportation and the Senate Committee on Appropriations on Department of Transportation if the General Assembly is in session. Failure of the Joint Legislative Transportation Oversight Committee, the House Appropriations Subcommittee on Transportation, or the Senate Committee on Appropriations on Department of Transportation to hold a meeting with the Department of Transportation within 60 days of a written request for a meeting from the Department of Transportation shall be deemed a waiver of consultation by the committee.
- 3. Approval. – If either the amount of State matching funds required by the federal grant or the amount of future annual maintenance and operational costs of the project are reasonably expected to exceed five million dollars (\$5,000,000), then the Department’s acceptance of funds shall be subject to approval of the project by an act of the General Assembly. If 30 days have passed since

consultation or the expiration of the consultation period under subdivision (2) of this subsection, then the inaction of the General Assembly, including the lack of an extra session to address the project, shall be deemed an approval of the project, and the Department may accept the funds without an act of the General Assembly.

For purposes of this subsection, the terms “State matching funds” and “annual maintenance and operational costs to the State” shall not include funds that may pass through the Department of Transportation but that originally came from a non-State source. (1979, c. 658, s. 2; 1987 (Reg. Sess., 1988), c. 1071, s. 1; 1989, c. 600, s. 2; 2011-145, s. 28.15.)

§ 136-44.36A. Railway corridor preservation. The North Carolina Department of Transportation is authorized, pursuant to 16 U.S.C.A. § 1247(d), to preserve rail transportation corridors and permit compatible interim uses of such corridors. (1987 (Reg. Sess., 1988), c. 1071, s. 2.)

§ 136-44.36B. Power of Department to preserve and acquire railroad corridors. In exercising its power to preserve railroad corridors, the Department of Transportation may acquire property for new railroad corridors and may acquire property that is or has been part of a railroad corridor by purchase, gift, condemnation, or other method, provided that the Department may not condemn part of an existing, active railroad line. The procedures in Article 9 of this Chapter apply when the Department condemns property to preserve or acquire a railroad corridor. (1989, c. 600, s. 3; 1991, c. 673, s. 1.)

§ 136-44.36C. Installment contracts authorized.

The Department of Transportation may purchase active or inactive railroad lines, corridors, rights-of-way, locomotives, rolling stock, and other rail property, both real and personal, by installment contracts which create in the property purchased a security interest to secure payment of the purchase money. No deficiency judgment may be rendered against the Department of Transportation in any action for breach of a contractual obligation authorized by this section, and the taxing power of the State is not and may not be pledged directly or indirectly to secure any money due the seller. (1991, c. 673, s. 2.)

§ 136-44.36D. Recreational leasing requirements.

Portions of rail corridors held by the North Carolina Department of Transportation in fee simple absolute may be leased by the Department for interim public recreation use provided the following conditions are met:

1. Before requesting trail use, a sponsoring unit of local government has held a public hearing in accordance with G.S. 143-318.12 and notified the owners of all parcels of land abutting the corridor as shown on the county tax listing of the hearing date, place, and time by first-class mail at the last addresses listed for such owners on the county tax abstracts. A transcript of all public comments presented at the hearing has been sent to the North Carolina Department of Transportation at the time of requesting use of the corridor.
2. A unit of local government has requested use of the rail corridor or a portion thereof for interim public recreational trail use, and agrees

in writing to assume all development costs as well as management, security, and liability responsibilities as defined by the North Carolina Department of Environment and Natural Resources and the North Carolina Department of Transportation.

3. Adjacent property owners are offered broad voting representation by membership in the organization, if any, that is delegated most immediate responsibility for development and management of the rail-trail by the sponsoring local government.
4. The North Carolina Department of Transportation has determined that there will not likely be a need to resume active rail service in the leased portion of the rail corridor for at least 10 years.
5. Any lease or other agreement allowing trail use includes terms for resumption of active rail use which will assure unbroken continuation of the corridor's perpetual use for railroad purposes and interim compatible uses.
6. Use of the rail corridor or portions thereof as a recreational trail does not interfere with the ultimate transportation purposes of the corridor as determined by the North Carolina Department of Transportation. (1991, c. 751, s. 1; 1997-443, s. 11A.119(a).)

§ 136-44.37. Department to provide nonfederal matching share.

The Department of Transportation upon approval by the Board of Transportation and the Director of the Budget may provide for the matching share of federal rail revitalization assistance programs through private resources, county funds or State appropriations as may be provided by the General

Assembly. (1979, c. 658, s. 3; 1983, c. 717, s. 48; 1985 (Reg. Sess., 1986), c. 955, ss. 47, 48; 2006-203, s. 76.)

§ 136-44.38. Department to provide State and federal financial assistance to cities and counties for rail revitalization.

- a. The Department of Transportation is authorized to distribute to cities and counties State financial assistance for local rail revitalization programs provided that every rail revitalization project for which State financial assistance would be utilized must be approved by the Board of Transportation and by the Director of the Budget.
- b. Repealed by Session Laws 1989, c. 600, s. 4. (1979, c. 658, s. 3; 1983, c. 717, s. 48; 1985 (Reg. Sess., 1986), c. 955, ss. 49, 50; 1989, c. 600, s. 4; 2006-203, s. 77.)

§ 136-44.39. Department to provide State and federal financial assistance to short-line railroads.

The Department of Transportation is authorized to provide assistance to short-line railroads to continue and enhance rail service in the State so as to assist in economic development and access to ports and military installations. Assistance under this section may involve both the Rail Industrial Access Program and the Short Line Infrastructure Access Program, as well as other innovative programs. Grants under this section shall not exceed fifty percent (50%) of the nonfederal share and must be matched by equal or greater funding from the applicant. (2011-145, s. 28.13.)

§§ 136-44.40 through 136-44.49. Reserved for future codification purposes.

Terms, Definitions and Articles

Terms and Definitions

Clearing Title (Curing Defects to Title): Defects in title include such things as mortgages, reversions, liens for payment of work done on the property, or easements across a property that would otherwise be held in fee simple. Curing means removing these defects (e.g. buying out or condemning the easement or reversion).

Deed: A legal document that transfers a property.

Easement: Grants the right to use a specific portion of land for a specific purpose or purposes. Easements may be limited to a specific period of time, granted in perpetuity, or the termination predicated upon the occurrence of a specific event. An easement agreement survives transfer of landownership and is generally binding upon future owners until it expires on its own terms.

Easement, Conservation: Places permanent restrictions on property in order to protect natural resources.

Easement, Construction: An additional temporary area or corridor needed to construct a trail or facility.

Fee simple: When a piece of property is owned 'fee simple', the owner has exclusive control of the property rights.

Fee Simple Absolute: An interest in land in which the owner is entitled to the entire property without limitation or restriction, and with unconditional power of disposition.

Fee Simple Determinate: Similar to Fee Simple Absolute, but states condition(s) under which the property will revert to the original owner/grantor.

Some deeds in this form, purporting to cause reversion if the property is no longer used for rail purposes or similar conditional language are turned into fee simple absolute by virtue of the application of the Marketable Titles Act and the possibility of reversion voided.

Lease: The temporary grant of an interest in land upon payment of a determined fee. The fee does not have to be monetary, but some consideration must be given for the right to use the land, or the lease will not be legally binding.

Legal Public Access: The right of passage, established by law, over another's property. Can be created by an easement dedicated or reserved for public access. Legal public access exists on public land, public waters, public rights of way, and public easements.

Less-Than-Fee-Simple: Land acquisition technique that obtains only certain land use rights from the landowners, such as conservation easements, management agreements, or leases.

License: Allows the licensed party to enter the land of the licensor without being deemed a trespasser.

Marketable Titles Act: An act providing for the extinguishment of title interests in real property that are not asserted within 30 years.

Notice of Interim Use (NITU): A document issued by the STB in Notice of Exemption for rail line abandonments (lines out of service for two or more years).

Ownership-In-Fee (Fee Purchase, Fee Simple): A complete transfer of land ownership from one landowner to another party, usually by purchase.

Public Use Condition (PUC): A condition attached

to an STB-approved rail line abandonment authorization prohibiting the railroad from disposing of rail assets for a period of up to 180 days after such authorization unless the properties have first been offered, on reasonable terms, for sale for public purposes.

Quiet Title: An action brought in state court to establish legal rights to property.

Quitclaim Deed: Document that transfers ownership of real estate but contains no guarantees that the seller has a valid right to do so or that others do not have rights to the land.

Rail Corridor: The path of a railroad right-of-way, including the tracks and a specified tract of land on either side of the tracks (generally one hundred feet wide).

Rail Trail (Rail-to-Trail): A multi-purpose public path (paved or natural) created along an inactive rail corridor.

Railbank(ing): Retaining a rail corridor for future railroad uses after service has been discontinued. The National Trails System Act, Sec. 8d, provides for interim public use of the corridor, allowing the establishment of recreational trails.

Right of First Refusal: A property interest in which the holder of the right has first option to purchase the property at the price of a bona fide offer made to the property owner by a third party. If not exercised within a set time period after the offer is made, it expires, and the owner is free to sell to the offeror.

Right-of-Way: A strip of land held in fee simple title - or an easement over another's land - for use as a public utility for a public purpose. Usually includes a designated amount of land on either side of a

trail that serves as a buffer for adjacent land uses. [cormanual.pdf](#)

Right of Way: The right of one trail user or vehicle to proceed in a lawful manner in preference to another trail user or vehicle.

Section 8(d): Common reference to U.S.C. 1247(d), the section of the National Trails System Act which provides for interim trail use when a surplus railroad line is placed in the federal railbank.

Title: Rights of ownership of property; paper that indicates ownership.

Title Search: A legal review of deeds of record in the chain of title to a piece of property analyzing all encumbrances or prior sales of the property to make sure that a piece of real estate can be sold without anyone else claiming rights to it.

Additional Information

Acquiring Rail Corridors, published by the Rails-to-Trails Conservancy includes discussion about how to research the property: http://www.railstotrails.org/resources/documents/resource_docs/acquiringrailcorridors.pdf

Successful Rail-Trails: An Acquisition and Organizing Manual: <http://atfiles.org/files/pdf/rtcmanual.pdf>

A Resolution to Facilitate the Protection of Rail Corridors preserved by the Department of Transportation and other public bodies in North Carolina, January 1998: <http://www.bytrain.org/corridor/protectrailcorridorsresol.html>

The North Carolina Rails-Trails Project Guide (1995): http://www.ncrailtrails.org/pdfs/ProjDevGuide2_2010.pdf

The NCDOT Rail Corridor Preservation Policy (1998): <http://www.bytrain.org/corridor/pdf/>

North Carolina General Statutes § 136-44.36A
Railway corridor preservation: <http://law.onecle.com/north-carolina/136-roads-and-highways/136-44.36a.html>

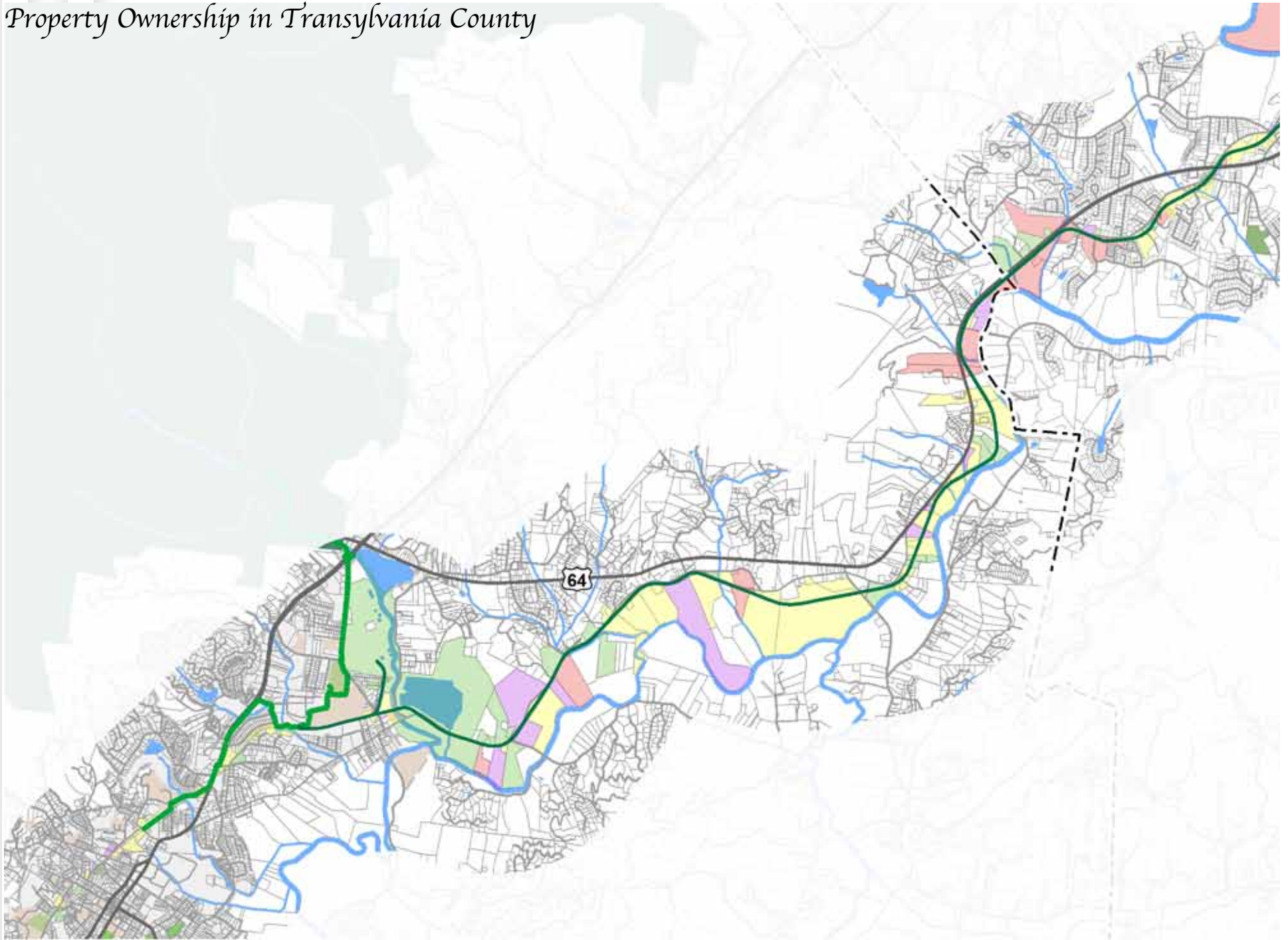
North Carolina General Statutes § 136-44.36D
Recreational leasing requirements: <http://law.onecle.com/north-carolina/136-roads-and-highways/136-44.36d.html>

Guide to the North Carolina Rail-Trails Records, 1987-2011: <http://www.lib.ncsu.edu/findingaids/mc00265#CollectionDescription>

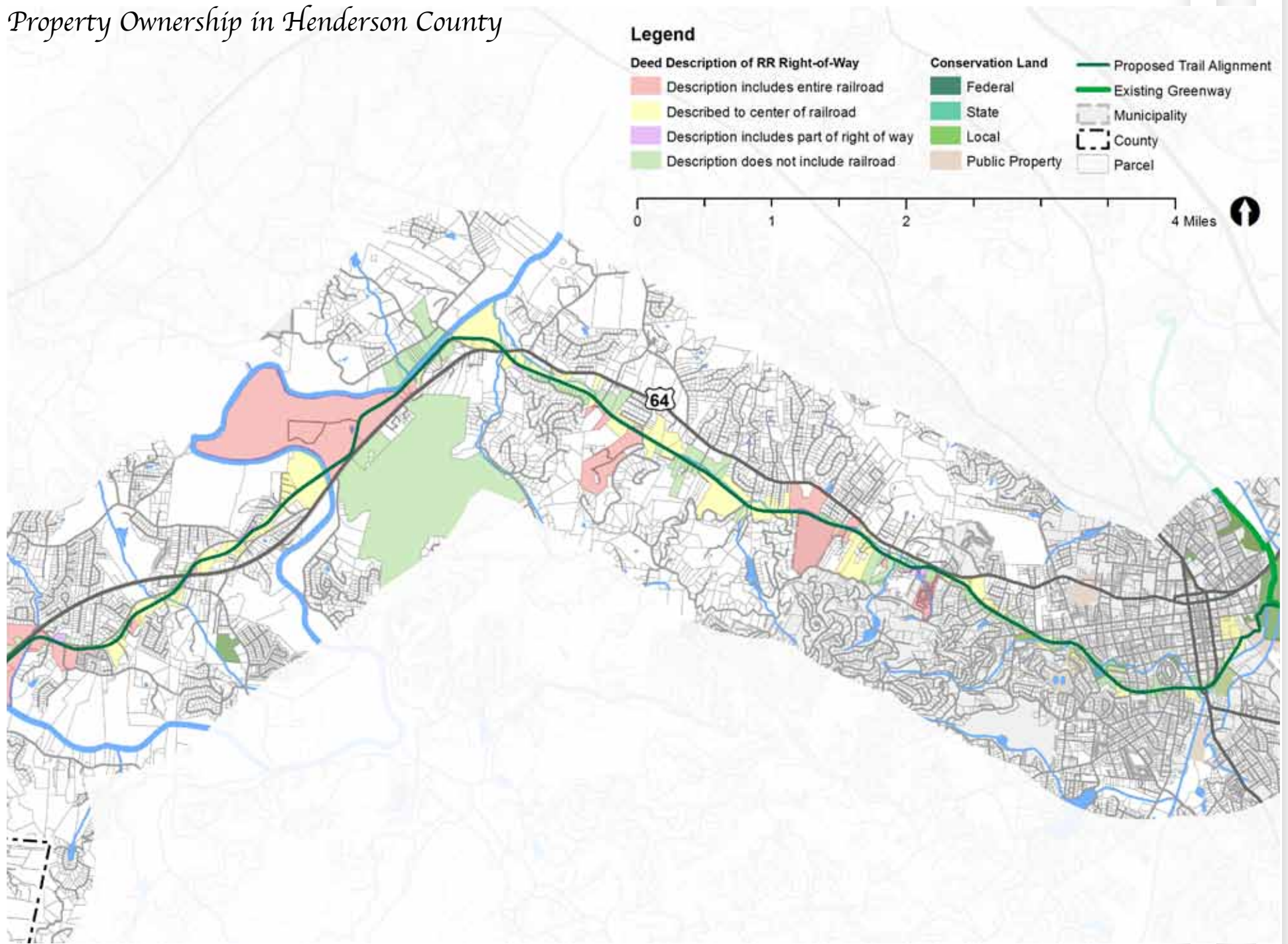
A History of Railroading in Western North Carolina by Cary Franklin Pope

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Property Ownership in Transylvania County



Property Ownership in Henderson County



8-9-1990

ORIGINAL

BEFORE THE
INTERSTATE COMMERCE COMMISSION

DOCKET NO. AB-290 (SUB-NO. 108X)

SOUTHERN RAILWAY COMPANY - ABANDONMENT -
BETWEEN PISGAH FOREST AND BREVARD,
IN TRANSYLVANIA COUNTY, NORTH CAROLINA

PETITION FOR EXEMPTION

8-9-1990

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Dated: August 9, 1990

BEFORE THE
INTERSTATE COMMERCE COMMISSION

DOCKET NO. AB-290 (SUB-NO. 108X)

SOUTHERN RAILWAY COMPANY - ABANDONMENT -
BETWEEN PISGAH FOREST AND BREVARD,
IN TRANSYLVANIA COUNTY, NORTH CAROLINA

PETITION FOR EXEMPTION

COMES NOW Southern Railway Company (Southern)¹ and hereby files this petition seeking an exemption under 49 U.S.C. § 10505 from the prior approval requirements of 49 U.S.C. § 10903, et seq., to abandon a 2.0-mile line between Milepost TR-19.8, Pisgah Forest, and Milepost TR-21.8, Brevard, lying in Transylvania County, North Carolina. In support of its petition, Southern submits the following facts and argument.

I. FACTUAL STATEMENT

1. Description and Operation of the Line

The line from Pisgah Forest to Brevard is the 2.0-mile end segment of a 21.8-mile branch line between Hendersonville and Brevard, North Carolina. See map attached as Exhibit 1.

¹Southern Railway Company is a wholly owned subsidiary of Norfolk Southern Corporation (NS), which also owns Norfolk and Western Railway Company.

The line is in need of substantial rehabilitation, and the occasional traffic generated by a lumber company and concrete plant located on it cannot justify routine maintenance work, let alone rehabilitation. New ties and ballast were last installed in 1979. The rail on this segment was rolled in 1915 and is very lightweight (70# jointed rail). There also are nine grade crossings and four trestles requiring maintenance on the two-mile segment. Southern estimates the cost of major program work is \$59,000 per mile of line. That figure jumps to \$147,000 per mile if the rail must be replaced. Continued use of the line without major maintenance being performed is a potential safety hazard, yet the revenues on the present volume of traffic do not justify the cost of that work.

2. Traffic History

Traffic on the line has been sporadic over the past ten years, ranging from a low of 1 carload in 1982 to a high of 26 carloads in 1987. Carloads shipped on the line totalled 8, 2, 1, 5, 3, 9, 22, 26, 5, 8, for the years 1980 through 1989, respectively, and only 1 carload through June 1990. The 10-year average is only 9 carloads per year, and there is no sign of improvement in the traffic base.

Alternate truck transportation is available to handle this minimal volume of traffic, which for the year 1989 would have amounted to about 2 truck trips per month. To the extent any of the commodities are rail dependent, the team track at Pisgah Forest is only two miles from the endpoint of the abandonment and will be available for any transloading that may be needed.

3. Environmental Data

Attached as Exhibit 2 is an environmental report prepared in accordance with the Commission's regulations.

II. ARGUMENT

1. Use of the Petition for Exemption

Southern has chosen in this case to file a petition for exemption from the abandonment regulations rather than a long-form, or even a summary, abandonment application because preparation of a long-form or summary abandonment application for the number of carloads moving over this line during 1988, 1989 and the current six months of 1990 would be a major burden upon Southern, and the results of such efforts would not aid the Commission in determining whether the present or future public convenience and necessity require or permit the proposed abandonment.

Use of the summary abandonment application would permit Southern to avoid the burden of preparing the information for the two prior calendar years unless an investigation were ordered. In that case, Southern would be required to file the remainder of the information called for in a standard long-form application within 60 days or its application would be dismissed. Southern seeks to avoid this possible consequence because the required information is not relevant. The result of not providing the information within the 60-day period is severe: the application may not be refilled for one year. Presumably, a petition for exemption could be filed prior to

the expiration of that one-year period. However, rather than face such a prospect, Southern has chosen to proceed with an exemption in the first instance.

The principal concerns voiced by shippers and public agencies to a rail carrier's use of petitions for exemption in abandonment cases appear to be the lack of notice and the lack of regulatory guidelines for the filing of objections to the petition. It is Norfolk Southern's practice to notify all shippers and officials in communities on lines proposed for abandonment through exemption well in advance of the proposed filing. In this case, NS wrote letters dated March 31, 1988, to both Brevard Lumber Company and McCrary Sand and Concrete Company advising them that the line to Brevard had been part of NS's 2,700-mile write-down program and was targeted for abandonment. NS sales also advised Brevard Lumber Company of the planned abandonment during a sales call to the owner of the company. Finally, Norfolk Southern personnel also advised McCrary Sand and Concrete Company personnel, the executive director of the Brevard-Transylvania Economic Development Commission, the Mayor of Brevard, a member of the Transylvania County Commission, and some local planning staff, of the proposed abandonment in a meeting in Brevard on November 22, 1989. The shippers did not voice any opposition to the abandonment. The municipal officials and economic development agencies have expressed an interest in preserving the rail corridor, possibly by purchasing it upon abandonment. Those agencies have been in contact with Southern officials and Southern has indicated its willingness to cooperate with their efforts. The state agencies concerned with rail transportation are also notified of the proposal. In addition, copies of the petition are served on all active customers and on the concerned state officials with a covering

letter which advises that any comments or protests should be directed to the Commission within 30 days of the filing of the petition.

2. The Statutory Standards

Section 10505 of Title 49, as amended by Section 213 of the Staggers Rail Act of 1980 (Publ.L. 96-448, 94 Stat. 1895), directs the Commission to exempt a transaction when the Commission determines that the transaction satisfies certain statutory criteria. Those criteria are that regulation is not necessary to carry out the national transportation policy (49 U.S.C. § 10505(a)(1)) and that the transaction is either of limited scope or is not needed to protect shippers from abuse of market power (U.S.C. § 10505(a)(2)).

Southern submits that the proposed abandonment falls within the statutory standards under which the Commission shall exempt a transaction from its jurisdiction pursuant to 49 U.S.C. § 10505. Continued regulation of the involved trackage is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101a. Granting of the exemption would foster sound economic conditions in transportation by permitting Southern to eliminate unnecessary expenditures and divert useable assets from a line that produces limited revenue as soon as possible.

The exemption also would minimize regulatory control and foster expeditious regulatory decisions by eliminating an abandonment proceeding that is not otherwise required, would reduce regulatory barriers to exit from the industry, and would encourage efficient management of the railroads. See F.D. No. 30401, Chicago and North Western Transportation Company - Abandonment - Exemption in McHenry County, Illinois (unprinted decision served October 2, 1984).


It conceivably could be argued that granting the exemption petition would not foster competition within the rail industry and with other modes. However, as only two active shippers of limited volume are affected, no transportation options are curtailed. The national rail transportation policy cannot be interpreted as ensuring intermodal competition in all instances. Rather, it is to ensure competition "to meet the needs of the public and the national defense." See 49 U.S.C. 10101a(4). Moreover, the needs of Southern's customers elsewhere on its system can only be met if Southern strives for long-term viability through the elimination of unprofitable operations.

The proposed abandonment is of limited scope in that only two active shippers use the line and that only an average of 9 carloads of traffic per year (and about 6 per year in the past 2 years) are generated. Even if the Commission were to find that the proposed abandonment were not of limited scope, there would be no abuse of market power since alternate transportation is available to the affected area.

WHEREFORE, Southern Railway Company requests that the Commission exempt from the provisions of 49 U.S.C. 10903, et seq., its proposed abandonment of 2.0 miles of railroad lying between Pisgah Forest and Brevard in North Carolina.

Respectfully submitted,

SOUTHERN RAILWAY COMPANY


R. E. L. DeLuttis
Vice President - Corporate
Development and Real Estate

Of counsel:

F. Blair Wimbush
General Attorney
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-2191

Dated: August 9, 1990

VERIFICATION

COMMONWEALTH OF VIRGINIA }
CITY OF NORFOLK } SS:

R. E. L. deButta, being duly sworn, deposes and says that he is Vice President-Corporate Development and Real Estate of Southern Railway Company; that he is authorized to sign, verify, and file with the Interstate Commerce Commission the foregoing Petition for Exemption; that he has carefully examined all of the statements contained in said Petition for Exemption; that he has knowledge of the matters set forth therein; and that the same are true and correct to the best of his knowledge, information, and belief.

R. E. L. deButta
R. E. L. deButta

Subscribed and sworn to before me
this 2nd day of August, 1990

J. D. Bruce
Notary Public

My commission expires:

December 22, 1991

(SEAL)

J. D. BRUCE
NOTARY PUBLIC
COMMONWEALTH OF VIRGINIA

ALLEN MEMPHIS 028 027811



CASE FILE 1/2
FIELD NO. 01/2

SHEET 1 OF 1

DEC 10 1990

INTERSTATE COMMERCE COMMISSION

DECISION

Docket No. AB-290 (Sub-No. 108X)

SOUTHERN RAILWAY COMPANY--ABANDONMENT EXEMPTION--
IN TRANSYLVANIA COUNTY, NC

Decided: December 3, 1990

Southern Railway Company (Southern)¹ seeks an exception under 49 U.S.C. 10505 from the prior approval requirements of 49 U.S.C. 10903-10904 to abandon its 2-mile line of railroad between Pisgah Forest (milepost TR-19.8) and Brevard (milepost TR-21.8), in Transylvania County, NC. The Railway Labor Executives' Association seeks imposition of labor protective conditions. We will grant the petition subject to standard labor protective conditions and an environmental condition.

The line proposed for abandonment is the end segment of a 21.8-mile branch line between Hendersonville and Brevard, NC. The involved line currently serves two shippers, Brevard Lumber Company (Brevard Lumber) and McCrary Sand and Concrete Company (McCrary). Southern indicates that it has notified Brevard Lumber and McCrary of the proposed abandonment and that they have not voiced any opposition.

Traffic on the line has been sporadic over the past 10 years, averaging only 9 carloads a year.² During the first 6 months of 1990, only one carload was shipped on the line. Alternate truck transportation is available to handle the minimal amount of traffic involved. To the extent any of the shippers' commodities are rail dependent, the team track at Pisgah Forest will be available for transloading.

Southern asserts that the line is in need of substantial rehabilitation, but that the occasional traffic generated by the lumber company and concrete plant located on it cannot justify even routine maintenance. Southern estimates the cost of major program work at \$52,000 per mile of line. If rail is replaced, the figure becomes \$147,000 a mile. Southern claims that continued use of the line without major maintenance is a potential safety hazard.³

Southern certifies that it has served a copy of its petition on each of the shippers, the Military Traffic Management Command, the U.S. Department of Transportation, the Attorney General of the United States, the Federal Trade Commission, the Governor of North Carolina, the North Carolina Utilities Commission, the

¹ Southern is a wholly-owned subsidiary of Norfolk Southern Corporation.

² Carloads shipped on the line totalled 0, 2, 1, 5, 3, 0, 22, 26, 5, and 8, respectively, for the years 1980 through 1989.

³ New ties and ballast were last installed in 1979. The rail was rolled in 1915 and is very lightweight (70# jointed). There are nine grade crossings and four trestles requiring maintenance.

North Carolina Department of Transportation, the North Carolina State Clearing House, and the Brevard Transylvania Economic Development Commission (EDC).

Under 49 U.S.C. 10901-10904, a rail line may not be abandoned without prior Commission approval. However, under 49 U.S.C. 10505, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny under 49 U.S.C. 10903-10904 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of abandoning this line, an exemption will expedite regulatory decisions and reduce regulatory barriers to exit (49 U.S.C. 10101a(2) and (7)). By enabling Southern to avoid the operating and maintenance costs on this low volume line, exemption also will foster sound economic conditions and encourage efficient management (49 U.S.C. 10101a(3), (5), and (10)). Other aspects of the rail transportation policy are not affected adversely. For example, competition and the continuation of a sound transportation system are not affected since the shippers have access to alternative transportation and have not opposed the abandonment.

The transaction is limited in scope since the proposed abandonment involves only 2 miles of rail line in a single county, providing service to only two shippers with light traffic. Moreover, regulation is not necessary to protect shippers from the abuse of market power as the shippers on the line appear to have adequate transportation alternatives and were served with copies of the petition and have not objected. However, to ensure that the shippers are informed of the status of the line, we will require Southern to serve a copy of this decision on them and to certify to us that it has done so within 5 days of the service date of this decision.

Under 49 U.S.C. 10505(g), we may not use our exemption authority to relieve a carrier of a statutory obligation to protect the interests of its employees. Therefore, as a condition to granting this exemption, we will impose the employee protective conditions in Oregon Short Line R. Co.--Abandonment-- Gashan, 360 I.C.C. 91 (1979).

Southern has submitted an environmental report with its petition and has notified the appropriate North Carolina agency of the opportunity to submit information concerning the energy and environmental impact of the proposed action. 49 CFR 1105.11. The Commission's Section of Energy and Environment (SEE) has examined petitioner's environmental report, verified the data it contains, and analyzed the probable effect of the proposed abandonment on the quality of the human environment.

The U.S. Fish and Wildlife Service has informed SEE that, should removal of bridge structures become necessary, this work should be done using hand-operated equipment, between July and mid-September of any year, to minimize potential impacts to fishery resources. SEE recommends that an appropriate condition be imposed, and we agree. Based upon SEE's recommendations, we conclude that the proposed abandonment, as conditioned, will not significantly affect either the quality of the human environment or conservation of energy resources.

SEE has determined that the right-of-way may be suitable for other public purposes. The Mayor of Brevard, a member of the Transylvania County Board of Commissioners, and some local

planning staff have informed Southern that they are interested in preserving the involved rail corridor, possibly by purchasing it upon abandonment. However, no party has appeared here and requested or substantiated a public use condition, and we will not impose one. Nevertheless, we will provide a period of 10 days after Federal Register publication for interested persons to request a public use condition.

It is ordered:

1. Under 49 U.S.C. 10505, we exempt from the prior approval requirements of 49 U.S.C. 10901-10904 the abandonment of the above-described 2-mile line subject to: (1) the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Kushen, 160 I.C.C. 91 (1979); and (2) the condition that, should removal of bridge structures become necessary, Southern perform the work using hand-operated equipment, between July and mid-September of any year, to minimize potential impacts to fishery resources.

2. Notice will be published in the Federal Register on December 10, 1990.

3. Southern is directed to serve a copy of this decision on each shipper on the line and to certify to this Commission that service has been made within 5 days after this decision is served.

4. Provided no formal expression of intent to file an offer of financial assistance has been received, this exemption will be effective on January 9, 1991.

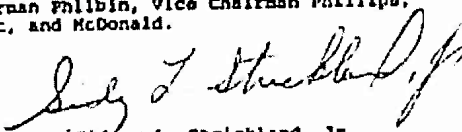
5. Formal expressions of intent to file an offer¹ of financial assistance under 49 CFR 1152.27(c)(2) must be filed by December 20, 1990, petitions to stay must be filed by December 26, 1990, and petitions for reconsideration must be filed by January 7, 1991.

6. If a formal expression of intent to file an offer of financial assistance has been timely submitted, an offer of financial assistance to allow rail service to continue must be received by the railroad and the Commission within 30 days after publication, subject to time extensions authorized under 49 CFR 1152.27(c)(2)(ii)(C) and (D). The offeror must comply with 49 U.S.C. 10905 and 49 CFR 1152.27(c)(2).

7. Offers of financial assistance and related correspondence to the Commission must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: "Mail Section, AB-OFA."

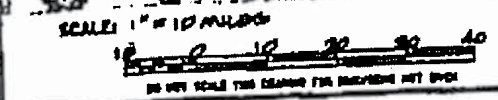
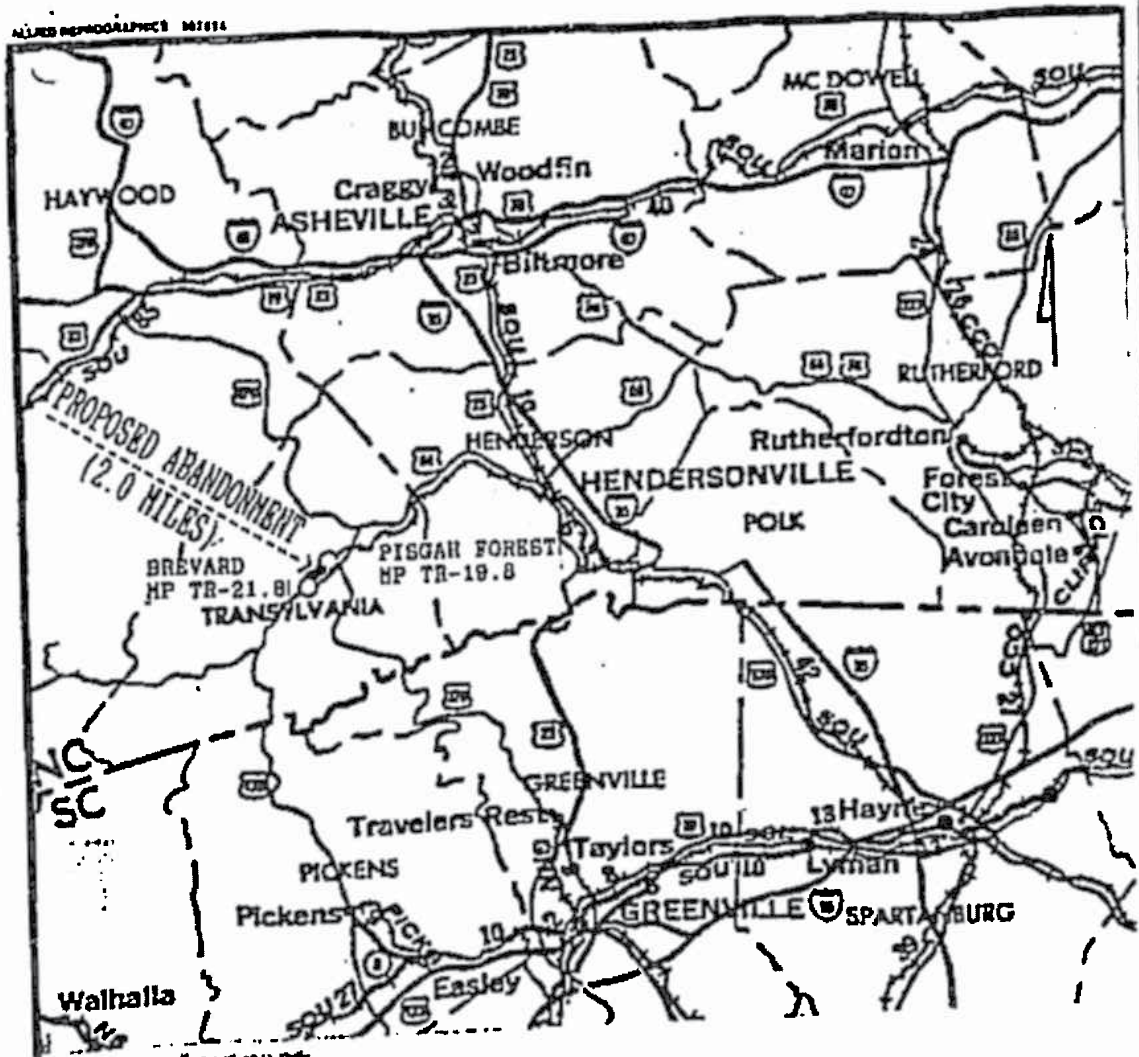
8. Requests for a public use condition in conformity with 49 CFR 1152.28(e)(7) must be filed by December 20, 1990.

By the Commission, Chairman Philbin, Vice Chairman Phillips, Commissioners Simmons, Emmett, and McDonald.


Sidney L. Strickland, Jr.
Secretary

(SEAL)

¹ See Exempt. of Rail Abandonment--Offers of Finan. Assist., 4 I.C.C. 20 164 (1987).



NS NORFOLK SOUTHERN

SOUTHERN RAILWAY COMPANY
INCORPORATED IN GEORGIA

OFFICE OF ENVIRONMENT & CONSTRUCTION SERVICES

REV	BY	DATE	DESCRIPTION
LOCATION: PISGAH FOREST TO BREVARD, NC			
TITLE: PROPOSED MAIN LINE ABANDONMENT BETWEEN MILEPOSTS TR-19.8 AND TR-21.8			
DATE	FILE NO.	MAP	SCALE: FEET - YARDS - METERS
DATE	FILE	197-16	SCALE NUMBER
DATE	DATE	1-11-92	TA 90-0021

CAD FILE: N/A
 PLO DOWN: N/A

SHEET 1 OF 1

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