

exemption filing as two parallel tracks of a double tracked line. According to Conrail, track number 1 extended 32.6 miles from Milepost 1.1 in Parkesburg to Milepost 33.7 in Manor Township. Track number 2 extended 33.9 miles from Milepost 0.0 in Parkesburg to Milepost 33.9 in Manor Township. Subsequent descriptions of the line mistakenly referred to the total length of the line to be abandoned as either 66.5 miles of track or 66.5 miles of rail line. SEA agrees with NS that the length of the line is the actual length of the right-of-way. Thus, the line originally at issue here extended 33.9 miles, from Milepost 0.0 in Parkesburg to Milepost 33.9 in Manor Township.¹

Moreover, it now appears that Conrail sold the portion of the line between Milepost 1.5 to Milepost 4.0 to SEPTA in 1996, so that NS now retains ownership only of the line from Milepost 0.0 to Milepost 1.5 and from Milepost 4.0 to Milepost 33.9. As the court stated in *FAST*, “[i]f, on remand, the [Board] concludes that [NS] has disposed of some portion of the line, the [Board] will be without power to expand the historical condition to cover that property already sold.” See *FAST* 252 F.3d at 262. Accordingly, this proceeding, pursuant to the court’s remand, will be applicable to the NS-owned portions of the line from Mileposts 0.0 to 1.5 and Mileposts 4.0 to 33.9.

NS suggests that this proceeding does not apply to the line between approximately Mileposts 0.0 and 1.5, and between Mileposts 27.0 and 33.9 because NS intends to retain that portion of the Enola Branch as industrial track. However, NS never sought to dismiss its request for authority to abandon that track, and, under the court’s remand, this proceeding includes that track.

C. The Possibility of Trail Use Here

Comment. Friends of the Atglen-Susquehanna Trail, Inc. (*FAST*), the Pennsylvania Department of Conservation and Natural Resources (*DCNR*),² the County of Chester, the Historic Preservation Trust of Lancaster County, and certain individuals commented that interim trail use/rail banking would be appropriate here, which, if an agreement could be entered into, would result in preservation on any railbanked portions of the right-of-way for the duration of the interim trail

use. In consultations, the SHPO indicated that, if the Trails Act remains available, and if a Trails Act agreement could be reached that would preserve the contributing resources on the rail line right-of-way, there would be no adverse effect on historic properties, thereby presumably mooted the need to continue with the mitigation stage of the section 106 process (development of an appropriate MOA).

Comment. NS has stated that it would consider a proposal for trail use that meets certain criteria. Specifically, NS states³ that it would seriously consider any proposal for trail use that is made promptly so as not to delay the conclusion of this proceeding and that:

(1) Does not result in the commitment of any additional railroad funds than are already committed to this project, (2) does not result in the commitment of any substantive amount of railroad time to the project, (3) does not result in any additional liability for the railroad, (4) does not result in any continuing responsibility to the project by the railroad after it has consummated that abandonment and conveyed the relevant segment of the [line], (5) completely satisfies all of the [Townships of West Sadsbury, Sadsbury, Eden, Bart, Providence, Martic, and Conestoga (Townships)] and [Pennsylvania Department of Transportation (PennDOT)], and (6) is acceptable to the [Pennsylvania Public Utility Commission (PUC)] in substitution for its previous order.

NS also has indicated that it will honor the settlement agreements entered into by Conrail and approved by PUC. Specifically, Conrail entered into an agreement with the Townships under which it would convey segments of the abandoned line to the respective Township through which each segment passed; the Townships would assume future ownership and maintenance responsibility for the line and the crossing structures; Conrail would contribute an agreed sum of money to the Townships for the future maintenance of the crossing structures that are to remain in place; and certain other crossing structures deemed to constitute serious highway safety hazards would be removed by either Conrail or a specified Township. Conrail entered into a similar settlement agreement with PennDOT. See PUC Docket Nos. A-00111016 and C-00913256, *Board of Supervisors of Bart Township v. Consolidated Rail Corporation, Pennsylvania Department of Transportation, and Lancaster County, et al.*, October 9, 1997. NS has indicated that any agreement with a potential trail sponsor to use the right-of-way as a trail would have to be

acceptable to the Townships and PennDOT.

Response. The Trails Act allows rail line that would otherwise be abandoned to be preserved (rail banked) and used in the interim as trails. See *Preseault v. ICC*, 494 U.S. 1 (1990). The trail sponsor must assume responsibility for any taxes on, and tort liability for, the property. 16 U.S.C. 1247(d). The Trails Act delays abandonment of a line (and any consequent reversion of rail easements to adjacent property owners) as a matter of law while the line is rail banked and interim trail use continues, and provides that the line may be reactivated for rail service at any time. *Id.* Alternatively, if the railroad owns the property in fee, a railroad can convert its property to trail use outside the auspices of the Trails Act after the abandonment is consummated. See *Hayfield N. R. Co. v. Chicago & North Western Transp. Co.*, 467 U.S. 622, 633–34 (1984) (*Hayfield Northern*) (following abandonment, rail right-of-way is like any other property).⁴

The Board’s procedures for establishing interim trail use/rail banking on a rail line proposed for abandonment pursuant to 16 U.S.C. 1247(d) are detailed in the Board’s regulations at 49 CFR 1152.29 and are separate from the section 106 process. Parties interested in pursuing interim trail use under the Trails Act for this proceeding would have to follow the Board’s regulations to do so. Although trail use requests are normally due within 10 days after the date on which the notice of exemption is published in the **Federal Register** for notice of exemption abandonment proceedings, the Board generally accepts late-filed requests for interim trail use as long as it retains jurisdiction over the subject rail line in a particular proceeding. However, interim trail use under 16 U.S.C. 1247(d) is voluntary on the part of both the railroad and the potential trail sponsor,⁵ and the Board cannot impose an interim trail use arrangement upon unwilling parties. Thus, while it is possible that interim trail use under the Trails Act could occur in this case on

⁴ Just as with interim trail use under 16 U.S.C. 1247(d) there presumably would be no adverse effect on historic properties under a private trail arrangement that would preserve the contributing resources on the rail line right-of-way and the need to continue with the mitigation phase of the NHPA process could be mooted.

⁵ A railroad is under no obligation either to negotiate concerning or enter into an interim trail use/rail banking arrangement. See 49 CFR 1152.29(b)(1); *Connecticut Trust for Historic Preservation v. ICC*, 841 F.2d 479, 482–483 (2d Cir. 1988); *National Wildlife Fed’n v. ICC*, 850 F.2d 694, 696 (D.C. Cir. 1988); *Washington State Dep’t of Game v. ICC*, 829 F.2d 877, 879–82 (9th Cir. 1987).

¹ The October 2002 Notice incorrectly described the line as extending from Milepost 0.0 to Milepost 27.0.

² DCNR stated that the Lancaster County Commissioners have expressed interest in sponsoring a rail-to-trail project.

³ See NS Reply Comments at 47.