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SERVICE DATE - JANUARY 24, 2005

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-444 (Sub-No. 1X)

LAMOILLE VALLEY RAILROAD COMPANY—ABANDONMENT AND
DISCONTINUANCE OF TRACKAGE RIGHTS EXEMPTION—IN CALEDONIA,
WASHINGTON, ORLEANS, LAMOILLE, AND FRANKLIN COUNTIES, VT

Decided: January 19, 2005

This decision addresses the petition of Timothy D. Phelps (petitioner) to reopen the Board's decision served on January 16, 2004, in this proceeding.

BACKGROUND

On December 29, 2003, Lamoille Valley Railroad Company (LVRC) filed a notice of exemption (December 2003 filing) under 49 CFR 1152 Subpart F—Exempt Abandonments and Discontinuance of Service and Trackage Rights to abandon approximately 95.26 miles of rail line between milepost 0.057 (SJLC valuation station 3+00) in St. Johnsbury, and milepost 95.324 (SJLC valuation station 5033+10) in Swanton, and approximately 1.52 miles of the Hardwick and Woodbury Connecting Track (H&W) between H&W valuation station 0+00 (Granite Junction) and H&W valuation station 80+48 (Buffalo Road) in Hardwick, in Caledonia, Washington, Orleans, Lamoille, and Franklin Counties, VT (collectively, the line). The line is owned by the State of Vermont (State) by and through the State of Vermont Agency of Transportation (VTrans). See Lamoille County Railroad, Inc. and Vermont Transportation Authority, Acquisition and Operation Between St. Johnsbury and Swanton, VT, Finance Docket No. 27494, et al. (ICC served Apr. 22, 1974). LVRC holds a leasehold interest in the line, pursuant to a lease agreement by and between LVRC and the State dated December 31, 1977.

In the December 2003 filing, LVRC also sought to discontinue trackage rights over a separate adjoining line of the former Central Vermont Railway, Inc. (CVR) between milepost 9.9 at the north abutment of the Missisquoi River Bridge at Sheldon Junction and milepost 27.4 at Richford (the Richford Subdivision), in Franklin County, VT. CVR had been granted authority to abandon the Richford Subdivision in The Central Vermont Railway, Inc.—Abandonment Exemption—in Franklin County, VT, Docket No. AB-174 (Sub-No. 3X) (ICC served Feb. 27, 1992). CVR had not consummated the abandonment pursuant to the authority granted in Docket No. AB-174 (Sub-No. 3X), and LVRC had not sought authority to discontinue its trackage rights at that time. Instead, LVRC had sold the Richford Subdivision to, and entered into a trail use agreement with, the State through VTrans. See The Central Vermont Railway, Inc.—Abandonment Exemption—in Franklin County, VT, Docket No. AB-174 (Sub-No. 3X) (ICC served Oct. 8, 1992). VTrans still owns and manages a trail on the Richford Subdivision.

Notice of the exemption for abandonment and discontinuance of trackage rights in this proceeding was served and published in the Federal Register on January 16, 2004 (69 FR 2646-47). The exemption became effective on February 17, 2004. Shortly after the effective date, LVRC notified the Board that on February 17, 2004, it consummated the discontinuance of the trackage rights between milepost 9.9 and milepost 27.4.

On February 5, 2004, petitioner filed a request to stay the effectiveness of the exemption with respect to abandonment of the line, but not with respect to discontinuance of LVRC's trackage rights over the Richford Subdivision. LVRC replied on February 12, 2004, opposing the stay request. LVRC argued that the Board should reject the stay request because it was late-filed (petitions for stay were due by January 26, 2004) and did not satisfy the criteria for a stay. By letter filed on February 19, 2004, petitioner requested that the Board consider the February 5 petition for stay as a petition to reopen.

By decision and notice of interim trail use or abandonment served on February 13, 2004 (February 2004 decision and notice), the proceeding was reopened and a 180-day period was authorized for VTrans to negotiate an interim trail use/rail banking agreement with LVRC for the line. The February 2004 decision and notice also imposed several environmental conditions. By letter filed on February 23, 2004, LVRC advised the Board that LVRC and VTrans had entered into an agreement to convert the subject line into a trail pursuant to 16 U.S.C. 1247(d) and 49 CFR 1152.29.

MOTIONS TO STRIKE

On February 19, 2004, petitioner filed a motion to strike statements in LVRC's February 12, 2004 reply. Petitioner presents no legal basis for striking the matters he assails but instead attempts to refute arguments made and facts presented by LVRC. On March 3, 2004, LVRC moved to strike petitioner's motion to strike as an impermissible reply to a reply under 49 CFR 1104.13(c). LVRC, however, responded to several of petitioner's arguments. As no party will be prejudiced, and in the interest of developing a complete record, both motions to strike will be denied.

DISCUSSION AND CONCLUSIONS

A petition to reopen an abandonment proceeding must state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances that would materially affect the Board's prior decision. 49 CFR 1152.25(e)(2)(ii), (4). Petitioner seeks to reopen this proceeding on the grounds of new evidence, to show that abandonment authority is not justified. As discussed below, petitioner has failed to show that reopening of this proceeding is warranted. Even had the Board had before it petitioner's proffered evidence at the time LVRC filed the notice, LVRC would still have been entitled to use the class exemption for lines that have been out-of-service for at least 2 years.

Petitioner argues that: (1) for several years preceding the filing of the notice of exemption, VTrans was aware of a desire for rail service by a number of shippers but no attempt was made by VTrans or LVRC to provide the service; (2) there has been no operator on the line since LVRC's lease with VTrans expired in July 1997; (3) the severing of the line by the removal of two bridges was the equivalent of an illegal embargo; and (4) VTrans' decision to make the line available for interim trail use was not based on a fully public process. In reply, LVRC argues that petitioner has not presented any new evidence and that the petition to reopen should be denied.

Potential Interest in Rail Service. Petitioner contends that VTrans had been made aware of a desire for rail service by a number of shippers, both immediately before and during the recent 2-year period for which no local rail traffic was certified to have moved, and that no attempt was made by VTrans or LVRC to contact these shippers and to provide rail service. On February 23, 2001, VTrans issued a "Request for Proposals" for both rail and non-rail uses of the right-of-way from St. Johnsbury to Swanton, VT. As part of a rail use proposal that was submitted to VTrans on March 29, 2001, by Vermont Rail Link, Inc. (VRL proposal), there were "Shipper's Best Estimate" forms on which shippers indicated their projected annual rail shipping needs based on rail service starting in late 2002. Also included in the VRL proposal was a series of letters from both shippers and other concerned organizations and individuals expressing support for continued rail service on the line. Petitioner claims that these forms and letters constitute new evidence and argues that they provide an explicit request from shippers on the line for rail freight service for the year 2002 and beyond.

Petitioner's assertions regarding the alleged interest in future rail service are based on estimates and letters submitted by entities that had never used rail service. These expressions of interest do not constitute requests for rail service, and they are not commitments to use and pay for future rail service. See Idaho Northern & Pacific Railroad Company—Abandonment Exemption—In Wallowa and Union Counties, OR, Docket No. AB-433X, slip op. at 3 (STB served Dec. 13, 2001). Moreover, petitioner has not shown that this estimated traffic level (750-1,000 carloads per year), were it to materialize, would be sufficient to support denial of an abandonment request. Id. In addition, there is no evidence in the record of any formal shipper complaints regarding lack of service on the line.

No Operator on the Line. Petitioner states that LVRC's lease with VTrans was not renewed in July 1997, so there has been no operator on the line since that time. Petitioner asserts that, by failing to renew its lease with VTrans, LVRC had placed itself in the position of not being contractually obligated to operate or maintain the railroad facilities for VTrans. Petitioner argues that the nonfunctioning owner/leaseholder-operator relationship imposed an unlawful impediment to the provision of rail service.

LVRC submitted in the record evidence that subsequent agreements with VTrans confirmed that LVRC would continue to serve as the common carrier on the line. See Settlement

Agreement dated February 19, 1998, and Interim Corridor Management Agreement dated January 4, 2002. Moreover, federal law provides that the common carrier obligation remains with a carrier until the carrier obtains the Board's authorization to abandon the rail line or discontinue service. 49 U.S.C. 10903.

Regardless of the contractual arrangements between VTrans and LVRC, LVRC retained the common carrier obligation to provide freight rail service on the line upon reasonable request until the Board granted authority to abandon the line. 49 U.S.C. 10903(d) & 11101(a). But again, there is no evidence in the record of any formal shipper complaints regarding lack of service on the line, and thus no evidence that LVRC violated its common carrier duty by failing to provide service upon reasonable request.

Illegal Embargo. Petitioner contends that severing the line from Walden to St. Johnsbury by the removal of two bridges resulted in an illegal embargo, making it impossible to handle rail freight traffic on the resulting disconnected portion of the line. Petitioner states that this condition has existed for at least 4 years, including the time period for which LVRC has certified that no local traffic has moved. Petitioner suggests that the resulting lack of traffic should not be considered an acceptable justification for LVRC to invoke the class exemption for lines that have been out-of-service for at least 2 years.

According to LVRC, rail traffic on the line dissipated prior to removal of the bridges. The erosion of LVRC's traffic base on the line began back in the early 1980s as a result of the closing of talc and asbestos mines located along the line and the long-term decline of agriculture in the area served by the line. Also, LVRC's participation in once significant overhead traffic moving between paper mills in the State of Maine and the Midwest ended when the Maine Central Railroad Company closed its mountain division, which ran between Portland, ME, and St. Johnsbury, VT. Freight service over the line effectively ended on April 21, 1989, when the prior owners of LVRC imposed a \$600 per car surcharge on originating and terminating traffic on the line.

The line then suffered numerous washouts and mud slides during floods in August 1995, which halted all remaining operations between St. Johnsbury and Morrisville. For safety reasons, VTrans, in 1996, removed Bridge No. 27A after its abutments became hazardous to highway safety and Bridge No. 13 because of instability in its eastern abutment. Therefore, VTrans did not remove the bridges to prevent rail traffic from moving over the line. The St. Johnsbury-Morrisville segment of the line had been severed prior to the removal of the bridges by the floods and there was no justification for rebuilding them, at significant cost, given the lack of rail traffic on the line.

Petitioner's argument that shippers would have moved traffic but for the removal of the bridges is belied by the absence of any shipper complaints about an embargo, or lack of service, on the line. While we can and do assess the legality of an embargo on complaint of a shipper

seeking and denied service, no shipper has formally requested or been denied service. Therefore, there is no basis for finding that the abandonment was precipitated or abetted by an illegal embargo.

Non-rail Use of the Line. Petitioner contends that the abandonment exemption was sought primarily because of the decision by VTrans to seek authority to convert the right-of-way to a trail and that VTrans' decision was based on a recommendation by the Mountain Valley Corridor Consortium (MVCC), a citizens committee delegated by VTrans to recommend the appropriate use for the right-of-way. Petitioner argues that VTrans accepted MVCC's recommendation without providing a detailed report of the public input received or defining the decisionmaking process used.

How VTrans arrived at its decision to seek authority for trail use is outside the ambit of our jurisdiction. Both VTrans (the owner of the line) and LVRC (the operator) seek to remove the line from the interstate rail network and extinguish the common carrier obligation to provide service over it. If we agree that the line is no longer needed for rail service, it is within the parties' discretion to negotiate conversion of the line to interim trail use, Goos v. I.C.C., 911 F.2d 1283, 1295 (8th Cir. 1990); National Wildlife Federation v. I.C.C., 850 F.2d 694, 696, 702 (D.C. Cir. 1988), and the Board's role in such a conversion is ministerial, Goos, 911 F.2d at 1295; see Citizens Against Rails-To-Trails v. S.T.B., 267 F.3d 1144, 1153 (D.C. Cir. 2001).

Accordingly, we find that LVRC has met all of the requirements set forth at 49 CFR 1152.50(b) to qualify for the 2-year out-of-service class exemption. In its notice of exemption, LVRC certified that: (1) no local traffic has moved over the line for at least 2 years; (2) any overhead traffic on the line can be rerouted over other lines; and (3) no formal complaint filed by a user of rail service on the line (or a State or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Board or with any U.S. District Court or has been decided in favor of the complainant within a 2-year period. Petitioner does not assert that the exemption criteria at 49 CFR 1152.50(b) have not been met. Nor does he allege that the notice contains false or misleading information that would void the exemption.

The record supports a conclusion that the lack of traffic on the line was not caused by VTrans and LVRC unlawfully withholding service to shippers on the line over the past 8 years, but rather by mill closings, declines in agriculture, and other changes in shipper needs for service that occurred over 15 years ago. In sum, petitioner has not shown that LVRC has failed to meet its obligations or that reopening of this proceeding is warranted. Therefore, the petition to reopen will be denied.

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

It is ordered:

1. The motions to strike are denied.
2. The petition to reopen the proceeding is denied.
3. This decision is effective on its date of service.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary