

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1071

STEWARTSTOWN RAILROAD COMPANY—ADVERSE ABANDONMENT—IN YORK
COUNTY, PA.

Digest:¹ This decision permits the estate of George M. Hart to bypass some of the normally required procedures should the estate seek abandonment of a rail line owned by Stewartstown Railroad Company. The Board is waiving those procedures that would be difficult or impossible for a non-owner of a rail line to comply with, such as the filing of a System Diagram Map, but retaining others that are necessary.

Decided: March 7, 2011

In a petition filed on November 2, 2010, the estate of George M. Hart (petitioner) seeks exemptions from several statutory provisions, as well as waiver of certain Board regulations, pertaining to procedures for obtaining abandonment authority. Petitioner indicates that it intends to file a third-party application for “adverse” abandonment of an approximately 7.4-mile line of railroad (Line) in York County, Pa.² On November 22, 2010, Stewartstown Railroad Company (SRC), the owner of the Line, filed a reply in partial opposition to petitioner’s exemption and waiver requests.

BACKGROUND

According to petitioner, the Line extends from milepost 0.0 at New Freedom, Pa., to milepost 7.4 at Stewartstown, Pa.,³ which traverses United States Postal Service Zip Code 17363. Petitioner asserts that George M. Hart, over a period of years, provided loans amounting to a total of \$352,415 to SRC, and that the loans were secured by the assets of the railroad in a recorded mortgage and a judgment note. Petitioner contends that, according to the mortgage, full payment of the loans must be tendered immediately upon its demand. Further, a provision

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² Petitioner included a draft notice of intent and a draft Federal Register notice with its petition.

³ In its reply, SRC contends that the stated mileposts are incorrect because Stewartstown, Pa. is located at milepost 7.2, and not milepost 7.4.

contained in George M. Hart's will instructs the executor of his estate to seek repayment of the amounts loaned to SRC under the mortgage and judgment note.⁴ Petitioner states that it has demanded prompt repayment, but that SRC has responded that it is unable to fulfill its debt obligations because it has neither operating revenues nor cash reserves to make sufficient repayment. Accordingly, petitioner states that it intends to file an adverse abandonment application so that it may, subject to any appropriate processes of state law, foreclose upon SRC's assets to satisfy SRC's debt obligations.

According to petitioner, there are no stations on the Line and no employees that would be affected by abandonment of the Line, because freight service was last provided in 1992, and excursion operations were suspended in the spring of 2004. Petitioner also claims that the Line is dilapidated, cannot safely handle train operations in its current state, and continues to deteriorate due to a lack of funds needed for rail line maintenance.

In opposing the petition, SRC contends that the petition contains factual errors and incorrect assumptions. SRC disputes petitioner's characterization of the condition of the Line, arguing that maintenance of the Line is underway. SRC also states that it has previously provided freight service to Mann & Parker Lumber Co., Columbia Forest Products, Bull's Supply, the Lumberyard (Wolf's Supply), and Metropolitan Edison. SRC contends that, while the Line has not been used for freight service in the last 6 years, the Line has been open for "other users."

DISCUSSION AND CONCLUSIONS

The Board's regulations require that abandonment applications conform to the requirements of 49 C.F.R. pt. 1152, subpart C. When appropriate, however, such as the filing of a third-party or adverse abandonment application, the Board may waive inapplicable and unneeded provisions. See Napa Valley Wine Train, Inc.—Adverse Aban.—in Napa Valley, Cal., AB 582 (STB served Mar. 30, 2001), and cases cited therein. Here, petitioner seeks exemptions and waivers with respect to its notice of intent and adverse abandonment application. While most of the requested exemptions and waivers are appropriate, some of the requested waivers will be denied, as discussed below.

Posting of the Notice of Intent. Petitioner requests exemption from 49 U.S.C. § 10903(a)(3)(B) and waiver of 49 C.F.R. § 1152.20(a)(3), which require that a copy of the notice of intent be posted at each agency station and terminal on the line to be abandoned, or, if there are no agency stations on the line, at any agency station through which business for the line is received or forwarded. Petitioner states that, upon its information and belief, there are no terminals or agency stations at which to post a notice of intent. SRC opposes petitioner's requests for exemption from 49 U.S.C. § 10903(a)(3)(B) and waiver of 49 C.F.R. § 1152.20(a)(3). SRC argues that, by posting notice upon the railroad's property, petitioner would ensure that local entities, which previously relied upon the railroad for freight service, would have some form of notice regarding the abandonment proceeding. SRC also

⁴ George M. Hart died on April 17, 2008. His will was admitted to probate by the Register of Wills of Carbon County, Pa.

contends that, contrary to petitioner's assertions, it has an open agency freight and passenger station located at its operating headquarters in Stewartstown, and that it has pre-pay freight stations located at Turnpike (Shrewsbury) and New Freedom, Pa. Given the uncontested fact that the Line has not been used for freight service for at least 6 years, we find requiring notice to be posted at the aforementioned stations to be unnecessary. Therefore, the exemption and waiver requests will be granted.

Service of the Notice of Intent on Shippers. Petitioner also seeks relief from the requirements of 49 U.S.C. § 10903(a)(3)(D) and 49 C.F.R. § 1152.20(a)(2)(i), which require that the notice of intent be served on significant users of the line. Petitioner states that there are no users of the Line, because there has been no common carrier service for several years. In response to petitioner's request, SRC states that it does not oppose an exemption from 49 U.S.C. § 10903(a)(3)(D) (i.e. posting at stations or terminals), as long as petitioner complies with the notice requirements of § 10903(a)(3)(B). At the same time, SRC objects to petitioner's request for waiver of the exemption's corresponding regulation contained in § 1152.20(a)(2)(i). While SRC admits that the Line has not been in freight service for the last 6 years, it states that the Line has been open for other users. SRC, however, does not identify these other users or what use, if any, they may make of the Line. It is undisputed that there have been no active shippers on the Line for some time. We, therefore, will grant an exemption from 49 U.S.C. § 10903(a)(3)(D) and waiver of 49 C.F.R. § 1152.20(a)(2)(i), except to the extent necessary to require petitioner to mail a copy of its notice to the former shippers identified in SRC's reply.

Service of the Notice of Intent on Labor Organizations. Petitioner requests a waiver of 49 C.F.R. § 1152.20(a)(2)(xii), which requires service of the notice of intent on the headquarters of all duly certified labor organizations that represent employees on the affected line. Petitioner claims that there are no known railroad employees who would be affected by the proposed abandonment, because there has been no rail service for over 6 years. SRC does not contest this waiver. While SRC notes that, contrary to petitioner's assertions, it has several employees who are currently furloughed pending the repair of the Line, SRC also acknowledges that its employees are not represented by a duly certified labor organization. We will grant petitioner's waiver request, because compliance with the requirement is unnecessary.

Notice of Intent. Petitioner asks for waiver of the requirements of 49 C.F.R. § 1152.21, which prescribes the language to be used in preparing a notice of proposed abandonment under the Board's formal application provisions. Petitioner states that the prescribed wording for the notice of intent is inappropriate for adverse abandonment proceedings. Instead, petitioner proposes to use the alternative language in Attachment A, which it appends to its petition. SRC objects to this request. SRC states that petitioner should use the prescribed language contained in § 1152.21, with the exception of the exemptions and waivers that are not contested.

The Board has approved form changes in other adverse abandonment cases. See E. St. Louis Junction R.R.—Adverse Aban.—in St. Clair Cnty., Ill., AB 838 et al., slip op. at 6-7 (STB served June 30, 2003). Here, petitioner's amended notice of intent in Attachment A is in substantial compliance with the requirements of 49 C.F.R. § 1151.21. Further, the proposed changes are reasonable in the context of petitioner's application. Accordingly, the waiver request will be granted.

Federal Register Notice. Petitioner requests a partial waiver of the requirements of 49 C.F.R. § 1152.22(i), which prescribes the wording for the draft Federal Register notices that applicants must submit to the Board. Petitioner states that strict adherence to the wording in § 1152.22(i) is inappropriate in this instance. Instead, petitioner proposes to use the alternative language in Attachment B, which it appends to its petition, and which is similar in content to petitioner's proposed notice of intent. SRC states that petitioner should use the prescribed language contained in § 1152.22, with the exception of those exemptions and waivers that are not contested. The Federal Register notice in petitioner's Attachment B is in substantial compliance with the requirements of 49 C.F.R. § 1152.22(i). For the same reasons that apply to the form of the notice of intent discussed above, the waiver request pertaining to 49 C.F.R. § 1152.22(i) will be granted.

Adverse Abandonment Application. Petitioner requests exemption from 49 U.S.C. § 10903(c) and waivers of 49 C.F.R. §§ 1152.10-14, § 1152.22(a)(5), and § 1152.24(e)(1), which relate to filing, amending, and providing notice to the public of prospective abandonments through a carrier's system diagram map (SDM); and which establish a 2-month waiting period between amendments of the SDM and the filing of a corresponding abandonment application. SRC opposes petitioner's exemption and waiver requests, arguing that petitioner is attempting to lessen its burden of proving that abandonment is consistent with the public convenience and necessity. SRC states that petitioner, through the discovery process, should be required to obtain additional information regarding SRC's SDM. The requirements of 49 C.F.R. § 1152.10-14 are directed to rail carriers. Here, petitioner is not a rail carrier and thus may not properly file, amend, or publish a SDM. Rather, SRC is required to have a SDM or an alternative narrative filed with the Board. For this reason, these exemption and waiver requests will be granted.

Petitioner also seeks waivers of 49 C.F.R. § 1152.22(b)-(d), which require that abandonment applications include information regarding the current physical condition of the line, the service performed on it, and the revenue and cost data attributable to it. Petitioner asserts that it does not have direct knowledge of the exact condition of the Line, that it has no information on the estimated costs of deferred maintenance and/or rehabilitation needed to restore the Line, and that it lacks information on the revenue and cost data associated with the inactive Line. SRC argues that the condition of the Line, the service history associated with the Line, and the costs necessary to rehabilitate the Line, are factors that underlie petitioner's burden of showing that abandonment is warranted. As noted above, petitioner states that the Line is dilapidated, cannot safely handle train operations in its current state, and continues to deteriorate due to a lack of funds needed for rail line maintenance. Because petitioner's assertions need to be supported by evidence, and petitioner will need to subsequently describe the condition of the Line to support its application, the request to waive 49 C.F.R. § 1152.22(b) will be denied. The waiver requests as to § 1152.22(c) and (d) will be granted, however, because the service history of a line and the revenue and cost data attributable to that line are not generally available to a third-party abandonment applicant.

Waiver of the One-year Time Limit on Abandonment Authority. Petitioner requests waiver of a requirement that would otherwise apply if the intended abandonment application

would be granted. This requirement is contained in 49 C.F.R. § 1152.29(e)(2), which sets a one-year time limit on the exercise of abandonment authority. Petitioner states that this waiver is warranted because it may need to invoke other legal processes to obtain control of the subject property. Petitioner's unopposed request for waiver of the one-year time limit on abandonment authority will be granted. This regulation presupposes control by the applicant over the timing of consummation, once the Board issues a final decision regarding abandonment. However, such is not the case in a third-party abandonment because, as petitioner correctly states, there is the potential need to invoke other legal processes, such as a proceeding under state law, to obtain control of the property.

Trail Use and Offers of Financial Assistance Conditions. Petitioner requests a conditional exemption from the provisions contained under the National Trails System Act, 16 U.S.C. § 1247(d), as well as waiver of its corresponding regulation contained in 49 C.F.R. § 1152.29, which address, among other things, use of the rail line for interim trail use and rail banking. The Board will not rule on petitioner's request at this time. There is no need to take such action now. These provisions would be applicable only if and when the Board grants petitioner's adverse abandonment application. Therefore, this issue can be addressed, if need be, in a later decision. See Denver & Rio Grande Ry. Historical Found.—Adverse Aban.—in Mineral Cnty., Colo., AB 1014, slip op. at 5 (STB served Oct. 18, 2007).

Petitioner also requests partial exemption from 49 U.S.C. § 10904, and partial waiver of its corresponding regulation contained in 49 C.F.R. § 1152.27, which govern Offers of Financial Assistance (OFA). Petitioner states that it does not oppose any OFAs that might be submitted for the purchase of the Line. However, petitioner asserts that it strongly opposes any offers to subsidize operations over the Line. Accordingly, petitioner seeks exemption from the one-year subsidy provisions contained in 49 U.S.C. § 10904. SRC opposes petitioner's requests, stating that it objects to any attempts by petitioner to subvert the financial assistance that may be provided to the railroad by third parties.

The Board will grant petitioner's request for exemption from the subsidy OFA provisions of 49 U.S.C. § 10904. The effect of granting an adverse abandonment is that the Board's primary jurisdiction is withdrawn, thus permitting state, local or other federal law to apply where there is no overriding federal interest in interstate commerce. Norfolk S. Ry.—Adverse Aban.—St. Joseph Cnty., Ind., AB 290 (Sub-No. 286), slip op. at 6 (STB served Oct. 26, 2006). If the Board ultimately finds that the public convenience and necessity require or permit withdrawal of its regulatory authority in this adverse abandonment proceeding, it would be fundamentally inconsistent to provide for further Board regulation under the subsidy provisions of § 10904. Id. For the same reasons, the Board will also grant a corresponding partial waiver of 49 C.F.R. § 1152.27.

The exemptions granted in this decision are not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101. Rather, these exemptions will promote that policy by eliminating unnecessary procedures, and thus will expedite regulatory decisions (49 U.S.C. § 10101(2)), foster sound economic conditions in transportation (49 U.S.C. § 10101(5)), and encourage efficient management of railroads (49 U.S.C. § 10101(9)). Other aspects of the rail transportation policy will not be adversely affected. Further, application of the statutory

provisions from which we are granting exemptions here is not necessary to protect shippers from an abuse of market power.

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

It is ordered:

1. Petitioner's petition for exemption and waiver is granted in part and denied in part, as described above.

2. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Nottingham, and Commissioner Mulvey.