

SERVICE DATE – JUNE 4, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34869

HONEY CREEK RAILROAD, INC.—PETITION FOR DECLARATORY ORDER

STB Docket No. AB-865X

HONEY CREEK RAILROAD, INC.—ABANDONMENT EXEMPTION—
IN HENRY COUNTY, IN

Decided: June 2, 2008

On April 21, 2006, Honey Creek Railroad, Inc. (HCR) filed a petition for declaratory order pursuant to an order of the Circuit Court of Henry County, IN, referring to the Board the question of whether HCR had abandoned a 5.9-mile line in Henry County.¹ Mr. Gary L. Roberts, *et al.* (Mr. Roberts), a party to the court proceeding, filed a reply to HCR's petition. Mr. Roberts also petitioned the Board to reopen an abandonment proceeding involving the line and to consolidate that proceeding with the proceeding initiated by HCR. For the reasons discussed below, we will grant Mr. Roberts' petition to consolidate the proceedings, grant HCR's petition in part, and deny Mr. Roberts' petition to reopen the Board's abandonment proceeding and to hold an oral argument.

BACKGROUND

These proceedings involve a 5.9-mile rail line running between Sulphur Springs and New Castle, in Henry County, IN. HCR, the most recent owner and operator of the line, claims that the line has not been abandoned, and that the line is still under the Board's jurisdiction. Mr. Roberts, a farmer whose property the line crosses, disputes these claims.

HCR's Operations Over the Line. In 1993, HCR filed a verified notice of exemption under 49 CFR 1150.31 to acquire the line from Consolidated Rail Corporation (Conrail) and operate over it. See Honey Creek Railroad, Inc.—Acquisition and Operation Exemption—Line of Consolidated Rail Corporation, Finance Docket No. 32332 (ICC served Sept. 20, 1993). Conrail had considered abandoning the line, and HCR purchased it to ensure that HCR's owner, Mr. William Smith, continued to have rail service to his Morristown Grain Company (Morristown Grain) grain elevator.

¹ Case No. 33C01-0506-CT-0019, Honey Creek Railroad, Inc. v. Gary L. Roberts et al.

HCR's operations over the line consisted of transporting grain shipments from the Morristown Grain elevator at Sulphur Springs to New Castle. At New Castle, Conrail, and later Norfolk Southern Railway Company (NSR), picked up the shipments and transported them to destinations throughout the South. Freight charges for movement from Sulphur Springs were billed on a collect basis to the out-of-state consignees or to third parties. HCR was compensated for its rail transportation services by Conrail, and later NSR, through an absorbed allowance paid by the Class I carrier from the line-haul revenues generated by the rail shipments.

Mr. Roberts claims that the shipments from Sulphur Springs stopped in 1996 when, he says, a road crew paved over a section of the line. In contrast, HCR claims that shipments continued until early 2000 when the grain elevator collapsed, and that the road crew subsequently paved over the line. The line deteriorated further after 2000. In 2001, NSR removed its switch connecting the line to the main line. By 2002, Mr. Smith had removed 2.2 miles of 132-pound rail from the line for use at another location.

The Abandonment Proceeding. In 2004, HCR filed a notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments to abandon the line. Notice of the exemption was served and published in the Federal Register on August 20, 2004 (69 FR 51751).² By decision and notice of interim trail use or abandonment (NITU) served on September 20, 2004, the Board reopened the abandonment proceeding and imposed a trail use condition under 16 U.S.C. 1247(d), a public use condition under 49 U.S.C. 10905, and several environmental conditions.³ By decisions served July 22, 2005, February 6, 2006, and February 2, 2007, the Board extended to February 11, 2008, the due date for filing a “notice of consummation” under 49 CFR 1152.29(e)(2), which, when filed, would signify that HCR had exercised the abandonment authority granted to it and fully abandoned the line. In a decision served on February 8, 2008, the Board further extended the time for HCR to file its notice of consummation until February 11, 2009, to maintain the status quo pending resolution of HCR's petition for declaratory order.

The Court Proceeding. Approximately two-thirds of a mile of the line crosses a field owned by Mr. Roberts. During the Spring of 2005, he evidently removed some of this track so that he could return the right-of-way to its original grade and thus stop flooding in his field. On June 22, 2005, HCR filed a complaint, a demand for jury trial, and a notice for injunctive relief with the Henry County Circuit Court against Mr. Roberts. Through those filings, HCR sought a preliminary injunction and asserted claims for conversion of personal property, malicious mischief, and for damages. Mr. Roberts filed an answer, claiming that HCR's rail line had been abandoned and that title had vested in Mr. Roberts as a result of the abandonment. The court then referred to the Board the question of whether the line had been abandoned under the Board's regulatory processes and stayed its proceedings pending Board action on the referral.

² Honey Creek Railroad, Inc.—Abandonment Exemption—in Henry County, IN, STB Docket No. AB-865X (STB served Aug. 20, 2004).

³ The trail use condition and public use condition expired on March 20, 2005.

The Declaratory Order Proceeding. On April 21, 2006, pursuant to the court's order, HCR filed its petition for declaratory order. HCR asks the Board to find that the rail line has not been abandoned because it has not filed a notice of consummation under 49 CFR 1152.29(e)(2). Accordingly, HCR asks the Board to find that the carrier continues to own the track and right-of-way. HCR also asks the Board to explain how its regulation of abandonments interacts with Indiana state law and to find that the line has not been abandoned under state law. As explained below, we are making all of the findings HCR asks us to make except for the requests concerning Indiana state law. We do not need to reach these state law issues.

After the Board granted numerous extensions to Mr. Roberts, he timely filed a reply on June 18, 2007. Additionally, Mr. Roberts filed motions to consolidate the declaratory order proceeding with the abandonment proceeding, to reopen the abandonment proceeding and reconsider the decisions served in it, and to hold an oral argument in both proceedings.

On June 22, 2007, HCR filed a motion asking that the Board grant it leave to file a rebuttal to the arguments raised by Mr. Roberts. In a reply filed on June 27, 2007, Mr. Roberts indicated that he did not object to the Board allowing HCR to file a rebuttal as long as he was also allowed to file a response. In a decision served on June 29, 2007, the Board granted the motion and allowed the parties to file another round of pleadings. HCR filed its rebuttal on July 11, 2007. Mr. Roberts filed a reply on July 23, 2007, and a letter on August 29, 2007.

PRELIMINARY MATTERS

Mr. Roberts asks the Board to consolidate the declaratory order proceeding with the abandonment proceeding. This request is reasonable and will be granted. The two proceedings share many of the same facts and issues. Moreover, consolidation will not unduly delay the declaratory order proceeding or prejudice any party.

Mr. Roberts also asks that we hold an oral argument in these proceedings. This request will be denied. The record for these proceedings is already extensive and contains the information we need to rule on the questions before us.

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. 554(e) and 49 U.S.C. 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. See Boston & Maine Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Delegation of Authority—Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). Because the court has asked for guidance, it is appropriate to issue a declaratory order and clarify the line's status.

A railroad may not "abandon" (i.e., permanently close and discontinue service over) a rail line without advance authorization from the Board. In general, this licensing requirement applies to all carrier lines, including both "main" lines and "branch" lines, i.e., those lightly-used lines

over which carriers provide common carrier service to shippers in what are often rural communities.⁴ Under 49 U.S.C. 10903, the Board may affirmatively approve the abandonment of a line by determining that the present or future public convenience and necessity require or permit the proposed abandonment. Alternatively, the Board may authorize abandonment by granting an exemption (individually or by class of rail lines) under 49 U.S.C. 10502.⁵ The Board's authority over abandonments is exclusive and plenary.⁶

The abandonment authority issued by the Board is permissive authority that the railroad may decide not to exercise. The agency retains jurisdiction over rail properties until abandonment authority has been exercised.⁷ To exercise abandonment authority and “consummate” an abandonment, a railroad must manifest a clear intent to abandon through its statements and actions, including discontinuing operations.⁸ Since 1997, under the Board regulation at 49 CFR 1152.29(e)(2), a railroad is required to file a “notice of consummation” with the agency within 1 year of the service date of the decision permitting abandonment to signify that it has exercised the authority granted and intends that the property be removed from the interstate rail network. Under the regulation, a notice of consummation is deemed conclusive on the issue of consummation if there are no legal or regulatory barriers to consummation (such as certain outstanding conditions). The regulation provides that if, after 1 year from the date of service of a decision permitting abandonment, consummation has not been effected by the railroad's filing of a notice of consummation, and there are no legal or regulatory barriers to consummation, the authority to abandon automatically expires (unless the Board has granted an extension). Once abandonment authority expires, a new proceeding would have to be instituted if the railroad wants to abandon the line. If, however, any legal or regulatory barrier to consummation exists at the end of the 1-year time period, the notice of consummation is due to be filed not later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier. A railroad can file a request for an extension of time to file a notice, for good cause shown, if it does so sufficiently in advance of the expiration of the deadline to allow for timely processing.

HCR asks the Board to find that the line at issue here has not been abandoned because the railroad has not filed its notice of consummation. Accordingly, HCR asks the Board to find that

⁴ See Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 311 (1981) (Kalo Brick).

⁵ See 49 CFR 1152.50 and 1152.60; Class Exemption for Expedited Abandonment Procedure for Class II and Class III Railroads, STB Ex Parte No. 647, slip op. at 1-2 (STB served Dec. 15, 2006).

⁶ See Kalo Brick at 311; The Phillips Company—Petition for Declaratory Order, Finance Docket No. 32518, slip op. at 4-5 (ICC served Apr. 18, 1995), aff'd sub nom. Phillips Co. v. Denver & Rio Grande Western R. Co., 97 F.3d 1375, 1376-78 (10th Cir. 1996) (Phillips).

⁷ Hayfield N. R.R. Co. v. Chi. & N.W. Transp. Co., 467 U.S. 622, 633-34 (1984) (Hayfield Northern).

⁸ See Birt v. STB, 90 F.3d 580, 585 (D.C. Cir. 1996) (Birt).

the carrier continues to own the track and right-of-way, and that the defenses asserted by Mr. Roberts under state law are preempted by Federal law until the railroad consummates abandonment and the line is thereby removed from the national rail transportation system. HCR also asks the Board to explain how its regulation of abandonments interacts with an Indiana statute, Sec. 32-23-11-6(a)(2), defining when a rail line has been abandoned, and to hold that the line is not abandoned for purposes of the state statute.

As explained below, we find that the line has not been fully abandoned. Accordingly, HCR still owns the line. Because our authority over abandonments is exclusive and plenary, any state law defenses to the contrary are federally preempted. Therefore, we do not need to reach HCR's request that we find that the line has not been abandoned for purposes of Indiana state law. Accordingly, we are denying HCR's request as to this part.

Notice of Consummation. Mr. Roberts argues that the Board should find that an abandonment has occurred even though HCR has not filed a notice of consummation under 49 CFR 1152.29(e)(2). Mr. Roberts claims that, while the filing of a notice is meant to give conclusive proof that an abandonment has occurred, the absence of a notice was not meant to give conclusive proof that the abandonment has not been consummated. He contends that, when a notice has not been filed, the Board looks to the surrounding facts and circumstances to determine whether an abandonment has in fact been consummated.

Mr. Roberts is mistaken regarding the nature of our notice of consummation filing requirement. As previously noted, our abandonment authority is permissive.⁹ The carrier may carry out the authority but is not compelled to do so. The requirement that a carrier must file a notice of consummation was intended to provide certainty and thereby reduce litigation involving whether the carrier's actions demonstrated an intent to abandon a line after abandonment authority had become effective.¹⁰ Mr. Roberts would have us depart from the certainty that the notice of consummation requirement was intended to achieve.

In short, the filing of a notice of consummation now provides the only legally recognizable way to consummate abandonment of a rail line that is subject to the Board's licensing requirements. If consummation has not been effected by the railroad's filing of a notice of consummation, the authority to abandon automatically expires after 1 year from the date of service of a decision permitting abandonment.¹¹ If a notice has not been filed, the line remains an active line of railroad subject to Board jurisdiction.¹²

⁹ See Hayfield Northern; Reading Blue Mountain and Northern Railroad Company—Abandonment Exemption—In Schuylkill County, PA, STB Docket No. AB-996X, slip op. at 1 (STB served Feb. 5, 2008).

¹⁰ See Aban. and Discon. of R. Lines and Transp. under 49 U.S.C. 10903, 1 S.T.B. 894, 904-06 (1996) (Final Rule).

¹¹ 49 CFR 1152.29(e)(2).

¹² Id. See also Final Rule at n.12.

Further, as has occurred here, the rule specifically provides that the Board may extend the filing date of a notice of consummation for good cause shown. Here, HCR has demonstrated its intent not to fully abandon its line through repeated, timely requests to extend the filing date for a consummation notice and the Board granted each request.¹³ The Board has extended the date until February 11, 2009, in order to consider the declaratory order petition. Therefore, the Board retains jurisdiction over the line.

De Facto Abandonment. Mr. Roberts next argues that HCR engaged in a de facto abandonment prior to filing its notice of exemption with the Board. Mr. Roberts claims that we have recognized that a de facto abandonment removes a line from our jurisdiction irrespective of whether the carrier has sought our authority to abandon the line. Mr. Roberts argues that such a de facto abandonment occurred here for a number of reasons, notably that a road crew paved over a section of track, NSR removed its switch, and that Mr. Smith removed some of the track.

We disagree that HCR's line of railroad should be treated as abandoned because of the removal of some of the track. It is well-settled that a line of railroad can be abandoned only pursuant to Board authority. A rail carrier cannot bypass this requirement by unilaterally removing track.¹⁴

Similarly, the fact that NSR removed its switch did not result in an abandonment of the subject line. Unless and until HCR is authorized to abandon the line, and exercises that authority, NSR continues to have a statutory obligation to provide service on reasonable request, see 49 U.S.C. 11101(a), and to provide interchange facilities, see 49 U.S.C. 10742. Had Morristown Grain refurbished the elevator at the end of the subject line and made a reasonable request for service, NSR would have had to replace the switch and provide service. Therefore, no physical action cited by Mr. Roberts taken by HCR or NSR constituted a lawful abandonment of the line.

Mr. Roberts relies on RLTD Railway Corp.—Aban. Exem.—in Leelanau County, MI, 2 S.T.B. 685 (1997) (RLTD), aff'd sub nom. RLTD Ry. Corp. v. STB, 66 F.3d 808 (6th Cir. 1999). But RLTD is inapposite. In that case, the Board ruled that it lacked jurisdiction over a request for authority to abandon a line of railroad because the track at issue previously had been abandoned when a predecessor railroad consummated an authorized abandonment of the line some 14 years earlier, and because the line in question also had been severed from the interstate rail network when another carrier abandoned the only connecting line. As explained above, no consummation or severance has occurred here, because the railroad has until 2009 to file a notice of consummation and a carrier does not sever a line by paving over a part of it¹⁵ or removing rail

¹³ Mr. Roberts suggests that HCR has used its extension requests as an instrument to block the vesting of his reversionary interest. But Mr. Roberts failed to oppose HCR's extension requests.

¹⁴ See Kalo Brick; Phillips.

¹⁵ See Norfolk and Western Railway Company—Abandonment Exemption—Between Kokomo and Rochester in Howard, Miami, and Fulton Counties, IN, Docket No. AB-290 (Sub-No. 168X), slip op. at 8 (STB served May 4, 2005).

from it.¹⁶ In addition, the Board codified the Final Rule at 49 CFR 1152.29(e)(2) and made it effective after the RLTD proceeding had begun. That regulation applies only to abandonment proceedings begun after January 23, 1997.¹⁷ RLTD therefore did not involve that regulation, and the case is not controlling here.

Private Track. Mr. Roberts argues that we have no jurisdiction over the line because HCR did not hold itself out to provide service to the general public, but rather used the track only to serve Mr. Smith's grain elevator in private carriage.¹⁸ As such, Mr. Roberts claims that HCR did not have to obtain abandonment authority from the Board, or file a notice of consummation.

This case does not involve private track. Here, HCR, a noncarrier, acquired an active rail line through our regulatory process. Thus, at the time of the acquisition, HCR became a rail carrier and assumed common carrier obligations, because it held itself out as available to perform common carrier rail service to the public on the line for compensation upon reasonable request.¹⁹ Moreover, the record shows that HCR performed common carrier operations on the subject line. According to the record, Morrystown Grain sold its grain on an FOB (free on board) origin basis, so that the title to the grain transferred to the out-of-state purchasers at the elevator.²⁰ HCR then provided service to the shipper grain owners by hauling the shippers' grain from the Morrystown Grain elevator over the subject line to the interchange point with NSR—the first leg of the shipments' trips to their ultimate destinations.²¹

¹⁶ See The Atchison, Topeka and Santa Fe Railway Company—Abandonment Exemption—In Lyon County, KS, Docket No. AB-52 (Sub-No. 71X), slip op. at 3 (ICC served June 17, 1991) (Lyon County).

¹⁷ See Aban. And Discon. of R. Lines and Transp. Under 49 U.S.C. 10903, 2 S.T.B. 311, 317 (1997).

¹⁸ “Private track” does not require any authority from the Board, or come within the Board's jurisdiction for any other purpose. “Private track” is track used wholly for private operations over track built and maintained by a company to serve only its own transportation needs, so that there is no “holding out” to serve anyone else. See e.g., B. Willis, C.P.A., Inc.-Petition for Declaratory Order, STB Finance Docket No. 34013 (STB served Oct. 3, 2001) (B. Willis), *aff'd sub nom. B. Willis, C.P.A., Inc. v. STB*, 51 Fed. Appx. 321 (D.C. Cir. 2002); see also Hanson Natural Resources Company—Non-Common Carrier Status—Petition for Declaratory Order, Finance Docket No. 32248, slip op. at 20-21 (ICC served Dec. 5, 1994).

¹⁹ See American Orient Express Railway Company LLC – Petition for Declaratory Order, STB Docket No. 34502, slip op. at 4 (STB served Dec. 29, 2005), *aff'd*, 484 F.3d 554 (D.C. Cir. 2007); Wisconsin Department of Transportation—Petition for Declaratory Order, STB Finance Docket No. 34623, slip op. at 2-3 (STB served Dec. 23, 2004).

²⁰ See HCR's Rebuttal Statement of Facts and Argument of Honey Creek Railroad and Reply to Motion to Reopen AB-865-X and Reconsider Decisions therein and to Consolidate AB-865-X and FD 34869 at 12.

²¹ See id.

As Mr. Roberts notes, HCR did not separately publish its own tariff. That is because, as the record shows, NSR and HCR participated in a standard railroad industry arrangement under which NSR and HCR held themselves out jointly to provide to the public a common carrier rail service to and from Sulphur Springs, the location of the Morristown Grain elevator and starting point of HCR's line.²² HCR operated as a common carrier railroad under this arrangement by serving as NSR's switching agent, and Sulphur Springs was listed as a joint HCR/NSR station. NSR published common carrier rates for shipments originating at Sulphur Springs and compensated HCR from the line-haul revenues for rail shipments originated at Sulphur Spring by HCR.²³

Excepted Spur Track. Mr. Roberts next argues that the track is an excepted spur within the meaning of 49 U.S.C. 10906 that did not require Board authorization to be abandoned. Section 10906 provides that the licensing requirements that pertain to the introduction or abandonment of rail service do not apply to spur, industrial, team, switching or side tracks (referred to collectively as excepted track).²⁴ Whether a particular track segment is subject to the Board's licensing requirements under 49 U.S.C. 10901 and 10903, or is excepted from those requirements under section 10906, depends on the intended use of the track.²⁵ Track of a common carrier that is used for loading, unloading, storage, switching, or other purposes that are incidental to, but not actually part of, the carrier's line-haul transportation service typically is considered to be excepted track.²⁶

In support of his argument, Mr. Roberts notes that the track was used to serve Mr. Smith's facility, that HCR did not maintain a schedule or file a tariff, and that the track is light weight, stub-ended, and has no stations. But even if, as Mr. Roberts claims, the track has some of the characteristics of excepted track, HCR needed prior authorization under 49 U.S.C. 10901 in order to acquire, and operate the track (which HCR obtained). That is because the track was the only common carrier track operated by HCR and therefore could not be ancillary or incidental to any other HCR track.²⁷ See Effingham Railroad Company—Petition for

²² Id. at 11.

²³ See id. at 5. The Board has long recognized that a shortline carrier such as HCR may act as agent to a line-haul carrier, and that the short line carrier need not publish or share a division of a joint rate with the line-haul carrier. See South Carolina Rys. Comm'n v. Seaboard Coastline Railroad, 365 I.C.C. 274, 277 (1981); A.S. Pringle and Co., Inc. v. Atlantic Coastline R. Co., 278 I.C.C. 655, 657 (1950). The record reflects that HCR received a \$25.00 per car allowance from Norfolk Southern for each loaded grain train received or shipped from Sulphur Springs. See VRS of Ken Pritchard at 5.

²⁴ See Union Pacific Railroad Company—Operation Exemption—In Yolo County, CA, STB Finance Docket No. 34252, slip op. at 3 (STB served Dec. 5, 2002) (Yolo County).

²⁵ See id.; Nicholson v. ICC, 711 F.2d 364, 367 (D.C. Cir. 1983).

²⁶ See Yolo County at 4.

²⁷ It should also be noted that Conrail, the prior owner, treated the subject trackage as a line of railroad, and not excepted track, when Conrail sought authority to abandon a section of

(continued . . .)

Declaratory Order—Construction at Effingham, IL, STB Docket No. 41986 (STB served Sept. 18, 1998) (Effingham), aff'd sub nom. United Transp. Union—Ill. Legislative Bd. v. STB, 183 F.3d 606, 613-14 (7th Cir. 1999). Therefore, HCR also needed Board authorization to abandon it. Effingham at 5; see also SierraPine—Lease and Operation Exemption—Sierra Pacific Industries, STB Finance Docket No. 33679, slip op. at 4 (STB served Nov. 27, 2001); Lyon County at 3.²⁸

State Law. Finally, HCR has asked us to explain how our determination relates to Indiana's abandonment law, Sec. 32-23-11-6(a)(2) of the Indiana code, and to find that the line has not been abandoned under state law. As to the first issue, as noted earlier, our authority over the question of whether a common carrier line of railroad has been abandoned is exclusive and plenary. Because any state law defenses to the contrary thus are federally preempted in any event, see 49 U.S.C. 10501(b), we need not decide whether the line has been abandoned under state law.

Based on our findings above, we do not need to reopen STB Docket No. AB-865X or reconsider the decisions served in that docket. The above analysis shows that there is no new evidence, substantially changed circumstances, or material error in any of the decisions served in that proceeding warranting such action.

It is ordered:

1. HCR's petition for declaratory order is granted as described above.
2. Mr. Roberts' petition to consolidate the proceedings is granted.
3. Mr. Roberts' petition for an oral argument is denied.
4. Mr. Roberts' petition to reopen AB-865X is denied.
5. This decision is effective on its service date.

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connecting track. See Consolidated Rail Corporation—Abandonment Exemption—In Henry and Madison Counties, IN, Docket No. AB-167 (Sub-No. 1122X) (ICC served Dec. 21, 1993).

²⁸ The fact that HCR only served one facility at the end of the line, Morristown Grain, does not alter our analysis, because HCR has held itself out to provide common carrier service to other potential facilities should they locate on the line. See Southwestern Gulf Railroad Company—Construction and Operation Exemption—Medina County, TX, STB Finance Docket No. 34284, slip op. at 28 (STB served Nov. 5, 2004).

6. A copy of this decision will be mailed to:

The Honorable Jay L. Toney
Circuit Court of Henry County
State of Indiana
1215 Race Street 340
New Castle, IN 47362

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

Anne K. Quinlan
Acting Secretary