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SERVICE DATE – NOVEMBER 18, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-400 (Sub-No. 4)

SEMINOLE GULF RAILWAY, L.P.–ADVERSE ABANDONMENT–IN LEE COUNTY, FL

Decided: November 17, 2004

On June 16, 2004, Lee County, FL (Lee County), filed an adverse abandonment application under 49 U.S.C. 10903, requesting that the Board find that the public convenience and necessity (PC&N) require or permit the abandonment by Seminole Gulf Railway, L.P. (Seminole Gulf) of a portion of the Baker Spur. The Baker Spur runs east from a point on Seminole Gulf's main line approximately 10 miles south of Ft. Myers, FL.¹ The application is described as "adverse" because it is contested by the railroad operating the line (Seminole Gulf).

Notice of the filing was served and published in the Federal Register on July 6, 2004 (69 FR 40718). On August 9, 2004, Seminole Gulf filed a protest and the American Short Line and Regional Railroad Association (ASLRRA) filed comments in opposition to the adverse abandonment application. On August 18, 2004, Seminole Gulf filed a supplemental statement. On August 31, 2004, Lee County filed a reply to Seminole Gulf's protest.² To correct typographical and grammatical errors and certain omissions, Lee County filed a corrected reply on September 17, 2004, to which Seminole Gulf filed a rebuttal on September 28, 2004. On September 29, 2004, Lee County filed a motion to strike Seminole Gulf's rebuttal or, in the alternative, for leave to file a surrebuttal.³

¹ The Baker Spur consists of a rail line beginning at engineering station 36+35+-, which is approximately 100 feet southwest of where the line crosses Alico Road, directly west of Alico Center Road, approximately 1 mile east of U.S. Hwy. 41, and parallel to Alico Road station 79+00, continuing across Alico Road and then running parallel and north of Alico Road for approximately 4,260 feet to the eastern terminus of the line at engineering station 79+95.

² Lee County acknowledges that its reply was filed one day after the deadline and asks for leave to file out of time. In the interest of having a complete record, and because there is no evidence that other parties were prejudiced as a result of this delay, we will accept and consider Lee County's reply.

³ A portion of applicant's reply contains evidence directed at impeaching Seminole Gulf's witnesses. That evidence triggered a Seminole Gulf rebuttal and, subsequently, a Lee County motion to
(continued...)

For the reasons discussed below, we will deny the adverse abandonment application.

BACKGROUND

The Baker Spur was built in 1973 and purchased by Seminole Gulf in 1987. Seminole Gulf leases the underlying right-of-way from CSX Transportation, Inc. (CSXT). CSXT has an easement interest in the property that will revert to the adjoining property owners upon the cessation of rail operations.

In 1994, Seminole Gulf was authorized to abandon the eastern 3.55 miles of the Baker Spur. Seminole Gulf Railway, Inc.—Abandonment Exemption, STB Docket No. AB-400 (Sub-No. 2X) (STB served Dec. 22, 1994). The remainder of the Baker Spur is about 1.75 miles long. While at least one other shipper used the line in the past, the only active shipper at this point is J.J. Taylor Distributors Ft. Myers/Naples, Inc. (J.J. Taylor). However, J.J. Taylor is in the process of relocating its facility and will depart the line by the end of 2004. Florida Power & Light (FP&L) has a facility located along the portion of the Baker Spur adjacent to the proposed abandonment, where it receives high and wide transformer shipments several times a year.

POSITIONS OF THE PARTIES

Lee County seeks abandonment authorization because it is in the process of widening Alico Road, a heavily traveled thoroughfare between Interstate Hwy. 75 and U.S. Hwy. 41. Lee County does not need this abandonment to complete its highway construction project, but states that a Board grant of this adverse abandonment would allow it to avoid the expenditure of public funds needed to construct a new grade crossing where the Baker Spur crosses Alico Road. According to Lee County, the cost of installing the grade crossing would exceed \$1 million, and removing the crossing upon the line's eventual abandonment would cost an additional \$300,000.

Lee County argues that we should grant its application because no existing shippers will be affected and because the property owners adjacent to the line do not plan uses for their property that involve rail service. According to applicant, the public interest will best be served by avoiding the expenditure of public funds required to construct and remove a grade crossing to serve a line from

³(...continued)

strike the rebuttal. The motion to strike will be denied. To compile a complete record, we will accept and consider Seminole Gulf's rebuttal to Lee County's reply, and Lee County's surrebuttal.

which the only current shipper will depart before the abandonment's effective date.⁴ Lee County asserts that the proposed abandonment will not adversely impact Seminole Gulf, as it will be able to realize the net salvage value of the line and save on any maintenance costs. Applicant further asserts that FP&L, which uses an adjacent portion of the Baker Spur, will also not be harmed as the railroad will be able to transload that shipper's equipment to a paved section of the service road to the south of the Baker Spur. Lee County also claims that there is no reasonable expectation of future business on the line and that the uses Seminole Gulf contemplates can be replicated elsewhere on its system.⁵

Seminole Gulf opposes Lee County's application and argues that Lee County has not met the PC&N standard. The railroad claims that there are realistic prospects for rail service, and that it is seeking new business for the line. Specifically, Seminole Gulf offers a letter from Ringling Bros. and Barnum & Bailey,⁶ in which the circus expresses its interest in using the line for winter engagements at a nearby arena and opposes the sought abandonment. In a verified statement, Gordon H. Fay, Seminole Gulf's President, points to recent interest from others in using its rail service. He states that Seminole Gulf has received inquiries from various shippers concerning the potential movement over the line of stone and other aggregates, steel, and environmental commodities such as shredded tires, used petroleum products, construction demolition debris, landscape mulch products, covered hopper bulk plastics, and a number of building-industry related commodities. Finally, Seminole Gulf states that, as a result of Hurricane Charlie's damage in the area in August 2004, it intends to use the line to distribute ballast by rail.

Seminole Gulf indicates that the line will continue to make a positive financial contribution after J.J. Taylor relocates, initially from revenues from billboards on the line and from the ballast movements. The railroad points out that Lee County does not need the abandonment of the line to complete its highway expansion project. Seminole Gulf maintains that abandonment would, however, adversely affect FP&L because the shipper's unloading process would be more difficult and more expensive post abandonment. In response to Lee County's concern that expending the funds for a new crossing would

⁴ Lee County requests that the abandonment authority become effective one day after J.J. Taylor has either departed its Alico Road facility or converted its operations so as not to require rail service.

⁵ Applicant attaches to its application statements from J.J. Taylor, nearby shipper FP&L, Airport Holdings, LLC, and J.J. Taylor's landlord, Alico Industries, Inc., all of which indicate that they have no plans to use the Baker Spur and that they either support or do not oppose Lee County's abandonment application.

⁶ Statement of J. William Misiura, Director of Transportation for Feld Entertainment, Inc., d/b/a Ringling Bros.

be wasteful because there is no reasonable prospect of rail service, the railroad states that potential shippers have expressed interest in rail service and that it would not seek abandonment of the line for 10 years after the crossing is installed.

In opposing the adverse abandonment application, ASLRRRA notes that Seminole Gulf continues to operate over this line and that applicant's highway expansion project will not be impeded by the operation of rail service. ASLRRRA argues that as long as Seminole Gulf is making good faith reasonable efforts to develop rail uses for the line, it should be given the opportunity to preserve rail service opportunities. ASLRRRA expresses concern that granting adverse abandonment applications of lines such as this would present a serious threat to the long term viability of the national rail infrastructure, because, as pieces of it are chipped away, shortline railroads will gradually disappear.

DISCUSSION AND CONCLUSIONS

Applicable Legal Standards

Under 49 U.S.C. 10903(d), the standard governing any application to abandon or discontinue service over a line of railroad, including an adverse abandonment or discontinuance, is whether the present or future PC&N require or permit the proposed abandonment or discontinuance. In implementing this standard, we must balance the competing benefits and burdens of abandonment or discontinuance on all interested parties, including the railroad, the shippers on the line, the communities involved, and interstate commerce generally. See New York Cross Harbor R.R. v. STB, 374 F.3d 1177, 1180 (2004) (Cross Harbor); City of Cherokee v. ICC, 727 F.2d 748, 751 (8th Cir. 1984). And we must take the goals of the Rail Transportation Policy (RTP), set forth at 49 U.S.C. 10101, into consideration in making our public interest determinations.

We have exclusive and plenary jurisdiction over abandonments, including adverse abandonments, in order to protect the public from an unnecessary discontinuance, cessation, interruption, or obstruction of available rail service. See Modern Handcraft, Inc.—Abandonment, 363 I.C.C. 969, 972 (1981) (Modern Handcraft). Accordingly, we preserve and promote continued rail service where the carrier has expressed a desire to continue operations and has taken reasonable steps to acquire traffic. See Chelsea Property Owners—Abandonment—Portion of the Consolidated Rail Corp.'s West 30th Street Secondary Track in New York, NY, 8 I.C.C.2d 773, 779 (1992) (Chelsea), *aff'd*, Consolidated Rail Corp. v. ICC, 29 F.3d 706 (D.C. Cir. 1994) (Conrail). On the other hand, we do not allow our jurisdiction to be used to shield a carrier from the legitimate processes of State law where no overriding Federal interest exists. See CSX Corporation and CSX Transportation, Inc.—Adverse Abandonment Application—Canadian National Railway Company and Grand Trunk Western Railroad, Inc., STB Docket No. AB-31 (Sub-No. 38) (STB served Feb. 1, 2002).

If we conclude that the PC&N do not require or permit continued operations over the track by the carrier in question, our decision removes that shield, thereby enabling the applicant to pursue other legal remedies to force the carrier off the line. Conrail, 29 F.3d at 709; Modern Handcraft, 363 I.C.C. at 972. But in applying our balancing test, we note that significant weight has been given to the fact that there is a potential for continued operations and the carrier has taken reasonable steps to attract traffic. See Cross Harbor, 374 F.3d at 1186; Conrail, 29 F.3d at 711, aff'g Chelsea, 8 I.C.C.2d at 778. In abandonment cases, the applicant (in this case the third party) has the burden of proof. Here, after considering the arguments and balancing the interests of all concerned, we conclude that Lee County has failed to demonstrate that the adverse abandonment of the portion of the Baker Spur meets the PC&N test.

PC&N Analysis

The record here does not support a finding that the PC&N require or permit the abandonment of this line. Although Seminole Gulf will lose its only current shipper on this line in the near future, the railroad continues to operate over the line at the present time. This is not a line that is inoperable or needs major repairs, and unlike many cases where adverse abandonment applications have been granted, this case involves a line that is presently carrying traffic. Cf. Modern Handcraft, 363 I.C.C. at 971-72.

Moreover, Seminole Gulf has shown that it is actively seeking new business for the line and presents evidence of potential new shippers and new uses for the line. We have historically denied adverse abandonment applications if there is a potential for continued operations and the carrier has taken reasonable steps to attract traffic. Salt Lake City Corporation—Adverse Abandonment—in Salt Lake City, UT, STB Docket No. AB-33 (Sub-No. 183), slip op. at 8 (STB served Mar. 8, 2002). Even though Seminole Gulf's efforts to attract new shippers to the line have not yet proven successful, they demonstrate some prospects for continued rail service. Given Seminole Gulf's efforts, we cannot say that there is no potential for continued rail service over this line.

In weighing the competing interests, we emphasize that the abandonment of this line is not required for Lee County to complete its planned expansion of Alico Road. Indeed, the record shows that Lee County negotiated the right to improve the crossing over Alico Road in a 1988 crossing agreement. Moreover, the evidence indicates that Lee County fully intended to construct a new crossing until it learned that J.J. Taylor was planning to move its facility. Thus, while abandonment may be convenient for Lee County, the Baker Spur does not stand in the way of the public benefits to be realized by the widening of Alico Road. Rather, Lee County's interest here is to complete its planned highway project at the lowest possible cost. But given the evidence before us, we cannot conclude that the relief Lee County seeks outweighs the public interest in potential rail service on this line. See Cross Harbor, 374 F.3d at 1183.

We are mindful of the effect that this decision will have on a public agency, Lee County, specifically that this decision will increase the cost that the taxpayers of that region must pay for a public improvement to a highway there. However, under the Interstate Commerce Act as interpreted by this agency and the courts, we may grant adverse abandonments only in limited circumstances.

In reaching a decision in an adverse abandonment proceeding, we must carefully consider the interests of interstate commerce and the rail system in general. Here, the record indicates that denial of the proposed abandonment will be consistent with the goals of the RTP, particularly 49 U.S.C. 10101(4), which is to ensure the development and continuation of a sound rail transportation system. Finally, in its comments, ASLRRRA raises concerns that the grant of adverse abandonment requests such as this could present a serious threat to the long-term viability of the national rail infrastructure, by gradually chipping away pieces of the nation's rail system and threatening shortlines. These concerns also weigh in favor of our denying the adverse abandonment application here.

In sum, in balancing the respective interests in this proceeding, we find that Lee County has not established that the PC&N require or permit the abandonment of this line. For the reasons discussed above, we conclude that the public is best served by denying the adverse abandonment application.

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

It is ordered:

1. Lee County's request to file its reply out of time is granted.
2. Lee County's motion to strike is denied. Seminole Gulf's rebuttal and Lee County's surrebuttal are accepted into the record.
3. Lee County's adverse abandonment application is denied.
4. This decision is effective on December 18, 2004.

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

Vernon A. Williams
Secretary