

ENTERED
Office of Proceedings
December 16, 2014
Part of
Public Record

BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS
2401 PENNSYLVANIA AVENUE, NW
SUITE 300
WASHINGTON, DC 20037

TELEPHONE: (202) 663-7820
FACSIMILE: (202) 663-7849

WILLIAM A. MULLINS

(202) 663-7823 (Direct Dial)
E-Mail: wmullins@bakerandmiller.com

December 16, 2014

VIA E-FILING

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: *Norfolk Southern Railway Company – Abandonment and Discontinuance of Service Exemption – In Lake County, Indiana, and Cook County, Illinois, STB Docket No. AB-290 (Sub-No. 336X)*

Dear Ms. Brown:

Late last week, Norfolk Southern Railway Company (“NS”) was e-mailed a letter (dated December 3, 2014)¹ from the Town of Dyer (the “Town”) in which the Town expressed concern over NS’s decision in the above captioned proceeding to exercise abandonment authority for the portion of the line that extends from milepost MP JH-15.8247 to MP JH-15.8677 (the area affected by the U.S. 30 highway project)² and to exercise discontinuance authority (rather than abandonment authority) for the line segments extending from MP JH 12.80 to MP JH-15.8247 and from MP JH-15.8677 to MP JH 19.10.³ In its letter, the Town demands formal responses to several questions, and wants the Board to deny NS’s discontinuance (presumably of the line segments that extend from MP JH 12.80 to MP JH-15.8247 and from MP JH-15.8677 to MP JH 19.10) and order “NSR

¹ It is unclear whether this filing was actually filed with the Board, as it has not yet been posted on the Board’s website.

² To preserve the ability to provide potential service in the future for the Western Line Segment and to avoid there being a gap between that segment and the rest of the NS system, NS has exercised its contractual right to activate trackage rights over the parallel CN line in order to provide a connection to the Western Line Segment. Norfolk Southern Railway Company – Trackage Rights Exemption – Wisconsin Central Ltd., FD 35859, (Filed September 23, 2014).

³ See Norfolk Southern Railway Company – Abandonment and Discontinuance of Service Exemption – In Lake County, Indiana, and Cook County, Illinois, AB-290 (Sub-No. 336X) (Notice of Partial Consummation) (Filed Sept. 24, 2014). As noted in its September 24th filing, NS previously exercised its discontinuance authority for the 1.2 mile Western Line Segment.

BAKER & MILLER PLLC

Cynthia T. Brown
December 16, 2014
Page 2

to proceed with consummation of the abandonment as original [sic] requested.” The Town’s requests should be denied.

As a preliminary matter, it has been noted several times in this proceeding (including in NS’s most recent Consummation Deadline Extension request),⁴ that NS has declined to negotiate trails use from the onset because the purpose behind this abandonment proceeding was to allow Canadian National Railway Company (“CN”) and Elgin, Joliet & Eastern Railway (“EJ&E”) to construct a grade separation over U.S. Route 30 consistent with the conditions imposed by the Board in approving CN’s acquisition of control of EJ&E highway project.⁵ Consistent with the Trails Act and Board precedent, interim trail use is only permitted if voluntarily agreed upon by the railroad and the trail sponsor.⁶ NS does not, and has never agreed, to discuss trails use in this proceeding.

The Town claims that NS is attempting to “misuse the railroad corridor, using Federal law in the process, to preempt local zoning controls for financial benefit” by agreeing to a discontinuance, rather than an abandonment. What the Town misunderstands is the fact that a railroad corridor remains under the jurisdiction of the STB unless a rail carrier applies for, receives, and consummates abandonment authority. Chicago & Northwestern Transportation Co. V. Kalo Brick & Tile Co., 450 U.S. 311 (1981). Once a carrier has obtained abandonment authority, whether to proceed with that authorized abandonment is the carrier’s option. The Alabama Great Southern Railroad Company – Discontinuance Exemption – In Saint Bernard Parish, LA, AB-290 (Sub-No. 323X) (STB served December 17, 2013) (“[w]hen a rail carrier is authorized to abandon a line, that authority is permissive, not mandatory. The rail carrier can choose to exercise that authority or not.”). Alternatively, a carrier may choose to exercise, as NS did in this proceeding, discontinuance authority rather than abandonment authority. See T&P Ry.--Aban.--Shawnee, Jefferson, & Atchison Count., KS, 2 S.T.B. 36, 40 (1997); Almono LP–Abandonment Exemption–In Allegheny County, PA, AB-842X (STB served Jan. 28, 2004). There is nothing in STB jurisprudence, and the Town points to none, holding that the STB has authority to order an abandonment when a carrier has chosen not to exercise its abandonment authority or to exercise discontinuance authority rather than abandonment authority.

In conclusion, it appears that the Town is unhappy that NS made a strategic business decision to exercise discontinuance authority rather than abandonment authority over a portion of

⁴ See Norfolk Southern Railway Company – Abandonment and Discontinuance of Service Exemption – In Lake County, Indiana, and Cook County, Illinois, STB Docket No. AB-290 (Sub-No. 336X) (Filed Sept. 5, 2014).

⁵ Canadian Nat’l Ry. and Grand Trunk Corp.—Control—EJ&E W. Co., FD 35087 (STB served Dec. 24, 2008).

⁶ Because trail use is voluntary, the Board denied The Trail Proponents’ request for issuance of a NITU. See Citizens Against Rails-to-Trails v. STB, 267 F.3d 1144, 1151-52 (D.C. Cir. 2001); See also Rail Abans.—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 598 (1986).

BAKER & MILLER PLLC

Cynthia T. Brown
December 16, 2014
Page 3

NS's line. In doing so, NS has not attempted to usurp state law, or violate "the spirit of the law." NS simply decided to exercise the lesser included authorization of discontinuance authority rather than abandonment authority; an action which is statutorily permitted. The Town's letter appears to be another attempt to force trails use and should be rejected as such. Should you have any questions, please contact the undersigned counsel for NS.

Sincerely,



William A. Mullins
Attorney for Norfolk Southern Railway Company

cc: All parties of record
Maquiling Parkerson, Marc Kirchner, LaWada Poarch