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SERVICE DATE – DECEMBER 1, 2009

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-397 (Sub-No. 7X)

TULARE VALLEY RAILROAD COMPANY—ABANDONMENT EXEMPTION—IN
TULARE COUNTY, CA

Decided: November 30, 2009

On September 8, 2009, Tulare Valley Railroad Company (TVR), a Class III rail carrier, filed a petition for reconsideration of the Board's decision in this proceeding served on August 19, 2009. TVR claims that the imposition by the Board of a section 106 historic preservation condition¹ in the particular circumstances of this case amounts to material error. This decision denies TVR's petition for reconsideration, but suggests how TVR might be able to seek a modification of the condition to permit salvage.

BACKGROUND

TVR filed a notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments to abandon a 5.9-mile line of railroad between milepost 71+2969.2 at or near Ducor and milepost 66.0 at or near Ultra, in Tulare County, CA. Notice of the exemption was served and published in the Federal Register on July 21, 2009 (74 FR 35904). The exemption became effective on August 20, 2009.

The Board's Section of Environmental Analysis (SEA) served an environmental assessment (EA) in this proceeding on July 24, 2009. In the EA, SEA stated that TVR had submitted an historic report as required by the Board's environmental rules at 49 CFR 1105.8(a), and had served the report on the California State Historic Preservation Office (SHPO) pursuant to 49 CFR 1105.8(c). SEA indicated that the historic report stated that the line includes a 48-foot culvert at milepost 70.4 stamped with the date 1934 and a wooden trestle bridge at milepost 67.8 constructed in 1924. SEA further indicated that it was currently in consultation with the SHPO regarding the potential eligibility of these resources for listing on the National Register of Historic Places. Accordingly, by decision served on August 19, 2009, the Board, consistent with the requirements of section 106, imposed the following condition on the abandonment exemption:

¹ Section 106 of the National Historic Preservation Act, 16 U.S.C. 470f, requires federal agencies to consider the effects of their decisions on historic properties.

. . . TVR shall: (1) (a) retain its interest in and take no steps to alter the historic integrity of all historic properties including sites, buildings, structures, and objects within the project right-of-way (the Area of Potential Effect) that are eligible for listing or listed in the National Register of Historic Places until the section 106 process of the National Historic Preservation Act has been completed; (b) report back to SEA regarding any consultations with the SHPO and any other section 106 consulting parties that have been identified and the public; and (c) not file its consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties) until the section 106 process has been completed and the Board has removed this condition . . .

Tulare Valley Railroad Company—Abandonment Exemption—in Tulare County, CA, STB Docket No. AB-397 (Sub-No. 7X), slip op. at 2 (STB served Aug. 19, 2009).²

TVR argues here that it “has complied fully with the Board’s condition,” but the SHPO has been “absolutely incommunicado,” thus preventing TVR from fulfilling the condition. For this reason, TVR contends that the Board’s imposition of the historic preservation condition constitutes material error and it asks that the Board remove it.

DISCUSSION AND CONCLUSION

Under 49 U.S.C. 722(c) and 49 CFR 1115.3(b), the Board will grant a petition for reconsideration only upon a showing that the prior action: (1) will be affected materially because of new evidence or changed circumstances, or (2) involves material error. TVR has alleged material error by the Board here.

The Board did not err in imposing the section 106 condition. The condition flows from a statutory mandate under 16 U.S.C. 470f, where section 106 of the National Historic Preservation Act is codified. In fact, had the Board ignored its statutory responsibility and not imposed such a condition in the circumstances presented here, that action could have been considered material error on the agency’s part.

Nor is there any basis on the record before us to remove the condition now. The section 106 process is ongoing and has not yet been completed. Moreover, as SEA reports, the SHPO has not been, in TVR’s words, “absolutely incommunicado” and TVR has not provided the information requested by the SHPO on more than one occasion.³

² At that time, at SEA’s recommendation, the Board also imposed a condition requiring TVR to consult with the National Geodetic Survey (NGS) and to notify NGS at least 90 days prior to beginning salvage activities that will disturb or destroy any geodetic station markers. That condition remains in effect.

³ According to SEA, in emails dated June 8, 2009, and September 8, 2009, the SHPO listed a number of specific data requirements it believed should have been, but were not, submitted by TVR. The first was sent directly to TVR; the second was sent to SEA with a copy to TVR.

In sum, we find no grounds on the record before us to reconsider our prior decision in this matter. We would, however, consider modifying the section 106 condition to allow for salvage of the tracks, ties and track material, if TVR can provide documentation to SEA and the SHPO that any parts of the line that would be affected by TVR's salvage plans do not meet the criteria for listing on the National Register of Historic Places⁴ and are less than 50 years old.⁵

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

It is ordered:

1. TVR's petition for reconsideration is denied.
2. This decision is effective on its service date.

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

⁴ The criteria for listing on the register can be found at 36 CFR 60.4.

⁵ For example, TVR could, if applicable, provide information establishing that it or its predecessors have replaced jointed rail with continuously welded rail, or submit any other information it may have regarding the historic integrity of the rail corridor, tracks, and track materials.