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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1023 (Sub-No. 1X)

PUGET SOUND & PACIFIC RAILROAD COMPANY—ABANDONMENT EXEMPTION—
IN GRAYS HARBOR COUNTY, WASH.

Digest:[1] The Board accepts Puget Sound & Pacific Railroad Company's late-filed notice that it carried out the abandonment authorized in this case. The Board also provides further clarification regarding the types of environmental conditions that postpone the deadline for carrying out a rail line abandonment.

Decided: September 9, 2011

In a decision served on May 19, 2009 (May 2009 decision), Puget Sound & Pacific Railroad Company (PS&P) was granted an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10903 to abandon an 8,344-foot long rail line in Grays Harbor County, Wash., subject to certain conditions.[2] Notice of the exemption was served and published in the Federal Register on February 18, 2009 (74 Fed. Reg. 7,638).

By letter filed on January 28, 2011, PS&P stated that it had consummated the abandonment of the line as of January 27, 2011.

As explained in the May 2009 decision, slip op. at 6, a notice of consummation must be filed within 1 year from the service date of the decision authorizing abandonment.[3] 49 C.F.R. § 1152.29(e)(2). If, at the end of the 1-year period, consummation has not been effected by the filing of a notice and there are no legal or regulatory barriers to consummation, the abandonment authority will automatically expire. Id. If, however, any legal or regulatory barrier to

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[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] In addition to imposing employee protection under Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979), the May 2009 decision imposed 4 conditions: an historic preservation condition under Section 106 of the National Historic Preservation Act and 3 salvage-related conditions.

[3] The May 2009 decision erroneously identified the initial 1-year consummation deadline as May 19, 2009, rather than May 19, 2010.

consummation exists at the end of the 1-year period, the notice of consummation must be filed no later than 60 days after the satisfaction, expiration, or removal of that barrier. Id.

Here, under the Board's time frames, PS&P filed its notice of consummation several months late. The Board's historic preservation condition was a barrier to consummation, but the condition was removed after it was satisfied, in a decision served July 16, 2010 (July 2010 decision). That decision also expressly stated that the remaining 3 salvage-related conditions were not barriers to consummation. July 2010 decision, slip op. at 1 n.3; see Consummation of Rail Line Abans. That Are Subject to Historic Pres. & Other Envtl. Conditions, EP 678, slip op. at 4 and n.2 (STB served Apr. 23, 2008) (Consummation of Rail Line Abans.). Therefore, the deadline for PS&P to file its notice of consummation was September 14, 2010, 60 days after the July 2010 decision was served. See 49 C.F.R. § 1152.29(e)(2). PS&P's notice of consummation, however, was not filed until January 28, 2011.

PS&P did not acknowledge that its notice of consummation was late or explain why it missed the consummation deadline. Therefore, in a decision served April 1, 2011 (April 2011 decision), the Board directed PS&P to file an explanation for missing the September 14, 2010 deadline. On April 11, 2011, PS&P filed a pleading (April 11 Reply) explaining its delay in filing its notice of consummation and asking that the Board accept its January 28, 2011 notification of its January 27, 2011 abandonment consummation.[4]

PS&P states that the reason for the delayed consummation was its inability to complete the consultation with the State of Washington's Department of Ecology (WADOE) required by the Board's salvage conditions. PS&P notes that the Board's salvage conditions required, among other things, consulting with WADOE and reporting the results of those consultations to the Board's Office of Environmental Analysis (OEA). PS&P states that it sent letters to WADOE's Solid Waste & Financial Assistance Office and WADOE's Water Quality Program on August 26, 2010, but that it did not receive a response from the Water Quality office until January 6, 2011, and has yet to receive a response from the Solid Waste & Financial Assistance Office. PS&P claims that it wanted to conclude the required consultations with WADOE while remaining under the Board's jurisdiction. PS&P further notes that the timeline for WADOE's response was beyond its control, and that it could not foresee that WADOE would take so long to respond.

[4] In the alternative, PS&P requests that the Board treat its filing as a petition to reopen this proceeding under 49 C.F.R. § 1152.25(e)(4) and extend the deadline for filing the notice of consummation to January 28, 2011.

DISCUSSION AND CONCLUSIONS

In a policy statement issued in 2008, the Board explained that salvage-related environmental conditions typically are not a barrier to consummation of abandonments,[5] and the Board specifically stated in the July 2010 decision that the remaining conditions in this case were self-executing and not a barrier to consummation. However, because some confusion evidently remains regarding when a notice of consummation should be filed in cases where the Board has imposed conditions, we are providing further clarification regarding the types of environmental conditions that create a barrier to consummation. In addition, in future cases where we impose conditions that are a barrier to consummation, we will specifically state in the conditions that the railroad's abandonment authority may not be consummated until the Board has found that the specific conditions have been satisfied and has removed them.

Many environmental conditions imposed by the Board in abandonment proceedings are salvage conditions, which direct the railroad seeking abandonment authority (or the contractor hired by the railroad to salvage the line) to take certain steps to protect the environment during the salvage process.[6] These conditions are only intended to be satisfied if and when any salvage activities take place. Although salvage conditions sometimes require the railroad to report the results of consultations or other findings back to OEA, they are regarded as "self-executing," because no further Board action is required prior to consummation of the abandonment.

A salvage condition typically is not a regulatory barrier to consummation because the railroad may decide not to salvage the line immediately upon being relieved of its service obligations, leaving the track and ties in place.[7] Therefore, a notice of consummation may be filed prior to satisfying a salvage condition. Filing a notice of consummation in that situation, however, does not remove the salvage condition or eliminate the requirement that the condition be complied with if and when salvage is initiated. In other words, a salvage condition remains in place as a condition that attaches to the property and applies to salvage activities whenever they occur, even if salvage is conducted months or years after the abandonment is consummated and even if conducted by a successor interest.[8]

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[5] Consummation of Rail Line Abans., slip op. at 4 and n.2.

[6] Impacts from salvage and disposal of a rail line typically include removal of tracks and ties, removal of ballast, and regrading of the right-of-way.

[7] Union Pac. R.R.—Aban. Exemption—In Shelby County, Tenn., AB 33 (Sub-No. 258X), slip op. at 2 (STB served May 3, 2010), citing Consummation of Rail Line Abans., slip op. at 4.

[8] Union Pac. R.R., slip op. at 2; see also Consummation of Rail Line Abans., slip op. at 4-5.

In contrast, certain other types of conditions that the Board imposes are temporary barriers to consummation.[9] For example, when an abandonment may affect an historic property or archaeological resources and the historic review process is ongoing, the Board will impose an historic preservation condition to satisfy the agency's responsibilities under Section 106 of the National Historic Preservation Act.[10] An historic preservation condition generally prohibits the railroad from selling the rail line, altering any sites or structures on the line, or conducting salvage activities on the line until the historic review process is complete and the Board removes the condition.[11] Similarly, when a proposed abandonment may adversely affect federally listed threatened or endangered species or their habitat, or when a proposed abandonment may affect land or water uses within a coastal zone,[12] the Board may impose a condition that results in a temporary barrier to consummation in order to ensure that the agency meets its responsibilities under Section 7 of the Endangered Species Act,[13] or the Coastal Zone Management Act.[14]

To provide greater clarity and avoid situations such as the one that occurred here, when the Board issues a decision in the future imposing a condition that is a barrier to consummation, the Board decision imposing that condition will specifically state that the carrier's abandonment authority may not be consummated until the Board has found that the condition has been satisfied and has removed it.

As previously noted, the Board here imposed, among other mitigation measures, a condition that required PS&P to consult with WADOE "prior to commencement of any salvage activities." PS&P acknowledges that, as the Board expressly stated in the July 2010 decision, the consultation condition was not a barrier to consummation, but asserts that it did not file a timely notice of consummation because it decided to satisfy the condition before consummating the abandonment. A railroad's decision to satisfy a salvage condition prior to abandonment, however, is not sufficient to toll the deadline for filing a notice of consummation of the abandonment.[15] A carrier wishing to preserve the Board's jurisdiction while carrying out self-executing conditions may seek to do so by timely requesting an extension of the consummation deadline. PS&P, however, did not do so here.

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[9] Consummation of Rail Line Abans., slip op. at 2.

[10] 16 U.S.C. § 470f.

[11] Consummation of Rail Line Abans., slip op. at 3.

[12] 49 C.F.R. § 1105.9(a).

[13] 16 U.S.C. §§ 1531-44.

[14] 16 U.S.C. §§ 1451-66. We note too that interim trail use/rail banking conditions under the National Trails System Act, 16 U.S.C. § 1247(d), are also considered barriers to consummation.

[15] Union Pac. R.R., slip op. at 2.

Given the apparent uncertainty surrounding the types of conditions that act as barriers to consummation, we will accept PS&P's late-filed consummation notice in this case. No party has objected to our accepting PS&P's late-filed notice, and there is no evidence that any party would be prejudiced by our doing so. Thus, no purpose would be served by requiring PS&P to refile for abandonment authority. We caution, however, that in light of the clarification provided in this decision and the Board's newly adopted process for more clearly identifying conditions that are barriers to consummation, we do not foresee accepting late-filed notices under similar circumstances in the future.

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

It is ordered:

1. PS&P's January 27, 2011 notice of consummation is accepted.

2. This decision is effective on its service date.

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