

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36040

NEWVISTA PROPERTY HOLDINGS, LLC—PETITION FOR DECLARATORY ORDER

Digest:<sup>1</sup> The Board finds that milepost 0.0 to milepost 0.71 of the Ironton Branch in Provo City, Utah, remains within the Board’s jurisdiction, and that milepost 0.71 to milepost 1.87 of the Ironton Branch is not part of the national rail system and is no longer within the Board’s jurisdiction.

Decided: March 16, 2017

BACKGROUND

NewVistas Property Holdings, LLC (NewVista),<sup>2</sup> originally came to the Board seeking an adverse, or “third-party,” abandonment under 49 U.S.C. § 10903 for approximately 1.87 miles of railroad owned by Union Pacific Railroad Company (UP) known as Ironton Branch in Provo City, Utah. The Board explained, however, that the Ironton Branch is excepted yard track under 49 U.S.C. § 10906 and therefore not subject to the Board’s § 10903 abandonment licensing authority NewVista Property Holdings, LLC—Adverse Aban. of the Ironton Branch—in Utah Cty., Utah, AB 1241 et al., slip op. at 2 (STB served June 24, 2016). As a result, the Board noted, it followed that the Ironton Branch was excepted from the Board’s adverse abandonment process as well. Id. The Board therefore closed the adverse abandonment proceeding, stating that “the proper vehicle for removing the Board’s jurisdiction over yard track is through a declaratory order proceeding.” (Id., citing Pinelawn Cemetery—Pet. for Declaratory Order, FD 35468, slip op. at 11 n.31 (STB served Apr. 21, 2015)). Because NewVista had requested a declaratory order as an alternative to its request for adverse abandonment authority, the Board also found that a controversy existed as to whether the yard track has been or can be removed from the Board’s jurisdiction. The Board therefore closed the adverse abandonment proceeding and instituted a declaratory order proceeding in this docket to consider that question.

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<sup>1</sup> 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. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> At the time of its March 7, 2016 filing, the name of the petitioner was “NewVista Property Holdings, LLC,” but its name changed to “NewVistas Property Holdings, LLC” effective on May 18, 2016. (See Opening Statement 2.)

NewVista filed its opening statement on August 23, 2016. A reply was filed by the Military Surface Deployment and Distribution Command (SDDC) on September 7, 2016, and by UP on September 12, 2016. On September 19, 2016, NewVista filed a letter stating that “[i]n light of the position taken by Union Pacific in its reply, NewVista sees no need for a rebuttal to Union Pacific.” SDDC filed a reply to NewVista’s letter on September 21, 2016.

## DISCUSSION AND CONCLUSION

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to eliminate a controversy or remove uncertainty. Based on the pleadings submitted, the Board will grant the request for a declaratory order to eliminate controversy and remove uncertainty regarding the status of the Ironton Branch. As discussed below, the Board finds that milepost 0.0 to milepost 0.71 remains within the Board’s jurisdiction, while the remaining portion of the Ironton Branch, milepost 0.71 to milepost 1.87, is no longer part of the national rail system.

Excepted track “can be removed from the Board’s jurisdiction upon a showing it is no longer needed for the interstate rail system.” Pinelawn Cemetery—Pet. for Declaratory Order, FD 35468, slip op. at 9 (STB served Apr. 21, 2015); see also UP Reply 2. Accordingly, in cases involving excepted § 10906 track that does not require prior approval to abandon under 49 U.S.C. § 10903, the Board depends on a case-by-case evaluation of all the facts and circumstances to determine whether the track remains within its jurisdiction as part of the national rail system.<sup>3</sup>

The Ironton Branch was the subject of a prior Board proceeding in Joseph R. Fox—Petition for Declaratory Order, FD 35161 (STB served May 18, 2009), aff’d sub nom. Fox v. STB, 379 Fed. App’x 767 (10th Cir. 2010). In that proceeding, the Board rejected a petition arguing that UP had abandoned the southern segment of the Ironton Branch from milepost 0.71 to milepost 1.87. The Board found that even though UP had received authority to abandon the Ironton Branch in 1977,<sup>4</sup> UP had not consummated the authority for the southern segment. Rather, UP had reclassified that portion of rail line as yard track and, as such, the segment remained under the Board’s jurisdiction.<sup>5</sup>

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<sup>3</sup> While the totality of the circumstances test in Pinelawn Cemetery had not been applied previously to § 10906 cases, the Board has done similar fact specific analyses in the past. See, e.g., Beaufort R.R.—Modified Rail Certificate, FD 34943, slip op. at 6-8 (STB served Mar. 19, 2008) (using a “totality of the circumstances” test to find a line exempt from Board licensing was not abandoned where the record showed that the line owner had kept the tracks and ties in place and maintained them in a state of readiness for service).

<sup>4</sup> See L.A. & Salt Lake R.R.—Aban. Portion of the Ironton Branch in Utah Cty., Utah, Docket No. AB-35 (Sub-No. 3) (ICC served Oct. 6, 1977).

<sup>5</sup> The Board’s decision in Fox addressed only the southern segment. By letter dated December 15, 1977, in the original abandonment proceeding, UP informed the ICC that the middle segment from milepost 0.64 to milepost 0.71 of the Ironton Branch had been abandoned. However, in its reply to NewVista’s opening statement in this docket, UP states that the segment

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UP states in its reply in this proceeding that at the time of the Fox decision, milepost 0.71 to milepost 1.87 of the Ironton Branch had recently been used for rail purposes and UP was actively seeking rail customers that might use the track. (UP Reply 2, citing Fox, FD 35161, slip op. at 4.) However, UP now asserts that the new opportunities never materialized and that it is no longer marketing use of this portion of the Ironton Branch to serve its customers. (UP Reply 2.) UP further states that it does not currently believe there is an expectation that customers will return to this portion of the Ironton Branch and that it does not view milepost 0.71 to milepost 1.87 of the Ironton Branch as necessary to its rail operations. Accordingly, UP does not object to the Board's removing this section from the agency's jurisdiction. (See id. at 2-3.) In its September 21, 2016 reply, SDDC also states that it has no objection to the removal of milepost 0.71 to 1.87 of the Ironton Branch from the Board's jurisdiction. (See SDDC Surreply 1.) Based on the changes in the use of the Ironton Branch from milepost 0.71 to milepost 1.87 since Fox and the statements of UP and SDDC here, the Board concludes that that portion of the Ironton Branch is no longer needed for the national rail system and therefore finds that it is no longer within the Board's jurisdiction.

There remains a dispute, however, regarding the remainder of the Ironton Branch. NewVista argues that the Ironton Branch has not been used for any railroad purposes in more than seven years and there is no prospect for any future new UP customers. (Opening Statement 5, Ex. A.) However, UP contends that the track from milepost 0.0 to milepost 0.71 of the Ironton Branch is still an active part of UP's interstate rail network and thus should not be removed from the Board's jurisdiction. (UP Reply 3-4.) Specifically, UP states that this portion of the Ironton Branch provides a connection between UP's Provo Subdivision and Sharp Subdivision that is used daily by an average of 4.9 trains per day, including through trains and switching movements. (Id. at 3-4.) According to UP, a majority of the through trains that use this connection are coal trains moving to or from coal mines located in Colorado and Utah. (Id.)<sup>6</sup> SDDC also requests that milepost 0.0 to milepost 0.71 remain within the Board's jurisdiction. (See SDDC Surreply 1.)<sup>7</sup> In response, NewVista did not withdraw its opening statement

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from mileposts 0.0 to 0.71 (which would include the middle segment purportedly abandoned) currently provides a connection between UP's Provo and Sharp subdivisions. (See UP Reply 3.) UP does not address the fact that the segment from 0.64 to 0.71 is currently in use, despite it having been abandoned in 1977. However, a rail carrier does not need the Board's prior approval to construct, operate, or abandon track that is excepted from Board licensing under § 10906. Accordingly, the Board assumes that UP reconstructed that segment to use as part of the § 10906 track.

<sup>6</sup> UP suggests that NewVista did not intend to request removal of the active connecting track between milepost 0.0 and milepost 0.71 from the Board's jurisdiction. (Id.) UP notes that even though NewVista's opening statement defines the Ironton Branch as the line between milepost 0.0 and milepost 1.87, it focuses on milepost 0.71 to milepost 1.87—the same portion of the Ironton Branch that was at issue in Fox—and presents no evidence to show an absence of railroad use of the section between milepost 0.0 and milepost 0.71. (Id.)

<sup>7</sup> SDDC also requests, among other things, that the Board's public notice requirements, and notification to the Department of Defense, not be waived in future cases similar to this

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assertion that the entire Ironton Branch had not been used for railroad purposes in seven years. NewVista stated in a September 19, 2016 letter that it “sees no need for a rebuttal to [UP].”

The Board concludes, based on the record, that the track between milepost 0.0 to milepost 0.71 is actively used in UP’s rail service. Actual use of the § 10906 track is clear indication that it is needed for the interstate rail system. Therefore, the section of the Ironton Branch from milepost 0.0 to milepost 0.71 remains in the Board’s jurisdiction.

It is ordered:

1. The request for declaratory order is granted.
2. Milepost 0.0 to milepost 0.71 of the Ironton Branch in Provo City, Utah, remains part of the national rail system within the Board’s jurisdiction, and milepost 0.71 to milepost 1.87 of the Ironton Branch is no longer part of the national rail system or within the Board’s jurisdiction.
3. This decision is effective on its service date.

By the Board, Board Members Begeman, Elliott, and Miller.

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one. While the Board takes SDDC’s concerns seriously, the Board does not have licensing authority over § 10906 track. Therefore, the Board is unable to require notice be provided in regard to any abandonment involving excepted § 10906 track. The Board invites SDDC to call our Rail Customer and Public Assistance (RCPA) Program. The RCPA Program provides informal assistance on a wide range of matters to the public. The RCPA may be reached at (866) 254-1792 or by email at [rcpa@stb.gov](mailto:rcpa@stb.gov).