

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 400 (Sub-No. 5)

PALMER RANCH HOLDINGS, LTD., PALMER RANCH HOLDINGS, INC., WYNNSTAY HUNT, INC., AND CHESHIRE HUNT, INC. – ADVERSE ABANDONMENT – SEMINOLE GULF RAILWAY, L.P., IN SARASOTA COUNTY, FLA.

Digest:¹ This decision permits petitioners to bypass some of the procedures normally required in a typical abandonment proceeding should the petitioners file an application for adverse abandonment of a rail line owned by the Seminole Gulf Railway, L.P. The Board is waiving those procedures that would be difficult or impossible for a non-owner of a rail line to comply with, such as revenue and cost data, but retaining others that are necessary in order to allow the Board to act on the application.

Decided: September 20, 2011

In a petition filed on February 7, 2011, Palmer Ranch Holdings, Ltd., Palmer Ranch Holdings, Inc., Wynnstay Hunt, Inc., and Cheshire Hunt, Inc. (collectively, petitioners) seek (1) waiver of certain Board regulations, and (2) exemption from certain statutory provisions in connection with an adverse or third-party application they plan to file under 49 U.S.C. § 10903. Petitioners indicate that they intend to seek adverse abandonment of approximately 3,181 feet of rail line (the Line) located in Sarasota County, Fla. On February 28, 2011, Seminole Gulf Railway, L.P. (SGLR), the owner of the Line, filed a reply in partial opposition to petitioners' waiver and exemption requests. As discussed below, the waiver and exemption requests will be granted in part.

BACKGROUND

According to petitioners, the Line extends from milepost SW 892.00 to approximately milepost SW 891.40, beginning 2,465 feet south of Sawyer Loop Road and ending 716 feet north of Sawyer Loop Road. Petitioners indicate that in 1910, Seaboard Air Line Railway (Seaboard) was granted an easement for the operation of a railroad across a corridor from Sarasota to Venice, Fla. on which a line of railroad known as the Venice Branch was constructed. The Line is a part of the Venice Branch. Petitioners state that SGLR and CSX Transportation, Inc.

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 Decision, EP 696 (STB served Sept. 2, 2010).

(CSXT) became the successors to and assigns of Seaboard with respect to the Venice Branch. SGLR subsequently purchased from CSXT the assets comprising the entire Venice Branch (other than the underlying real property) and acquired the common carrier obligation for the line. SGLR leased the underlying real property from CSXT.

By a decision and notice of interim trail use or abandonment served on April 2, 2004, SGLR was authorized to abandon a 12.43-mile portion of the Venice Branch that extends immediately to the south of the Line (and not including the Line) between milepost SW 892.00 outside the limits of the City of Sarasota and milepost 904.4 near the City of Venice.² The April 2004 decision also authorized a 180-day period for Sarasota County, Fla. (the County) to negotiate an interim trail use/rail banking agreement with SGLR for that 12.43-mile line segment for use as a trail under the National Trails System Act, 16 U.S.C. § 1247(d) (Trails Act). Petitioners indicate that a trail use agreement for the 12.43-mile line segment was entered into, and the right-of-way with respect to that portion was conveyed by a quit claim deed from CSXT to The Trust for Public Land (TPL), an organization working with the County to convert the line segment into a trail. TPL, together with the County, converted the 12.43-mile line segment into a trail, known as the Legacy Trail, a public recreational corridor for bicycling, skateboarding, and running.

Petitioners now are considering seeking abandonment of the 3,181 foot Line to the north of the Legacy Trail. Regarding the track at issue in this proceeding, petitioners state that there are no known shippers on the Line, and that, by the year 2002, all freight service had ceased. Because the surrounding area has become residential, petitioners contend that there is no foreseeable prospect that shippers will locate on the Line in the future, nor will there be any future need for rail service on the Line. Petitioners state that the Line has deteriorated and is in disrepair and that box cars left derelict on the track for a number of years have become a nuisance, attracting crime and vagrants to the surrounding community. Petitioners contend that abandonment will relieve SGLR of the expenses associated with maintaining the Line and the liability for personal injury and/or property damage that may occur on the Line and that the abandonment will facilitate better administration of SGLR's assets, including the materials that compose the unused Line.

To facilitate the filing of their adverse abandonment application, petitioners request certain waivers and exemptions from the abandonment process. Petitioners state that the waivers and exemptions sought are similar to those that the Board has customarily granted relating to adverse abandonment applications.

In opposing the petition, SGLR argues that petitioners did not indicate their true interest in seeking to institute an adverse abandonment proceeding. SGLR believes that petitioners are developers of high-end residential properties along the Line who do not want a rail line or a public trail abutting their development projects. SGLR admits that there are no shippers located

² See Seminole Gulf Ry.—Aban. Exemption—in Sarasota Cnty., Fla., AB 400 (Sub-No. 3X) (STB served Apr. 2, 2004).

on the Line, but states that the Line is being used, as recently as December 2010, for storage of its freight cars.

According to SGLR, there is a spur off of the Line that provides access to three rail-served facilities located just north of the Line and that also is being used for additional car storage. Although these facilities are not currently being served, SGLR believes that there is a potential for renewed service as the economy and housing construction rebounds. SGLR points out that, because of how the switch to reach the facilities is configured, the forced abandonment would preclude SGLR from being able to use the spur or to provide service to these facilities in the future. SGLR admits that there have been a few complaints concerning trespassers or vagrants, but states that SGLR's police regularly patrol the area and investigate any complaints.

Additionally, SGLR states that, if the Line were abandoned without providing for public use/and or trail use, TPL and the County would lose their ability to extend the Legacy Trail. It also states that abandonment would leave the southern railbanked section of the Venice Branch as an island disconnected from the rail network.

DISCUSSION AND CONCLUSIONS

The Board's regulations require that abandonment applications conform to the requirements of 49 C.F.R. pt. 1152, subpart C—Procedures Governing Notice, Applications, Financial Assistance, Acquisition for Public Use, and Trail Use. In appropriate instances, however, such as the filing of a third-party adverse abandonment application, the Board will waive inapplicable and unnecessary provisions and grant exemptions as appropriate from statutory requirements.³

Notice of Intent. Petitioners ask for waiver of the requirements of 49 C.F.R. § 1152.21 to permit them to deviate from the prescribed form of notice as set forth in the regulations. Petitioners state that the prescribed wording in the notice of intent is inappropriate for adverse abandonment proceedings. Instead, petitioners propose to use the alternative language in Attachment A, which they append to their petition. SGLR opposes certain waiver and exemption requests sought by petitioners and points out that, to the extent the Board denies or modifies any of petitioners' requests, the form of the notice must be modified to add back in the relevant information.

The Board has approved form changes in other adverse abandonment cases. See E. St. Louis Junction R.R.—Adverse Aban.—in St. Clair Cnty., Ill., AB 838, slip op. at 6-7 (STB served June 30, 2003). Except as we note below, petitioners' amended notice of intent in Attachment A is in substantial compliance with the requirements of 49 C.F.R. § 1151.21, and the proposed changes are reasonable in the context of petitioners' application. As SGLR points out, the notice should be corrected to reflect that only a portion of the Venice Branch is involved in the proceeding; that SGLR is the owner and operator of the Line but that CSXT owns the

³ E.g., Napa Valley Wine Train, Inc.—Adverse Aban.—in Napa Valley, Cal., AB 582 (STB served March 30, 2001).

underlying right-of-way; that applicants, rather than the railroad, are responsible for providing requested documentation; and that references to Board offices and individuals should be updated.⁴ SGLR also contends that we should not exempt this proceeding from the public use process at 49 U.S.C. § 10905 and that the notice should be modified to reflect that change. Because we are not granting petitioners' exemption request at this time regarding public use of the Line, as discussed below, petitioners must modify their proposed notice accordingly. Their waiver request will be granted subject to those modifications.

Service of the Notice of Intent on Shippers. Petitioners seek relief from the requirements in 49 U.S.C. § 10903(a)(3)(D) and 49 C.F.R. § 1152.20(a)(2)(i) that the notice of intent be served on significant users of the Line. Petitioners state that there are no known shippers or users of the Line because the Line has been out of service for many years. In response to petitioners' request, SGLR admits that the entire Venice Branch has been out of service for a number of years and that there are no known shippers or users of rail service on the Line, but SGLR suggests that, in adverse abandonment proceedings such as this one, the Board should require that all railroads involved be served. In this instance, both SGLR, as owner of the rail facilities, and CSXT, as the owner of the underlying land, should be served. Likewise, petitioners should be required to serve TPL and the County as the developers of the adjacent Legacy Trail. We will grant an exemption from 49 U.S.C. § 10903(a)(3)(D) and waiver of 49 C.F.R. § 1152.20(a)(2)(i), except to the extent necessary to require petitioners to serve copies of any future filings in this proceeding on SGLR, CSXT, TPL and the County.

Service of Notice of Intent on The National Railroad Passenger Corporation (Amtrak) (if Amtrak operates over the involved line). Petitioners seek waiver of the requirement in 49 C.F.R. § 1152.20(a)(2)(x) that the notice be served on Amtrak. Petitioners state that passenger service on the Line ended in the 1950s, and there is no prospect for possible service over the 3,181 feet of rail line. SGLR states that it does not object to the waiver because Amtrak does not operate in the area. The waiver request will be granted.

Service of the Notice of Intent on Labor Organizations. Petitioners request a waiver of 49 C.F.R. § 1152.20(a)(2)(xii), which requires service of the notice of intent on the headquarters of all duly certified labor organizations that represent employees on the affected line. Petitioners state that there are no known railroad employees who have worked on this track in more than 2 years. SGLR does not contest this waiver. We will grant petitioners' waiver request.

Service of the Notice of Intent on the U.S. Railroad Retirement Board. Petitioners request a waiver of 49 C.F.R. § 1152.20(a)(2)(ix), which requires service of the notice of intent on the U.S. Railroad Retirement Board. Petitioners state that they are not aware of any SGLR employees who would be affected by the proposed abandonment. SGLR does not object to this waiver. We will grant the waiver request.

⁴ While SGLR challenges petitioners' description of the reasons for the adverse abandonment application, petitioners are entitled to present their asserted reasons in the notice.

Posting of the Notice of Intent. Petitioners request an exemption from 49 U.S.C. § 10903(a)(3)(B) and waiver of 49 C.F.R. § 1152.20(a)(3), which require that a copy of the notice of intent be posted at each agency station and terminal on the line to be abandoned, or, if there are no agency stations on the line, at any agency station through which business for the line is received or forwarded. Petitioners state that this requirement is relevant only in proceedings that involve a rail carrier abandoning one of its lines, and is not applicable to a third party seeking adverse abandonment. Petitioners state that the Line has been out of service for many years, and there are no terminals or agency stations at which to post a notice. SGLR does not oppose petitioners' requests for exemption from 49 U.S.C. § 10903(a)(3)(B) and waiver of 49 C.F.R. § 1152.20(a)(3). Therefore, the exemption and waiver requests will be granted.

System Diagram Map. Petitioners seek an exemption from 49 U.S.C. § 10903(c), which requires carriers to maintain a system diagram map and to identify on that map rail lines planned for abandonment or discontinuance of service. Petitioners also seek waiver of 49 C.F.R. § 1152.22(a)(5), which requires reference to inclusion of the rail line subject to the abandonment request on the carrier's system diagram map or narrative, the date upon which the line was first listed on there for abandonment, and a copy of the line description which accompanies the carrier's map. Petitioners state that, because they are not a carrier and do not have such a map, these requirements are inapplicable. SGLR does not oppose the exemption and waiver requests, but states that a detailed map showing the location of the Line and its relation both to the Legacy Trail and to the remaining portion of the Venice Branch should be available to petitioners and should be required.

We will exempt petitioners from the requirements of 49 U.S.C. § 10903(c) and waive the above regulation. Exemption and waiver of the system diagram map requirements are customary in adverse proceedings, because a third party generally does not have access to the system diagram map, as is the case here.⁵ Petitioners, however, must file a detailed map of the line they propose for abandonment. See 49 C.F.R. § 1152.22(a)(4).

Condition of Properties. Petitioners seek waiver from 49 C.F.R. § 1152.22(b) requiring a detailed description of the present physical condition of the Line. Petitioners state that they do not have this type of information, but anticipate submitting photographs of the Line that will show that the track is unusable and has not been maintained, and that the Line has been out of service. Petitioners contend that box cars have been left derelict on the Line for more than 2 years and now present a nuisance to the landowners, as well as the potential for significant liability to the railroad. SGLR does not agree with petitioners' description of the Line, but it does not object to waiver of these requirements.⁶ We will deny the waiver request.⁷ Petitioners apparently intend to use the condition of the Line to support their application; this information will be important to our determination.

⁵ Norfolk S. Ry.—Adverse Aban.—St. Joseph Cnty., Ind., AB 290 (Sub-No. 286), slip op. at 4 (STB served Oct. 26, 2006).

⁶ SGLR states that petitioners have not requested nor has SGLR granted permission for petitioners to enter onto the Line to take photographs or otherwise. SGLR also states that anyone that enters the property without its permission and compliance with its requirements for entry

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Revenue and Cost Data. Petitioners seek waiver of the regulations in 49 C.F.R. § 1152.22(d) requiring revenue and cost data. Petitioners point out that they do not possess this information and no such data may exist as there are no known shippers on the Line. SGLR does not oppose this request. We will grant the waiver request.

Environmental and Historic Regulations. Petitioners seek waiver of the Board's regulations requiring environmental and historic reporting. Petitioners assert that the Line has been out of service for several years and that the Board's former Section of Environmental Analysis, now the Office of Environmental Analysis (OEA), has already prepared an environmental assessment (EA) covering the Line in Seminole Gulf Railway—Abandonment Exemption—in Sarasota County, Fla., AB 400 (Sub-No. 3X) (STB served Feb. 13, 2004), and found that the abandonment of the Venice Branch would not have any adverse environmental impacts. SGLR opposes the waiver request.

Contrary to petitioners' contention, the environmental and historic review prepared by OEA in Docket No. AB 400 (Sub-No. 3X) evaluated only the 12.43-mile portion of the Venice Branch proposed for abandonment in that docket and did not include the Line that is the subject of the request before us here. The Board generally conducts a full environmental and historic review in adverse abandonment cases, and environmental and historic reports give the agency the information necessary to conduct that review.⁸ Petitioners must therefore comply with the requirements to prepare and submit both an environmental and an historic report if an application for an adverse abandonment is filed in this proceeding. For these reasons, we will deny petitioners' waiver requests for 49 C.F.R. §§ 1105.7 and 1105.8, 49 C.F.R. § 1152.20 (c) and 49 C.F.R. § 1152.22(f).

Notice of Consummation and the 1-year Time Limit on Exercising Abandonment Authority. Petitioners request waiver of 49 C.F.R. § 1152.24(f) requiring the filing of a consummation notice and 49 C.F.R. § 1152.29(e)(2), which sets a 1-year time limit on the exercise of abandonment authority that would otherwise apply if the intended abandonment application were to be granted. Petitioners state that these waiver requests are warranted because those requirements presuppose control over consummation once the Board's decision is issued, but that in an adverse abandonment, the applicant usually must invoke state law to obtain control over the property. SGLR opposes the request to the extent it would deprive SGLR of the opportunity to salvage the track and track materials, if the adverse abandonment were granted.

(. . . continued)

will be prosecuted for trespassing. SGLR, however, must grant a reasonable request for access by petitioners.

⁷ See Stewartstown R.R.—Adverse Aban.—in York Cnty., Pa., AB 1071 (STB served Mar. 10, 2011); CSX Transp., Inc.—Adverse Aban.—in Shelby Cnty., Tenn., AB 1010 (STB served Oct. 10, 2007).

⁸ See Norfolk S. Ry.— St. Joseph Cnty., Ind.

Petitioners' request for waiver of the requirement that the petitioners file a consummation notice will be denied because the Board needs to know if and when a rail line is removed from its jurisdiction. Petitioners' request for waiver of the 1-year time limit on exercising abandonment authority will be granted. This regulation presupposes control by the applicant over the timing of consummation, once the Board issues a final decision granting abandonment authority. But such is not the case in a third-party abandonment proceeding because, as petitioners correctly state, there is the potential need to invoke other legal processes, such as a proceeding under state law, to obtain control of the property. Granting the waiver regarding the time period in which petitioners would have to exercise the sought abandonment authority will not deprive SGLR of its right to salvage the Line, should we grant authority for an adverse abandonment.

Offers of Financial Assistance, Public Use and Feeder Line Conditions. Petitioners ask for exemption from 49 U.S.C. § 10904 and waiver of the corresponding regulations at 49 C.F.R. § 1152.27, which govern an offer of financial assistance (OFA) to continue rail service. SGLR does not oppose petitioners' requests. The Board will grant petitioners' request for exemption from the OFA provisions of 49 U.S.C. § 10904. The effect of granting an adverse abandonment is that the Board's primary jurisdiction is withdrawn, thus permitting state, local or other federal law to apply where there is no overriding federal interest in interstate commerce. Norfolk S. Ry.—St. Joseph Cnty., Ind., slip op. at 6. If the Board ultimately finds that the public convenience and necessity require or permit withdrawal of its regulatory authority in this adverse abandonment proceeding, it would be fundamentally inconsistent with the rationale underlying the adverse abandonment sought here to provide for further Board regulation under the OFA provisions of § 10904. For the same reasons, the Board will also grant a corresponding waiver of 49 C.F.R. § 1152.27.

Similarly, petitioners seek an exemption from 49 U.S.C. § 10905, which provides for the offering of rail properties approved for abandonment for sale for public purposes. Petitioners also seek a waiver of the corresponding regulations at 49 C.F.R. § 1152.28. SGLR opposes waiver of the right to request a public use condition, arguing that petitioners do not represent the public interest here. Petitioners have not shown that they represent the public interest or that they seek abandonment authority to further an alternative public use of the property. But we do not need to resolve this issue now. Rather, we will address this issue, if relevant, in the final decision on the merits of the adverse abandonment application. See Seminole Gulf Ry.—Adverse Aban.—in Lee Cnty., Fla., AB 400 (Sub-No. 4) (STB served June 9, 2004).

Petitioners also seek an exemption from the feeder line provisions in 49 U.S.C. § 10907, which also keep a rail line within the Board's jurisdiction for the purpose of providing continued rail service. SGLR does not oppose the exemption. We will grant the exemption.

Federal Register Notice. Petitioners request a limited waiver from 49 C.F.R. § 1152.22(i), which prescribes the wording for the draft Federal Register notice that an applicant must submit to the Board. Petitioners state that some of the wording in § 1152.22(i) is inappropriate for adverse abandonment proceedings and attendant exemptions and waivers granted from the regular filing requirements. Instead, petitioners propose to use the alternative language in Attachment B, which they append to their petition, and which is similar in content to petitioners'

proposed notice of intent. SGLR opposes this waiver request to the same extent it opposed petitioners' waiver request for their proposed notice of intent. SGLR further objects to petitioners' inclusion of language that a request for interim trail use address whether a trail use condition would be consistent with an adverse abandonment. Petitioners must make the same modifications in the Federal Register notice discussed above for their proposed notice of intent (regarding the scope of the proposal, ownership of the property, etc.). They need not, however, modify their proposed language regarding trail use, because that and other trail use information could assist us in deciding petitioners' application. Subject to these modifications, we find that the Federal Register notice in petitioners' Attachment B is in substantial compliance with the requirements of 49 C.F.R. § 1152.22(i). To the same extent we granted a waiver for the form of the notice of intent discussed above, we grant the waiver request pertaining to 49 C.F.R. § 1152.22(i), and we will grant their waiver request, as modified.

We grant the exemptions in this decision because full compliance with the Interstate Commerce Act is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101. Rather, these exemptions, which will provide petitioners with a reasonable opportunity to make their case that there is no overriding present or future public need for the Line to remain part of the national rail system, will promote the rail transportation policy by eliminating unnecessary procedures, and thus will expedite regulatory decisions in accordance with 49 U.S.C. § 10101(2). Other aspects of the rail transportation policy will not be adversely affected. Further, as we have shown above, application of the statutory provisions from which we are granting exemptions here is not necessary to protect shippers from an abuse of market power, because there have been no shippers on the line for several years, and no prospective shippers are likely in the foreseeable future.

Waiver of Filing Fees. Petitioners ask for waiver or a reduction of the filing fees for this petition and for the proposed adverse abandonment application that they plan to file. The Board's Chief, Section of Administration, Office of Proceedings, the agency official delegated authority to rule on filing fee waiver requests under 49 C.F.R. § 1002.2(e), has denied this request.

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

It is ordered:

1. Petitioners' petition for exemption and waiver is granted in part and denied in part, as described above.
2. This decision is effective on its service date.

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