40056 SERVICE DATE – JULY 21, 2009
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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34943

BEAUFORT RAILROAD COMPANY, INC.—MODIFIED RAIL CERTIFICATE

Decided: July 20, 2009

This decision denies two identical petitions for stay of a May 20, 2009 decision and notice of interim trail use (May 2009 Decision).[1] The May 2009 Decision denied a petition by several landowners for reconsideration of a March 19, 2008 decision (March 2008 Decision)[2] and granted a request for a notice of interim trail use (NITU) to permit rail banking/interim trail use under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), for the majority of the line at issue in the March 2008 Decision. The March 2008 Decision denied reconsideration of a December 2006 notice of the filing of a modified certificate of public convenience and necessity (modified certificate) under 49 CFR 1150.21-23 for operation of a rail line in South Carolina. The petitions for stay argue that the Board's finding that the line had not been abandoned, and that the Board therefore retained jurisdiction to issue the NITU, constituted material error. The petitioners assert that the U.S. Court of Appeals for the District of Columbia Circuit, where the petitioners have filed petitions for judicial review of the May 2009 Decision,[3] will likely overturn that decision. The petitions for stay will be denied because they do not meet the criteria for a stay.

BACKGROUND

This proceeding involves a rail line, referred to as the Port Royal Railroad (PRR) line, extending approximately 25 miles from milepost AMJ-443.26, in Yemassee, SC, to milepost AMJ-468.31, in Port Royal, SC, that was formerly owned by Seaboard System Railroad, Inc. (Seaboard). The line was authorized to be abandoned by the Board's predecessor, the Interstate Commerce Commission (ICC), in 1984.[4] Abandonment authorizations, however, are not

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[1] Beaufort Railroad Company, Inc.—Modified Rail Certificate, STB Finance Docket No. 34943 (STB served May 20, 2009).

[2] Beaufort Railroad Company, Inc.—Modified Rail Certificate, STB Finance Docket No. 34943 (STB served Mar. 19, 2008).

[3] Clarendon Farms LLC v. STB, No. 09-1176 (U.S.C.A. D.C. Cir., filed June 22, 2009).

[4] Seaboard System Railroad, Inc.—Abandonment—in Beaufort County, SC, Docket No. AB-55 (Sub-No. 110) (ICC served Aug. 23, 1984).

self-executing, and, here, Seaboard did not exercise its authority to abandon. Rather, as explained in the March 2008 Decision and the May 2009 Decision, after Seaboard was authorized to abandon the line, the line was acquired by the South Carolina State Ports Authority (SCSPA) and then leased to the South Carolina Public Railways Commission (SCPRC), which is now organizationally a part of the State of South Carolina Division of Public Railways (SCDPR). Beaufort Railroad Company, Inc. (BRC), is a subsidiary of SCDPR, a division of the South Carolina Department of Commerce. SCSPA is also an instrumentality of the State of South Carolina (BRC and SCSPA will be collectively referred to as the State).

Tangent Transportation Company, Inc. (Tangent), a wholly owned subsidiary of SCPRC, operated the line, pursuant to a modified certificate,[5] from 1985 to 2003.[6] In 2003, Tangent gave the required 60-day notice to terminate its service under the modified certificate,[7] apparently because of the anticipated loss of its primary shipper, which was expected to occur in connection with the then-imminent closure of the Port of Port Royal. But on December 1, 2006, BRC filed a notice with the Board under 49 CFR 1150.23(a), containing the information required for a new modified certificate. BRC was authorized to begin operations upon filing that notice.[8] Notice of the filing of the modified certificate was published in the Federal Register on December 28, 2006 (71 FR 78270) (December 2006 notice), pursuant to 49 CFR 1150.23(a).

On January 17, 2007, Delores Coberly, Don Edgerly, John Keith, Dartha P. Pierce, Pender Brothers, Inc., and John Scherer (collectively, Initial Petitioners) jointly filed a petition (Initial Petition), under 49 CFR 1115.3, for reconsideration of the Board's December 2006 notice. Initial Petitioners claimed that they own the fee interest in parcels of the right-of-way (ROW) of the PRR. The State replied in opposition to the petition for reconsideration.

On March 22, 2007, Clarendon Farms, LLC; Diane D. Terni; Greedy Children Land, LLC; and Prodigal Son, LLC (jointly, Petitioners), stating that they had the same interests as Initial Petitioners, filed a petition for leave to intervene (Supplemental Petition), in which they asked the Board to reconsider the issuance of the December 2006 notice, and also to initiate an

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[5] A modified certificate is a type of license that operators of state-owned lines can obtain and relinquish merely by providing notice to the Board. See Common Carrier Status of States, State Agencies, 363 I.C.C. 132, 133 (1980) (Common Carrier Status), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982); March 2008 Decision, slip op. at 1-2.

[6] See Tangent Transportation Company—Modified Rail Certificate, Finance Docket No. 30655 (ICC served June 13, 1985).

[7] See 49 CFR 1150.24.

[8] See Common Carrier Status, 363 I.C.C. at 138.

investigation into the factual matters at issue. The State filed a reply in opposition to intervention.

The Board denied both petitions for reconsideration of the December 2006 notice in the March 2008 Decision and found that the PRR line had not been abandoned and that it was still therefore part of the national rail system. The March 2008 Decision explained (slip op. at 5-9) that Tangent's 2003 termination of service on the line did not amount to consummation of an abandonment of the line by the State rail line owner, and that, therefore: (1) the Board retained jurisdiction to accept BRC's modified certificate filing, and (2) the December 2006 notice for a modified certificate remained in effect. In addition, the Board addressed concerns raised by Initial Petitioners about the State's possible use of the ROW for rail banking/interim trail use in the event that BRC, the operator of the line, terminated its service obligation. After citing Board precedent providing that rail banking/interim trail use requests can be filed in conjunction with notices to terminate service under a modified certificate, the Board found that, if BRC terminated its service obligations, and the State found an interested party to use the ROW for interim trail use subject to rail banking, that outcome would be permissible provided that it was pursued under the applicable statutory and regulatory requirements of the Trails Act.[9]

On April 8, 2008, Petitioners filed a petition (Second Petition) under 49 CFR 1115.3 for reconsideration of the Board's March 2008 Decision. Petitioners argued that the Board erred in that decision in holding that it retained jurisdiction to accept BRC's modified certificate filing. They also claimed that it was material error for the Board to accept representations made by BRC that other parties had disputed in their filings before the Board. Petitioners asked for a Board investigation to resolve factual discrepancies regarding the condition of the line and what actions the State has taken to maintain it.

On April 28, 2008, the State filed a reply in opposition to the Second Petition. Between May and July of 2008, Petitioners filed two responses, and a supplemental submission; and the State filed a reply to the first of the Petitioners' responses.

On July 16, 2008, the State and the Beaufort Jasper Water and Sewer Authority (BJWSA)[10] filed a notice of intent to terminate service by BRC and a request for issuance of a NITU to rail bank the line for the possible future restoration of active rail service and to use it as an interim trail pursuant to the Trails Act. On August 22, 2008, Petitioners filed a response and

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[9] See March 2008 Decision, slip op. at 9.

[10] References to 'the State' in this decision regarding issues prior to the July 16, 2008 filing refer to BRC and SCSPA. In new issues after July 16, 2008, notably the NITU, and in the arguments made in the reply to the petitions for stay, 'the State' refers to BRC, SCSPA, and BJWSA.

motion to strike the State's notice of intent and NITU request. On September 11, 2008, the State filed a reply in opposition to Petitioners' response and motion to strike.

The Board found in the May 2009 Decision that Petitioners had failed to meet their burden of showing material error, new evidence, or substantially changed circumstances that would justify reconsideration of the March 2008 Decision. The Board further found that Petitioners had not demonstrated a need for an investigation. Accordingly, the Board denied reconsideration and granted the request for a NITU, which it found was filed in compliance with the requirements of the Trails Act and the Board's Trails Act rules.

On June 19, 2009, Clarendon Farms, LLC (Clarendon), filed a petition for stay of the May 2009 Decision pending judicial review. On June 30, 2009, Diane D. Terni, Greedy Children Land, LLC, and Prodigal Son, LLC, filed a petition for stay of the May 2009 Decision pending judicial review. Although the parties are represented by different counsel, and the petitions for stay were filed on different dates, the two petitions are identical. They will be referred to together as 'Petitions,' and the petitioning parties, who have filed jointly throughout the history of this proceeding, will continue to be referred to collectively as 'Petitioners.'

On June 24, 2009, the State filed a reply in opposition to the June 19 stay request. On July 1, 2009, the State filed a reply in opposition to the June 30 stay request. On July 7, 2009, Clarendon filed a rebuttal to the State's June 24 reply.

POSITIONS OF THE PARTIES

Petitioners argue that the Board's denial of the petitions to reconsider whether the Board retained jurisdiction to issue BRC's modified certificate and a NITU was material error. Petitioners claim that the Board erred in its determinations that the PRR line was not abandoned because Tangent terminated service, there has been no rail service over the line since Tangent's termination, and the State has not maintained the line in a fully operational condition. Petitioners further assert that BRC sought the modified certificate in December of 2006 solely to allow the State to effectuate its plans of selling the line to the BJWSA so as to preclude Petitioners from claiming the reversionary property rights they allegedly have in a portion of the ROW.

Petitioners also argue that it was material error for the Board to adopt the State's factual assertions because certain factual assertions were contested. Petitioners contend that the Board's failure to initiate an investigation into both the facts of the proceeding, and the State's credibility was a material error.

Petitioners further claim that it was material error for the Board to issue a NITU in this case. Petitioners argue that the State's true intent was to install water and sewer pipes within the ROW, and not to preserve the ROW for potential future rail service through rail banking and interim trail use. Petitioners argue that, because the Board's issuance of the NITU was based on

material error, the May 2009 Decision will likely be overturned on appeal. Petitioners set forth various harms that they claim will occur absent a stay pending judicial review.

In its reply, the State asserts that Petitioners have failed to establish the requisite elements for a stay of the Board's decision. The State further asserts that Clarendon intends to develop property that encompasses a portion of the ROW for residential and commercial purposes. Clarendon's rebuttal argues that the State mischaracterizes Clarendon's plans for the ROW.

PRELIMINARY MATTER

Board regulation 49 CFR 1104.13(c) prohibits the filing of "replies to replies." Clarendon nevertheless filed a rebuttal to the State's reply. A person requesting Board action must include in the opening pleading all arguments supporting the requested action. Likewise, any responding party is required to place all arguments in its only pleading: a reply. The limit to one round of pleadings each promotes quicker Board action and is particularly appropriate in stay proceedings, which are often considered in an expedited manner. Although the Board has waived section 1104.13(c) on a case-by-case basis (and indeed did so at an earlier stage of this proceeding), Clarendon provides no good cause to depart from that rule here. Accordingly, Clarendon's rebuttal will not be considered.

DISCUSSION AND CONCLUSION

The factors to be considered in addressing a petition for stay are: (1) whether there is a strong likelihood that petitioners will prevail on the merits of any challenge to the action sought to be stayed; (2) whether petitioners would be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other interested parties; and (4) whether issuance of a stay would be in the public interest. Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958) (Virginia Petroleum Jobbers Ass'n). On a motion for stay, "it is the movant's obligation to justify the…exercise of such an extraordinary remedy." Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 978 (D.C. Cir. 1985). Parties seeking a stay carry the burden of persuasion on all of the elements required for such extraordinary relief. See generally Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974). As discussed below, Petitioners have failed to make the showing required under these standards.

Likelihood of Success on the Merits. Petitioners have not shown that there is a strong likelihood that they will succeed on the merits of their claim on appeal. The Board has twice reviewed Petitioners' contentions and reasonably held, in the March 2008 Decision and May 2009 Decision, that the Board retains jurisdiction over the PRR because the State never consummated abandonment. The Board's decisions are fully explained and supported by the record.

As the Board explained in its decisions in this case, abandonment authority is permissive. As a result, historically, determining when abandonment authority was actually consummated often proved elusive, as it depended on a case-by-case evaluation of all the facts and circumstances to determine the line owner's intent. Therefore, in 1997, the Board established by rule a requirement that railroads authorized to abandon lines must file a "notice of consummation" of abandonment so that each railroad's intent would be made clear.[11] But here the State (the line owner) was exempt from the abandonment provisions of the statute by Common Carrier Status. Thus, as the Board here reasonably found, the State is not subject to the notice of consummation requirement when it decides to withdraw a line from the national rail system. Rather, the Board must look at additional factors concerning the intent of a state rail line owner to abandon a line to determine whether a withdrawal has occurred.

Petitioners' argument that Tangent's termination of service shows an intent by the State owner to remove the line from the national transportation system is unpersuasive. As the Board explained, there is no rigid formula for determining intent and the Board looks to the totality of the facts and circumstances of each case.[12] Here, the Board reasonably determined that a notice of termination by the modified certificate *operator* was not enough to show an intent to abandon by the line owner. That conclusion is consistent with the Board's larger policy of facilitating the continuation of rail service. The Board, and the ICC before it, have long encouraged states to purchase rail lines at risk to preserve them for present or future rail service. One of the ways in which the Board has done this is by relieving states of the regulatory burdens of entry and exit.[13] It would be at odds with the Board's long-standing policy for the Board to have concluded that a state would automatically lose its property and the public would lose the opportunity for future rail service (as well as the public investment of funds in the property) merely because the state's arrangement with a particular operator ends and the state did not engage a replacement operator immediately or within a short period of time.[14]

Petitioners argue that it was material error on the Board's part to deny the request for an investigation to resolve factual discrepancies between the parties as to what the State has done to maintain the line since 2003, and also to determine the State's motivation with regard to the PRR line. However, the Board took note of all pleadings and analyzed the entire record, including all parties' claims about maintenance, and concluded that it retained jurisdiction over the PRR line. The March 2008 Decision and the May 2009 Decision provide detailed explanations of how the Board came to its conclusion. It was not necessary to obtain additional evidence through an

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[11] 49 CFR 1152.29(e).

[12] See March 2008 Decision, slip op. at 6, 8; May 2009 Decision, slip op. at 6.

[13] See Common Carrier Status.

[14] See March 2008 Decision, slip op. at 8; May 2009 Decision, slip op. at 9.

investigation, as the record was sufficient to resolve the issues at hand. The factual claims made in the Initial Petition, Supplemental Petition, and Second Petition, amount to the conclusion that Tangent discontinued service and the State has not maintained the line since the termination. The "discrepancy" in the record is that the State claims to have spent $30,000 on the upkeep of the PRR since Tangent's termination. The Board accepted the State's claim on maintenance, as no party had provided evidence to the contrary. Petitioners provided photo documentation of the line in May 2008, over a year after the Initial Petition was filed and several months after the March 2008 Decision was served, showing that certain areas of the line require rehabilitation before rail service could resume.[15] But, as noted in the May 2009 Decision, slip op. at 7, the State has acknowledged that rehabilitation would be required.

When determining whether an abandonment has been consummated, the Board looks for a physical act that shows a clear intention on the part of the rail line owner to remove the line from the national rail system and relinquish the property interest.[16] Because discontinuation of service and lack of maintenance such as that alleged by Petitioners standing alone are not physical acts sufficient to show an intent to relinquish permanently the right to use a line for rail service, the State's actions, *even as alleged by Petitioners*, do not demonstrate that intent.[17] Therefore, the Board had an ample basis here to conclude that it had the information it needed to decide the issues presented to it and that an investigation into the alleged factual discrepancies in the record was unwarranted.

Nor was it necessary to request further information as to the State's motivation. Petitioners contend that the State never intended to restore rail service and is misusing the Board's processes. However, nothing in the record of any prior decision in this docket, or the State's subsequent NITU request, shows that the modified certificate sought in 2006 was sought in bad faith.

But even if Petitioners are correct that the State's motivation in recent years has been to use the ROW as a trail, the Board's issuance of the NITU in the May 2009 Decision would not be material error. Rail banking/interim trail use under the Trails Act is a legitimate way to keep

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[15] See May 2009 Decision, slip op. at 7.

[16] See March 2008 Decision, slip op. at 6-7; May 2009 Decision, slip op. at 7.

[17] See Norfolk and Western Railway Company—Abandonment Exemption—Between Kokomo and Rochester in Howard, Miami, and Fulton Counties, IN, STB Docket No. AB-290 (Sub-No. 168X), slip op. at 6 (STB served May 4, 2005) (given the totality of the circumstances, a railroad's removal of sections of track was not determinative of intent to abandon).

a railroad ROW intact and available for possible future rail use.[18] Moreover, trail conditions have been issued in the past in similar situations involving modified certificates.[19]

Finally, Petitioners complain that the State's real intention has been to install water and sewer pipes in the ROW. But Petitioners' suggestion that this warrants a stay ignores the fact that the Board consistently has refrained from deciding matters regarding how a trail is developed or used. It is well settled that the Board's role in rail banking/interim trail use is essentially ministerial. That is, the Board only looks to see if the trail sponsor meets the statutory and regulatory requirements to be a trail user, that the railroad agrees to trail use, and that nothing occurs that would preclude a railroad's right to reassert control over the ROW at some future time to revive service. See Georgia Great Southern—Abandon & Discontin. Of Service—GA, 6 S.T.B. 902, 907 (2003); Idaho Northern et al.—Abandonment & Discon. Exemption, 3 S.T.B. 50, 59 (1998); Iowa Power, Inc.—Construction Exemption—Council Bluffs, IA, 8 I.C.C.2d 858 (1990); Iowa Southern Railroad Company—Exemption—Abandonment, 5 I.C.C.2d 496 (1989), aff'd Goos v. ICC, 911 F.2d 1283 (8th Cir. 1990); Citizens Against Rails-to-Trails v. STB, 267 F.3d 1144 (D.C. Cir. 2001).

There is nothing impermissible under the Trails Act regarding the dual use of a right-of-way as both an interim trail and a utility corridor. Kansas Eastern Railroad, Inc.—Abandonment Exemption—in Butler and Greenwood Counties, KS, STB Docket No. AB-563 (Sub-No. 1X) (STB served June 2, 2006). Petitioners do not show that the construction of water and sewer lines within the ROW – which would undoubtedly be buried beneath the rail bed – provide any basis on which to prevent rail banking or the development of an interim recreational trail.[20] Accordingly, Petitioners have failed to demonstrate likelihood of success to warrant a stay.

Irreparable Harm. Petitioners have not demonstrated irreparable actual or imminent harm so as to warrant a stay of the effectiveness of the May 2009 Decision. Petitioners argue that, if a stay is not granted, substantial construction likely will be undertaken by the State before any judicial appeal is heard, and the "pristine condition" of Petitioners' alleged property interest in the ROW will be destroyed. However, the ROW already contains a railroad track, undercutting any claim that the land is in pristine condition, and the Board does not view the track's possible replacement with a recreational trail and buried water and sewer lines as necessarily causing

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[18] See e.g. Preseault v. ICC, 494 U.S. 1 (1990) (Preseault); Birt v. STB, supra.

[19] See Sammamish Transportation Company—Notice of Interim Trail Use and Termination of Modified Certificate, STB Finance Docket No. 33398 (Sub-No. 1) (STB served Feb. 26, 1998).

[20] Petitioners appear to be disingenuous in complaining about the need for new water and sewer lines. According to the State's June 24 reply, Clarendon may be intending to develop water and sewer pipes on its property under the auspices of the BJWSA. See State reply at 7.

irreparable harm.[21] Petitioners also argue that the likely announcement of a potential trail may create an expectation of access to and use of the ROW by the public that would be difficult to reverse if the May 2009 Decision is ultimately overturned. Petitioners ignore that any such expectation, even if true, is conditional because trail use is always subject to revocation in favor of a restoration of rail services. Therefore, Petitioners fail to demonstrate how this alleged harm is irreparable.

Harm to Other Interested Parties. Petitioners also claim that a stay would not harm the State. However, the effect of a stay would be to prohibit the State from going forward with plans for a trail for public use until after the outcome of judicial review of the May 2009 Decision. Unnecessarily impinging on the State's right to move forward with its authorized plans would harm the State's interests and the State is entitled to administrative finality. This case began in 2006, and the Board has already fully addressed the arguments Petitioners make in opposition to the May 2009 Decision.

Public Interest. Finally, Petitioners' argument that a stay of the May 2009 Decision would be in the public interest is unpersuasive. Because the Board is authorized by statute to promote the public interest in reaching its decisions, and has fully done so here as reflected in the decisions in this case, the "interests of private litigants must give way to the realization of public purposes."[22] As the Board's decisions show, the Board reasonably found that the public interest favors the rail banking and interim trail use of the ROW.

Petitioners claim that other parties will also attempt to misuse the Board's processes, in a similar manner to the alleged misuse by the State, on the basis of the May 2009 Decision, and that staying the decision until after judicial review is, therefore, appropriate. Even if the May 2009 Decision is ultimately reversed, the Board does not believe that Petitioners have stated an adequate basis for a stay on this ground. This challenge to the modified certificate has been pending since 2006, yet the Board has not seen a substantial increase in the type of proceeding at issue here.

Petitioners also assert that the public interest requires a stay based on its allegation that the May 2009 Decision creates a public expectation of access to the ROW for recreational trail use, and the public may even begin to access and use the ROW prior to judicial review. Petitioners claim that, if they subsequently are successful on appeal and in reclaiming the ROW, they may face trespassing and damage to their property. The Board finds that this concern is speculative, and that it does not state a harm to the public interest. Any damage claims that

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[21] In its reply to the stay request, the State says that it has no plans to undertake any construction activities on the ROW that would affect Petitioners' adjoining property.

[22] See Virginia Petroleum Jobbers Ass'n, 259 F.2d at 925.

Petitioners might have could be addressed by bringing an appropriate action in a court of competent jurisdiction.[23]

For all these reasons, Petitioners have failed to meet their burden of showing that the stay criteria have been met. Therefore, the stay requests will be denied, and the Board's May 2009 Decision will remain in effect.

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

It is ordered:

1. Clarendon's July 7, 2009 rebuttal is not accepted into the record.

2. The petitions for stay of the May 2009 Decision are denied.

3. This decision is effective on its date of service.

By the Board, Acting Chairman Mulvey, and Vice Chairman Nottingham.

Anne K. Quinlan
Acting Secretary

[23] See Preseault, 494 U.S. at 11 (property owner can bring a takings claim in state court).