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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-1014

DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION—
ADVERSE ABANDONMENT—IN MINERAL COUNTY, CO

Decided: May 21, 2008

The City of Creede, CO (the City), filed an application for adverse abandonment for a 1-mile portion of rail line within the City limits that is owned and operated by the Denver & Rio Grande Railway Historical Foundation (D&RGHF). For the reasons set forth below, we grant the City's application.

BACKGROUND

History of the Line. The Creede Branch is a 21.6-mile rail line, extending from milepost 299.3 near Derrick to the end of the line near milepost 320.9 at Creede, in Rio Grande and Mineral Counties, CO.¹ In its application, the City provides a history of the Creede Branch,² which is not disputed by D&RGHF. According to the City, the Creede Branch was built to serve the mining industry in and around Creede in the last half of the 1800s. However, as mining activity in the area declined, so did freight operations over the Creede Branch. Freight service into the City ceased in 1969 and on the remainder of the Creede Branch by the mid-1980s.

The City states that the 1-mile segment that it seeks to have abandoned is comprised of two rights-of-way (ROWs): the Section 25 ROW and the Section 36 ROW. According to the City, the Section 25 ROW was granted to the Denver & Rio Grande Western Railroad Company (D&RGW) by the Federal Government, pursuant to the Right of Way Act of 1875, while the Section 36 ROW was granted to D&RGW by the Colorado State Land Board in a 1969 agreement.³ The City states that the interest in the land under the Section 25 ROW was deeded

¹ See Union Pacific Railroad Company—Abandonment Exemption—in Rio Grande and Mineral Counties, CO, STB Docket No. AB-33 (Sub-No. 132X), slip op. at 1 (STB served May 24, 2000) (May 2000 Decision).

² See City's Application at 6-7.

³ The City notes that this 1969 agreement replaced an 1892 agreement between the Colorado State Land Board and D&RGW granting D&RGW the ROW.

to the City in 1901 and the land under the Section 36 ROW was deeded to the City in 1965, and that, in both instances, the deeds were subject to the pre-existing ROWs.⁴

History of the Case. In December 1998, the successor to D&RGW, Union Pacific Railroad Company (UP), filed a notice of exemption with the Board for authority to abandon the Creede Branch in STB Docket No. AB-33 (Sub-No. 132X), Union Pacific Railroad Company—Abandonment Exemption—in Rio Grande and Mineral Counties, CO. However, before the abandonment authority could be consummated, D&RGHF submitted an offer of financial assistance (OFA) to acquire the line, pursuant to 49 U.S.C. 10904 and 49 CFR 1152.27.⁵ On April 28, 1999, UP and D&RGHF advised the Board that they had reached an agreement for the purchase and sale of the Creede Branch. By decision of the Director of the Office of Proceedings served on May 11, 1999, in STB Docket No. AB-33 (Sub-No. 132X), UP's abandonment exemption was dismissed, effective on the consummation date of the sale, and D&RGHF was authorized to acquire the subject rail line. On May 24, 2000, D&RGHF and UP consummated the sale of the line.

Since D&RGHF's purchase of the line, the City and area residents (collectively, petitioners) have filed three separate petitions to reopen and revoke the OFA sale authorized by the Board in STB Docket No. AB-33 (Sub-No. 132X). Among the arguments raised by the petitioners was the claim that D&RGHF, and its President, Donald Shank, were not financially responsible and thus did not meet the qualifications to be an OFA purchaser. The petitioners also claimed that D&RGHF could not, and would not, conduct freight rail operations and only wanted the line to operate a tourist service. Because the Creede Branch had not been used for rail service for decades, the line required rehabilitation work before service (freight or passenger) could resume, and the petitioners asserted that D&RGHF was unable to fund the necessary repairs. D&RGHF disputed these assertions in each instance.

The Board denied all three petitions to reopen and revoke, in the May 2000 Decision, and in decisions served on June 22, 2004 (June 2004 Decision), and May 3, 2005 (May 2005 Decision).⁶ In the June 2004 Decision and May 2005 Decision, the Board noted that repeated

⁴ City's Application at 17. See also City's Application, Exh. 3, for a map of the 1-mile segment, including the boundaries of the Section 25 and Section 36 ROWs.

⁵ Another party, Rio Grande & San Juan Railroad Co., also submitted an OFA. When faced with multiple offerors, the railroad may choose the one with which it will negotiate, 49 CFR 1152.27(l)(1), and UP chose to negotiate with D&RGHF.

⁶ The City also filed a petition for declaratory order, pursuant to an order of the U.S. District Court for the District of Colorado, referring to the Board three questions related to the issue of Federal preemption of the City's zoning laws as applied to the outer portions of D&RGHF's ROW. The City had adopted a local zoning ordinance that would have classified parts of D&RGHF's ROW for residential use only. The Board issued a decision finding that the City's zoning ordinance was federally preempted under 49 U.S.C. 10501(b). See City of Creede,
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attacks on the OFA sale were not the appropriate way to address the petitioners' concerns, and it pointed out that, if the petitioners wished to move to take the line out of the national rail system, they were free to file an application for adverse abandonment.

On December 17, 2007, the City filed an application under 49 U.S.C. 10903,⁷ requesting that the Board authorize the third-party, or adverse, abandonment of approximately 1.0 mile of rail line at the end of the Creede Branch (extending from near milepost 320.9 to near milepost 319.9), a run-around track, and a spur track, all located in the City limits.⁸ In accordance with the procedural schedule set forth in 49 CFR 1152.26, D&RGHF filed its protest to the application on January 31, 2008, and the City filed its reply to D&RGHF's protest on February 15, 2008.⁹ On January 31, 2008, the Board received a protest from San Luis & Rio Grande Railroad (SL&RG), opposing the City's adverse abandonment application. The Board also received numerous letters from residents and business owners in and around the City, nearly all of which express support for the City's adverse abandonment application.

PRELIMINARY MATTERS

Motion to Strike. In its protest, D&RGHF argues that the letters submitted by the local area residents and businesses should be stricken as impermissible filings under the procedural schedule. In the alternative, D&RGHF argues that, if the letters are not stricken, the Board should accord them no weight. The City argues in response that these letters are allowed under the procedural schedule and should be considered as evidence that there are no businesses in the City that need or want rail service.

Contrary to D&RGHF's assertion, there is nothing in the procedural requirements of 49 CFR 1152.26, governing abandonment proceedings that prohibits individuals from filing letters in support of, or opposition to, an abandonment application, or that requires that these filings be given no weight. Moreover, the Board has accepted such filings in prior adverse

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CO—Petition for Declaratory Order, STB Finance Docket No. 34376 (STB served May 3, 2005).

⁷ In a decision served in this proceeding on October 18, 2007 (October 2007 Decision), the City was granted exemptions from several statutory provisions as well as waivers of certain Board regulations at 49 CFR 1152 that would not be relevant to its adverse abandonment application or that called for information not available to the City.

⁸ Notice of the City's application was served and published in the Federal Register on January 4, 2008 (73 FR 930-31).

⁹ The Board also received a pleading from Wason Ranch Corporation (Wason) on January 31, 2008, requesting that the Board expand the scope of this proceeding to include those portions of the Creede Branch that traverse Wason's property. By a decision served on March 4, 2008, the Board denied this request.

abandonment cases.¹⁰ Accordingly, in the interest of encouraging public participation, D&RGHF's motion to strike, or, in the alternative, that these letters be given no weight, is denied.

Request for Official Notice. On February 14, 2008, D&RGHF filed a request that the Board take official notice of its decision in Norfolk Southern Railway Company—Adverse Abandonment—St. Joseph County, IN, STB Docket No. AB-290 (Sub-No. 286) (STB served Feb. 14, 2008) (St. Joseph County),¹¹ which was served after D&RGHF filed its protest. On February 29, 2008, the City filed a reply to D&RGHF's request, stating that D&RGHF's request should be deemed a motion to supplement its protest. The City states that it does not object to such a motion, but argues that it should be permitted to file a reply, which it included as part of its filing. In its reply, the City argues that the St. Joseph County decision is distinguishable from the case here.

The City is correct that it is unnecessary for the Board to take official notice of its own decision, even if it was issued subsequent to a party's submission. Accordingly, D&RGHF's request and the City's request to reply will be denied as moot.

Motions to Supplement. On February 25, 2008, D&RGHF filed a request (February 25 letter) that the Board take official notice of the fact that Railinc, an affiliate of the Association of American Railroads (AAR), issued a railroad reporting mark of "DRGR" and an AAR accounting rule 260 code number 212 to the Denver & Rio Grande Railroad Company, the operating affiliate of D&RGHF. D&RGHF states that this constitutes additional evidence that it is a legitimate rail carrier. On February 29, 2008, D&RGHF filed a request (February 29 letter), asking that the Board take official notice of a newspaper article describing a mining business venture in the Creede area as further evidence of the potential for future traffic. On March 17, 2008, the City submitted a reply to both of these requests. The City argues that these two letters do not meet the criteria of 49 CFR 1114.6, by which the Board takes official notice of corroborative material.

The City is correct that D&RGHF has used an incorrect procedure for what it seeks, which is to supplement its protest. Accordingly, we will treat D&RGHF's February 25 and February 29 letters as motions to supplement its protest. The City does not appear to object to these requests and has submitted a reply to both letters. Because both of D&RGHF's letters provide information that was not available to it at the time of its protest, and the City does not object, we will grant D&RGHF's motions to supplement and include its two letters as part of the record, as well as the City's reply to these letters.

¹⁰ E.g., Salt Lake City Corporation—Adverse Abandonment—in Salt Lake City, UT, STB Docket No. AB-33 (Sub-No. 183), slip op. at 1 (STB served Mar. 8, 2002) (Salt Lake City).

¹¹ A petition for administrative reconsideration of St. Joseph County is pending before the Board.

On March 24, 2008, D&RGHF filed another request (March 24 letter) that the Board take official notice of a newspaper article reporting that two sites near Creede have been proposed as designated sites for environmental cleanup under the Superfund program as evidence of future potential traffic. The City filed a reply to this request on April 14, 2008. Again, we will treat D&RGHF's request as a motion to supplement D&RGHF's protest, and because this motion contains information that was not available to D&RGHF at the time of its protest, it will be granted. The City's reply will also be entered into the record.

OFA Request. In addition to arguing that the Board should deny the City's application, SL&RG requests that the Board permit SL&RG to file an OFA to acquire the abandoned segment if the application is granted.

We will deny SL&RG's request to allow it to file an OFA. The issue of whether or not to permit an OFA in this case has already been addressed. In the October 2007 Decision, slip op. at 4-5, the Board granted the City's request for an exemption from and waiver of the statutory and regulatory OFA provisions, respectively, should the City's adverse application be granted. SL&RG suggests that the Board's finding may have been "inadvertent," which we will take to mean that it was allegedly a material error under 49 U.S.C. 722(c). Accordingly, we will treat SL&RG's request as a petition to reopen the October 2007 Decision.

The Board's finding was not inadvertent, however, nor was it a material error. In the October 2007 Decision, slip op. at 4-5, the Board pointed out that it does not permit OFAs for lines as to which adverse abandonment has been granted because an OFA would be inconsistent with the reasons for granting the adverse abandonment in the first place. As we noted in that decision, "should the Board ultimately find that the public convenience and necessity require or permit withdrawal of its regulatory authority in this adverse abandonment proceeding, the OFA, feeder line, and public use provisions would be fundamentally inconsistent with the purpose of the Board's adverse abandonment decision." Accordingly, the Board's granting of the City's exemption and waiver requests from the OFA provisions was not material error, and SL&RG's petition to reopen will be denied.

DISCUSSION AND CONCLUSIONS

A. Applicable Legal Standards.

Under 49 U.S.C. 10903(d), the standard governing any application for authority to abandon a line of railroad is whether the present or future public convenience and necessity (PC&N) require or permit the proposed abandonment. In applying this standard in an adverse abandonment context, we must consider whether there is a present or future public need for rail service over the line and whether that need is outweighed by other interests.¹²

¹² See New York Cross Harbor R.R. v. STB, 374 F.3d 1177, 1180 (D.C. Cir. 2004) (New York Cross Harbor); City of Cherokee v. ICC, 727 F.2d 748, 751 (8th Cir. 1984). See also

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We have exclusive and plenary jurisdiction over abandonments to protect the public from an unnecessary discontinuance, cessation, interruption, or obstruction of available rail service.¹³ Accordingly, we typically preserve and promote continued rail service where a carrier has expressed a desire to continue operations and has taken reasonable steps to acquire traffic.¹⁴ On the other hand, we do not allow our jurisdiction to be used to shield a line from the legitimate processes of state law where no overriding Federal interest exists.¹⁵ In an adverse abandonment case, if we conclude that the PC&N does not require or permit continued operation over the line, our decision removes the shield of our jurisdiction, enabling the applicant to pursue other legal remedies to force the carrier off a line.¹⁶

B. PC&N Analysis.

Potential for Freight Service. D&RGHF concedes that there are no current freight operations on the line, given that the line has not yet been restored to operational condition. But the lack of current freight operations alone is not grounds for granting an adverse abandonment application. Under the PC&N test, the Board must also consider the potential for future freight rail traffic.¹⁷

In its application, the City argues that it is likely that there will never be a shipper that would utilize the 1-mile segment that it seeks to have abandoned. In its protest, D&RGHF identifies four potential shippers and thus claims that its prospects for freight rail service are greater than those in Seminole Gulf, a case in which an adverse abandonment application was denied.

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Seminole Gulf Railway, L.P.—Adverse Abandonment—in Lee County, FL, STB Docket No. AB-400 (Sub-No. 4) (STB served Nov. 18, 2004) (Seminole Gulf); St. Joseph County.

¹³ See Modern Handcraft, Inc.—Abandonment, 363 I.C.C. 969, 972 (1981) (Modern Handcraft).

¹⁴ See Chelsea Property Owners—Abandonment—Portion of the Consolidated Rail Corp.’s West 30th Street Secondary Track in New York, NY, 8 I.C.C.2d 773, 779 (1992) (Chelsea), aff’d sub nom., Consolidated Rail Corp. v. ICC, 29 F.3d 706 (D.C. Cir. 1994) (Conrail).

¹⁵ See Kansas City Pub. Ser. Frgt. Operation—Exempt.—Aban., 7 I.C.C.2d 216 (1990) (Kansas City). See also CSX Corporation and CSX Transportation, Inc.—Adverse Abandonment Application—Canadian National Railway Company and Grand Trunk Western Railroad, Inc., STB Docket No. AB-31 (Sub-No. 38) (STB served Feb. 1, 2002) (Grand Trunk).

¹⁶ See Conrail, 29 F.3d at 709; Modern Handcraft, 363 I.C.C. at 972.

¹⁷ Seminole Gulf; St. Joseph County.

In its reply to D&RGHF's protest, however, the City has raised serious questions about the likelihood that any of these alleged shippers would need to use the line for freight rail service. We look at the prospect of each of the prospective shippers that D&RGHF identified.

a. GMCO Corporation (GMCO)

In past Board proceedings, D&RGHF has cited GMCO as a potential shipper when refuting claims that D&RGHF had no interest in providing freight rail service. In those proceedings, the Board found that GMCO's interest in shipping as much as 25 cars of magnesium chloride¹⁸ a year to the governments of Mineral and Hinsdale Counties, CO, represented a reasonable level of commitment to use a rail line that was not yet fully rehabilitated.¹⁹ Here, D&RGHF claims that GMCO "remain[s] interested in shipping magnesium chloride by rail . . . all the way into Creede for both Mineral County and the U.S. Forest Service."²⁰

The City provides persuasive evidence, however, that, since those past decisions, the prospect for shipments by GMCO over D&RGHF's line has greatly diminished. First, the City claims that Hinsdale County is no longer interested in receiving magnesium chloride from GMCO, a fact that appears uncontested in that D&RGHF omits Hinsdale County as a potential customer in its reply. Second, the City notes that, in GMCO's letter to D&RGHF, GMCO has lowered the number of possible carloads for shipment to Mineral County from 12-15 (as stated in a 2003 letter from GMCO) to 3-5 carloads. However, even this estimate may be high, as the city manager for Creede has stated that Mineral County uses only one car of magnesium chloride per year.²¹ Moreover, there is no evidence that Mineral County seeks service from D&RGHF for even that small amount of magnesium chloride. Unlike in its past submissions, here, D&RGHF does not provide a letter from Mineral County indicating its interest in having its shipment received by rail. The City, in contrast, has submitted evidence that the Commissioners of Mineral County voted unanimously not to write a letter supporting D&RGHF's opposition to the adverse abandonment application.²² D&RGHF also claims that the U.S. Forest Service is interested in receiving magnesium chloride, but there is no evidence in support of this claim.²³

¹⁸ According to the City's application, magnesium chloride is a chemical that is used as a dust suppressant on road surfaces. City's Application at 37.

¹⁹ See June 2004 Decision, slip op. at 7; May 2005 Decision, slip op. at 4-5.

²⁰ See D&RGHF's Protest, V.S. of Donald H. Shank (Shank), at 18.

²¹ See City's Application, V.S. of Clyde Dooley (Dooley), at 3.

²² City's Reply, Exh. 38.

²³ GMCO's letter to D&RGHF makes no mention of shipping carloads of magnesium chloride to the U.S. Forest Service. See D&RGHF's Protest, Exh. 1. GMCO does mention the possibility of shipping 30 carloads to South Fork, CO, to service Archuleta County, CO, but

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b. Steven Baxter/Tenco Red Cedar Logs

D&RGHF also identified Steven Baxter, a Creede resident, as another potential shipper. According to D&RGHF, Mr. Baxter is in the formative stages of establishing a company called Tenco Red Cedar Logs (Tenco). The City states that this company would finish cedar logs for use in home construction. D&RGHF claims that Mr. Baxter is interesting in having carloads of cedar logs shipped from out of state to his business in Creede.

Despite D&RGHF's claim, the likelihood that Mr. Baxter would actually need or request freight rail service is highly speculative. The City notes that, in response to a discovery request, the only evidence that D&RGHF could point to of Mr. Baxter's interest in service were e-mails between Mr. Baxter and Mr. Shank. A review of these e-mails shows that Mr. Baxter simply inquired about the possibility of having the cedar logs shipped by D&RGHF.²⁴ But Mr. Baxter makes no commitment to ship by D&RGHF. Moreover, in response to an inquiry from the city manager of Creede about the possibility that Mr. Baxter would receive shipments by rail, Mr. Baxter states: "I have not made any commitment to [D&RGHF] to purchase rail service at this time. . . . Tenco is in the formative stages and will not require transportation services, truck or rail, for some time to come."²⁵ Based on this evidence, the potential for D&RGHF to make freight rail shipments to Mr. Baxter is highly speculative.²⁶ Moreover, the City points out that, even according to D&RGHF, if Tenco were to receive shipments of cedar logs by rail, it would be no more than 1-3 carloads per year.

c. Mining

D&RGHF also argues that there is a possibility that the long-defunct mining industry around the City will resume. D&RGHF specifically alleges that a "wealthy individual" it identifies as Brian Egolf recently purchased over 700 mining claims with plans to press several of the mines into production. D&RGHF claims that these mines represent future freight rail potential.

But D&RGHF's claim that these mines may lead to future freight rail service is even more speculative than its claims regarding GMCO and Mr. Baxter. D&RGHF's references to Mr. Egolf and his plans are extremely vague. D&RGHF does not provide basic information about Mr. Egolf, such as his address, his profession, or his business plan (including any form of

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D&RGHF itself makes no mention of this and the City notes that D&RGHF's line does not go to Archuleta County.

²⁴ See City's Application, Exh. 12, App. 5.

²⁵ City's Application, Exh. 23.

²⁶ See Chelsea, 8 I.C.C.2d at 782 ("[The only potential shipper's] one-sentence letter expressing continuing interest resembles nothing more than an effort to preserve options.").

business organization). Nor does D&RGHF provide any corroborating support from Mr. Egolf that he intends to put these mines back into production, much less ship products from the mines by rail.

Moreover, it is unclear from D&RGHF's protest where these 700 mines are located, other than that they are outside of the City. The City points out that, even if mining activities were to resume in the mountains that surround the City (a claim that D&RGHF has not been able to support), products from these mines would need to be shipped from the mines by truck to the freight trains and then transloaded. The City argues that there is no reason that this transloading could not take place outside of the City limits, on a portion of the Creede Branch not sought for abandonment here.

Based on the record here, it appears that, even if mining activities were to resume, it would be just as easy for the trucks to take the mine products an additional mile or two up the line, especially because there is no transloading facility on the stretch of track for which the City seeks abandonment authority, or anywhere else in the City.²⁷ Indeed, because the mine products would already have to be loaded on to the trucks, the record suggests that mining companies might elect to take the mining products all the way to their final destination by truck.

In its February 29 letter, D&RGHF cites to a newspaper article indicating that a company called Hecla Mining (Hecla) has entered into a business venture that may result in the resumption of some mining activity in the area around Creede. But, again, even if the mining venture were to result in new mining activity (which, the City claims, is uncertain), D&RGHF does not explain why Hecla would be likely to have the products from these mining activities hauled into the City for transloading.

d. Last Chance Mine

Finally, D&RGHF refers to the Last Chance Mine as a source of potential rail freight. According to D&RGHF, Jack Morris, the owner of the Last Chance Mine, anticipates annually shipping 100 or more carloads of bulk rock, specialty rock, and rock products to markets in Texas and New Mexico and for export to China.

Again, there are several problems with D&RGHF's claim. First, the City notes that the Last Chance Mine is 4 miles from Creede, leading to the same issue about how the freight would be moved from the mine to the City and then transferred to railcars. Second, D&RGHF again does not provide any corroborating evidence of an interest in using freight rail service, such as a letter or verified statement from Mr. Morris. Finally, and most problematic, the City has

²⁷ See *id.* (rejecting claim of potential traffic based on the fact that the carrier had no location where it could transload waste to its railcars).

presented evidence showing that the Last Chance Mine appears to be solely a tourist attraction and not an active mine.²⁸

e. Other Possible Shippers

In its March 24 letter, D&RGHF points to another newspaper article that reports that two sites approximately 1 mile north of Creede have been proposed for designation as Superfund cleanup sites. D&RGHF states that this development shows additional potential for freight traffic. However, the article explains that at this stage, the two sites are just being proposed as Superfund sites. And even if these sites become Superfund sites, the City states (in its reply to D&RGHF's letter) that, upon further inquiry, it has determined that neither of these clean-up projects would require transportation service.²⁹ Moreover, as the City notes, even if the two sites were to require transportation service for some reason, there is no evidence that this transportation would occur by rail. D&RGHF's proposal to ship such material on the 1-mile segment of the Creede Branch also seems fraught with potential problems. Having these materials, which may be hazardous, trucked into the City and transloaded there could create serious environmental and safety concerns. If D&RGHF were to ship such products, it might make more sense to do so outside of the City.

In addition to demonstrating that the potential shippers identified by D&RGHF are unlikely to need to use the 1-mile portion of the Creede Branch within the City limits for freight rail service, the City also argues that any unknown shippers are unlikely to materialize. According to the City, more than 90% of the land in Mineral County is Forest Service land owned by the Federal and State Governments. Moreover, according to Creede's city manager, the City is the only town in Mineral County, with a population of only 417 people, and there are no businesses in the City (such as manufacturers) that would require freight rail service.³⁰ Based on the geography and demographics of the City and surrounding area, we agree with the City

²⁸ City's Reply, Exh. 37.

²⁹ In its reply, the City describes in detail (something that D&RGHF failed to do) the nature of these proposed environmental clean-up projects. The City explains that the environmental integrity of the Willow Creek, located north of Creede, is being jeopardized by two sources. The first is the Commodore Waste Rock Pile, a pile of rock left over from mining activity which, if not stabilized, could create debris that blocks the flow of water in Willow Creek. The second is the Nelson Tunnel, which drains water filled with contaminants from several closed mines into Willow Creek. According to the City, the stabilization of the Commodore Waste Rock Pile would be achieved by building a new "cribbing" or retaining wall to stabilize the rock pile. The City states that contamination from the Nelson Tunnel would be remedied through a number of possible options—including redirecting the flow of water around the contaminants, "cap[ping]" the contaminated rock, placing the contaminated rock in a lined repository, or constructing a waste water treatment plant—but not transporting the contaminated rock out of the area.

³⁰ City's Application, V.S. of Dooley at 1-2.

that there will not likely be any businesses that require freight rail service in the foreseeable future on this line that has not handled freight rail traffic for decades.

In its protest, SL&RG claims that it has actively worked with numerous potential shippers of “oil and gas field commodities” in the area surrounding Creede. But the City points out in its reply that there are no oil and gas field commodities in the immediate Creede vicinity. Moreover, these alleged prospective shippers were not identified by D&RGHF.

In sum, there appears to be little, if any, potential for freight rail traffic here. The most likely potential shipper is Mr. Baxter, but, his business is still in the formative stages, and if the prospect for traffic were to materialize some day, it would amount to only 1-3 carloads per year, an amount so small it does not weigh against abandonment under the PC&N test.

Because the likelihood for freight rail traffic is almost non-existent, D&RGHF’s claim that this case is akin to Seminole Gulf is without merit. In Seminole Gulf, the Board denied an adverse abandonment application, in part, because the carrier presented evidence of potential new shippers—in particular, a letter from a shipper that was interested in service, opposed abandonment, and was capable of generating traffic. Here, in contrast, D&RGHF has claimed that there are potential new shippers, but it has provided no evidence that freight rail traffic would actually materialize, or that there would be enough of this traffic to justify keeping this line in the interstate rail system. Moreover, none of the alleged shippers that D&RGHF has identified (including GMCO or Tenco) has opposed the abandonment.³¹

In Seminole Gulf, the Board also noted that the carrier was “actively” seeking new business for the line. Under the PC&N test, in addition to looking at the potential for freight traffic, we also look to see if the carrier is taking “reasonable steps” to attract traffic.³² D&RGHF, by its own admission, has done little to solicit freight traffic. According to D&RGHF, it will not “beat the bushes” to attract shippers until it can definitely establish a date on which it can begin providing service,³³ which will not be until the necessary rehabilitation work is complete.

D&RGHF has had over 7 years to seek out potential shippers and to rehabilitate its line. D&RGHF claims that rehabilitation of the line is nearly complete, but again, it provides no evidence to support this contention. Moreover, this claim is disputed by the City, which argues that there is still significant work to be done on the line. By contrast, in Seminole Gulf, slip op.

³¹ See Modern Handcraft, 363 I.C.C. at 971 (in case where adverse abandonment was granted, only party to oppose the adverse abandonment was the carrier); Grand Trunk, slip op. at 6 (in case where adverse abandonment was granted, no shippers protested the application).

³² See Chelsea, 8 I.C.C.2d at 779.

³³ D&RGHF’s Protest, V.S. of Shank at 17.

at 5, there was no dispute that the line was operable, which meant that service could be reinstated immediately.

There is no bright-line rule establishing a time-frame for an OFA offeror to restore service. In Yakima Interurban Lines Association—Adverse Abandonment—in Yakima County, WA, STB Docket No. AB-600, slip op. at 6 (STB served Nov. 19, 2004), after concluding that an adverse abandonment application should be denied, the Board stated that its “finding [was] without prejudice to [the applicant’s] seeking to reopen or file a new abandonment application, should the proposed rehabilitation and restoration not occur within a reasonable period of time.” Here, it has been 7 years since D&RGHF’s acquisition, and D&RGHF has still not been able to identify a realistic prospect for freight rail service and does not appear to have made much effort to do so. Given the circumstances of this case, 7 years is a sufficient “reasonable period of time” for D&RGHF to have accomplished this end.

Based on the facts here, with regard to the issue of potential freight traffic, this case is more analogous to Chelsea than to Seminole Gulf. In Chelsea, the carrier, Conrail, claimed that adverse abandonment should be denied because it needed the line in question to haul waste. However, the Interstate Commerce Commission (ICC) noted that the feasibility of such a proposal was “highly relevant in making a public convenience and necessity ruling” and that it “need not blindly accept Conrail’s assertions” that the potential waste-hauling traffic it claimed was legitimate.³⁴ After performing an in-depth examination of Conrail’s plan for waste-hauling, the ICC determined that the applicant had shown that Conrail’s waste-hauling plan was not feasible and granted the adverse abandonment application. Here, too, the Board will not unquestioningly accept speculative claims of potential freight traffic.³⁵

Having looked closely at D&RGHF’s alleged prospects for service, we find its claims of potential freight rail traffic to be unsubstantiated. Accordingly, we find that D&RGHF has not shown any realistic potential for freight traffic over the 1-mile portion of the Creede Branch within the City. And as noted, even if some traffic were to materialize, the remainder of the Creede Branch would still be available to ship such traffic (assuming, of course, that D&RGHF is able to rehabilitate that portion of the line).

Alternative Transportation Options. Even in the unlikely event that demand for freight rail service was to materialize at some point in the future, the City has demonstrated that shippers would have sufficient alternative transportation options. In addition to the fact that freight could be shipped by truck along highways in the area, as we have already discussed, most of the potential shippers identified would need to transload in order to use the D&RGHF line. There is no reason why D&RGHF could not use a location outside of the City, just 1 or 2 miles further up

³⁴ Chelsea, 8 I.C.C.2d at 780.

³⁵ D&RGHF also argues that this case is similar to St. Joseph County. In that case, however, the Board found (in the decision served on February 14, 2008) that there is a more realistic potential for freight traffic than exists here.

on the Creede Branch, for transloading. Indeed, as the City notes, there is no transloading facility in the City,³⁶ and when there was freight service, from 1969 to 1985, freight was shipped to Wason (an area just outside of the City), then transloaded to trucks and hauled into the City. In fact, there has been no freight rail service over the 1-mile portion of the line within the City since 1970 (and before that, trains operated into the City infrequently).³⁷ Despite this decades-long lack of need for freight rail service, if, for some reason, potential shippers were to materialize in or near the City, the removal of just 1-mile of line at the end of the Creede Branch would not deprive them of the ability to ship by rail.

Citing New York Cross Harbor, D&RGHF argues that a finding that D&RGHF does not need the 1-mile portion of the line because it can provide any service that might be needed in the future by using the remainder of the Creede Branch would impermissibly shift the burden of proof to D&RGHF. D&RGHF is incorrect.

In adverse abandonment proceedings, the burden of proof first lies with the applicant to show that the carrier has no likelihood of success in preserving the line for rail service. When the applicant makes such a showing, the burden then shifts to the carrier to show that there is a realistic potential for rail service. The court in New York Cross Harbor—a case in which the applicant sought adverse abandonment over a route over which traffic was moving—held that, in that proceeding, the agency misapplied the burden of proof by placing it on the carrier. Here, however, the City met its burden by demonstrating that there was no potential for freight rail service on this segment. At that point, the burden properly shifted to D&RGHF to refute the City’s showing.

Passenger Service and Speeders. D&RGHF also argues that the 1-mile portion of the Creede Branch within the City limits is needed for a proposed passenger tourist service and for “speeders”³⁸ used by local residents for recreational purposes. In its protest, SL&RG similarly indicates that its opposition to the adverse abandonment is based on its desire to keep the line in the interstate rail system so that SL&RG can eventually acquire the Creede Branch and provide its own tourist excursion.³⁹

³⁶ See Grand Trunk, slip op. at 6 (“[S]hippers will not lose routing options or have less efficient, more costly service if [the carrier] is forced to abandon its trackage.”).

³⁷ See City’s Application at 7.

³⁸ According to the City, speeders are small, gas-powered, steel-wheeled vehicles that railroads use to transport maintenance employees and supplies over the track. As a hobby, people acquire speeders that have been discarded by railroads, restore them, and operate them over abandoned or little-used lines. City’s Application at 45.

³⁹ SL&RG claims that it did not have sufficient time to develop evidence of a public need to keep the Creede Branch in service between the date the notice of this proceeding was published in the Federal Register (January 4, 2008) and the date protests were due (January 31, 2008), and, that as a result, the Board should develop a further record on this issue. The City

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Although we have never had an adverse abandonment proceeding where potential passenger service was cited as a reason to keep the line in the national rail system, passenger service could factor into the PC&N analysis if revenue from existing or potential passenger service on a line might make more than a de minimis amount of rail freight service feasible. In the OFA context, in Trinidad Railway, Inc.—Abandonment Exemption—in Las Animas County, CO, STB Docket No. AB-573X, *et al.*, slip op. at 10 (STB served Aug. 13, 2001) (Trinidad Railway), the Board stated that:

In determining whether there are sufficient traffic prospects to enable [the prospective carrier] to operate the line . . . , we consider all potential income resulting from the operation of the rail line. In this case, that includes income from passenger operations. . . . Thus, rail freight need not provide all of the income that would be needed to cover the cost of owning, maintaining and operating the line. . . .⁴⁰

In this case, however, we have determined that there is no realistic prospect for future freight rail service. Thus, D&RGHF's use of this segment would be primarily if not solely for passenger service, rather than a passenger-freight hybrid, as discussed in Trinidad Railway.⁴¹

In any event, the record shows that the likelihood of passenger service operating over the 1-mile segment of line in question is dubious. D&RGHF has not identified any prospects for passenger service and the record is devoid of any evidence of how D&RGHF intends to operate its alleged tourist excursion service. As noted, D&RGHF has also not supported its claim that the line is close to being ready to transport passengers safely, and the City has raised serious questions about the extent of rehabilitation work still needed and D&RGHF's ability to continue funding repairs. The City has provided evidence that D&RGHF applied for several million dollars from the Colorado Department of Transportation (Colorado DOT), but that D&RGHF

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correctly notes, however, that SL&RG should have been on notice about this proceeding months prior to publication of the Federal Register notice, as the City filed its petition for waivers and exemptions of the filing requirements on June 7, 2007, and the Board issued a decision on this petition on October 18, 2007. Thus, SL&RG's inability to present a more developed case within the lawfully prescribed time-frame is not a basis to delay a ruling on or deny the City's abandonment application.

⁴⁰ See also June 2004 Decision, slip op. at 8 (“D&RGHF intended from the outset to rehabilitate the Creede Branch and subsidize any available freight traffic by running a tourist passenger excursion service on the line.”).

⁴¹ For the same reason, we will not consider speeder users as part of our weighing of the relevant factors under the PC&N test. Any revenue from this activity would not be used to support freight rail service—because there will almost certainly be no freight service—and is therefore immaterial to the PC&N analysis.

withdrew its request when it could not meet Colorado DOT's requirements, including a letter of credit.⁴² The City also shows that the State of Colorado suspended D&RGHF's charitable registration status since 2004 for failing to report information from fiscal year 2002, meaning that D&RGHF is not permitted to fundraise in Colorado or receive donations from people in Colorado.⁴³ D&RGHF states that Federal and state funding for rehabilitation is available. But the only evidence in support of this claim is an excerpt from a newsletter stating that another carrier, Columbia Basin Railroad Company, Inc., obtained a \$3 million dollar loan from the Federal Railroad Administration.⁴⁴ There is no evidence to support the conclusion that D&RGHF would be able to qualify for such a loan were it to apply for one. D&RGHF does not provide evidence of any other sources of revenue (other than from speeder users).

In its protest, SL&RG states that it wishes to acquire the Creede Branch so that it can also provide a tourist excursion, but, as the City notes, SL&RG has only applied for funds from the Colorado DOT to conduct a study to determine ridership levels for passenger service in the area.⁴⁵ As the City points out, whether the study will ever be conducted is uncertain, and there is no way to know whether the study will identify a demand for passenger service, and if so, whether the demand for passenger service would be sufficient to make that type of service feasible. The fact that SL&RG still needs to research the prospect of passenger service belies claims by SL&RG and D&RGHF that passenger service is wanted or needed.

Other Arguments. D&RGHF argues that the City's adverse abandonment application should be denied based on the Board's decision in Riverview Trenton Railroad Company—Petition for Exemption from 49 U.S.C. 10901 to Acquire and Operate a Rail Line in Wayne County, MI, STB Finance Docket No. 34040 (STB served Nov. 30, 2007) (Riverview Trenton). In that decision, the Board denied a petition to revoke an acquisition and operation exemption on the grounds that the carrier had made sufficient progress in its attempt to restore rail service, as evidenced by the rehabilitation work the carrier had performed. D&RGHF argues that the steps it has taken to rehabilitate the Creede Branch are greater than those taken by the carrier in Riverview Trenton. Along these lines, D&RGHF also claims that the reason adverse abandonment was granted in Chelsea and Modern Handcraft was that the carrier was making no attempt to restore rail service, while here, D&RGHF has demonstrated through its rehabilitation work that it is trying to restore service.

D&RGHF's reliance on Riverview Trenton is misplaced. Aside from the fact that that case involved a different issue (whether to revoke authority to acquire and operate a rail line for failure to implement the authority the Board had granted), the Board also determined that the

⁴² City's Application, Exh. 30.

⁴³ Id., Exh. 31.

⁴⁴ D&RGHF Protest, V.S. of Shank, Exh. 6.

⁴⁵ See SL&RG's Protest, V.S. of Edwin Ellis at 6.

petitioner in that proceeding “has made no attempt to show that the Detroit area no longer needs the kind of service that [the carrier] plans to provide, or that [the carrier] could not provide that service.”⁴⁶ In a prior decision in that proceeding, the Board also found that the carrier “has submitted statements from shippers supporting its project” and “we believe that the statements show that the project is sound enough to attract some significant support under difficult circumstances.”⁴⁷ Thus, in Riverview Trenton, the need for freight rail service had been adequately demonstrated. Here, in contrast, the City has shown that there is no realistic prospect for freight rail service. As for D&RGHF’s claim that this case is distinguishable from Chelsea and Modern Handcraft, although the carriers in each of those cases had not made much effort to rehabilitate or maintain their respective lines, that fact was not the primary basis for the ICC’s decisions. Rather, the ICC granted the adverse abandonments in those cases because there was no potential for freight rail service, as is the case here. Accordingly, the fact that D&RGHF evidently has performed some rehabilitation work does not change our finding that there is no likelihood of freight rail service on the line.

D&RGHF also states in its February 25 letter to the Board that its operating affiliate has been granted a reporting mark and accounting code by the AAR’s Railinc affiliate, which it claims demonstrates that D&RGHF and its affiliate are “legitimate rail carriers.” The City has raised questions about whether D&RGHF properly obtained this reporting mark and accounting code. We need not resolve those questions here because, as the City notes in its reply to this letter, whether D&RGHF is a “legitimate carrier” has no bearing on whether or not there is a potential for rail traffic or, more broadly, whether the City’s adverse abandonment application should be granted.⁴⁸

Lastly, SL&RG argues that “the Board should consider the fact that rail is the *only* form of transportation that can combat America’s insatiable thirst for oil and its effect on global warming” and that “[g]ranted adverse abandonment applications such as this present[s] a serious threat to the long term viability of the national rail infrastructure by chipping away pieces that are difficult, if not impossible, to restore at a later date.”⁴⁹ But the 1-mile segment in question is not, and, as we have found, likely will not be, used for freight service, and its use for passenger service is also dubious. Accordingly, this argument provides no basis for keeping this 1-mile segment in the interstate rail system.

⁴⁶ Riverview Trenton, slip op. at 3.

⁴⁷ Riverview Trenton Railroad Company—Petition for Exemption from 49 U.S.C. 10901 to Acquire and Operate a Rail Line in Wayne County, MI, STB Finance Docket No. 34040, slip op. at 11 (STB served May 15, 2003), aff’d, City of Riverview v. STB, 398 F.3d 434 (6th Cir. 2005).

⁴⁸ See Grand Trunk and Chelsea (granting adverse abandonment applications for lines that were owned by prominent rail carriers).

⁴⁹ SL&RG Protest at 5-6.

Public Interest Considerations. In considering the relevant factors in an adverse abandonment case, we also weigh the public interest associated with the City's plans for the property.⁵⁰ In its application, the City states that it wants to gain control over the publicly owned land under the 1-mile of railroad ROW because the City desires to: continue the public uses to which the underlying property already has been put; put an end to the controversies over the uses of this land; and plan for the orderly development of the property.

Here, the City has shown that it plans to develop the underlying property for public purposes.⁵¹ The potential public development ideas that the City discusses include expanding the City's park and playground and paving the parking areas, as well as pursuing other economic development, such as constructing a daycare center, expanding the City's one grocery store, or expanding the local theater.⁵² The city manager notes that land that is available for development in the City is limited,⁵³ making the need for land from the ROW particularly important. The City also states that it would like to reconstruct the grandstand and bleachers that were removed by D&RGHF so that it can accommodate the vendors and visitors that attend the City's annual 4th of July celebration, which provides an economic boost to the City.

Here, the City's plans are somewhat less developed than those we have seen in some other cases where adverse abandonments have been granted. But given the essentially non-existent need to preserve this 1-mile segment as part of the national rail system, we find that adverse abandonment would serve the public interest by allowing possible development of public projects.⁵⁴

⁵⁰ See, e.g., Conrail, 29 F.3d at 712 (interests of state agencies in favor of abandonment indicates that adverse abandonment would serve the public interest by allowing possible development of other public projects); Norfolk & W. Ry. Co.—Aban. Exem.—Cinn., Hamilton County, OH, 3 S.T.B. 110, 118-20 (1998) (Cincinnati) (agency will allow displacement of rail service for other public purposes where public interest justifies it).

⁵¹ We do not base our determination that granting adverse abandonment here would be in the public interest on the City's arguments that doing so would advance the City's desire to gain control over the ROW to continue the public uses to which the underlying property already has been put and would put an end to the controversies over the uses of this land. First, this segment of line has not been lawfully abandoned and removed from the interstate rail system, and thus, the City encroached upon the ROW at its own risk. Second, the issue of whether or not D&RGHF is permitted to collect rents from local residents and businesses involves interpretation of the land grant that created the railroad ROW and, thus, is not a matter for the Board, but a question for a court.

⁵² City's Application at 19-20; V.S. of Dooley at 7.

⁵³ V.S. of Dooley at 7.

⁵⁴ As we have noted, the only shipper with any potential at all would move 1-3 carloads per year (and even that is highly speculative). The public benefits, although modest, outweigh

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D&RGHF argues that, under Salt Lake City, a carrier's interest in reinstating rail service outweighs the interests of a local government in public safety and quality of life. But Salt Lake City differs in one major respect from the case here. Although the Board did deny an adverse abandonment application in Salt Lake City, the Board's decision was based on the fact that the carrier was ready, willing, and able to operate over the line in the future, as evidenced by the fact that the carrier had already reinstated service.⁵⁵ Unlike the carrier in Salt Lake City, D&RGHF has not, and as we have discussed, likely will not, reinstate freight rail service over the line, and D&RGHF's planned passenger service is also dubious and speculative. The facts before us here are more similar to cases such as Chelsea, where the ICC found that the applicants' interest in developing the line for real estate purposes (the same interest now claimed by the City here) outweighed those of the carrier, given that the carrier's alleged plans for potential freight rail service had not been shown to be economically feasible.⁵⁶

Finally, under 49 U.S.C. 10903(d), the Board must consider whether the abandonment will have a serious, adverse impact on rural and community development. Given that there is no realistic potential for freight rail service, removing this line from the interstate rail system would not adversely impact rural and community development. In fact, abandonment would help foster community development, consistent with the public uses that the City has identified in this proceeding.

For these reasons, we find that a balancing of the interests favors the City in this case.

Conclusion. Because the City has met its burden under the PC&N test, its application for adverse abandonment will be granted. The City has argued that, once the Board's jurisdiction is lifted, D&RGHF's property interests will be extinguished under the terms of the agreements by which the two ROWs were created. D&RGHF disputes the City's claim that it has a fee title interest in the land under the ROW for Section 36 (although does not dispute that the City has a fee title interest for the land under Section 25). We make no determination regarding the parties' property rights, which are matters of state law. This decision simply removes the shield of Federal jurisdiction so that the processes of state law may be applied.⁵⁷

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the interest in keeping the line in place so that it can be available to carry 1-3 carloads per year, particularly since there is no certainty that these carloads will ever materialize.

⁵⁵ Salt Lake City, slip op. at 7.

⁵⁶ See also Modern Handcraft (finding that the applicants' interest in developing the ROW for mass transit outweighed those of the carrier, given that the carrier had no prospects for freight rail service); Cincinnati (finding that the applicants had shown that the ROW was needed for a valid public purpose, specifically, multi-purpose improvements for the City's downtown area, and that there was no overriding public need for continued rail service).

⁵⁷ See Kansas City, 7 I.C.C.2d at 225; Modern Handcraft, 363 I.C.C. at 972.

C. Environmental Matters.

The Board's Section of Environmental Analysis (SEA), in an Environmental Assessment (EA) served on January 29, 2008, considered the potential environmental impacts of the proposed abandonment and found that it would not significantly affect the quality of the human environment. As such, SEA found that the Environmental Impact Statement process is unnecessary in this case. The EA recommended that two environmental conditions be placed on any decision granting abandonment authority. First, SEA recommended: that the City be required to retain its interest in and take no steps to alter the historic integrity of all sites, buildings, and structures within the project ROW that are eligible for listing or are listed in the National Register of Historic Places (National Register) (generally, those 50 years old or older) until the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f (NHPA), has been completed; that the City report back to SEA regarding any consultations with the Colorado Office of Archeology and Historical Preservation (SHPO) and any other section 106 consulting parties; and that salvage activities related to abandonment (including removal of tracks and ties) not commence until the section 106 process has been completed, and the Board has removed this condition. Second, SEA recommended that notice be given to the National Geodetic Survey at least 90 days prior to the commencement of salvage activities that would disturb or destroy any geodetic station markers.

SEA received one comment on the EA, from Mr. Robert Davis. In his comment, filed on February 14, 2008, Mr. Davis argued, among other things, that an adverse abandonment should not be permitted when a historical group is trying to preserve the rail line. After considering Mr. Davis' comment, SEA continues to recommend imposition of the two environmental conditions discussed above.

We adopt SEA's environmental analysis and recommendations. Accordingly, the conditions recommended by SEA will be imposed. Based on SEA's recommendation, the Board concludes that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

D. Labor Protection.

In approving this application, we must ensure that affected employees are adequately protected. See 49 U.S.C. 10903(b)(2). We have found that the conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), satisfy these statutory requirements, and they will be imposed here.

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

It is ordered:

1. D&RGHF's motion to strike the letters filed in this proceeding, or, in the alternative, that these letters be given no weight, is denied.

2. D&RGHF's February 14, 2008 request for the Board to take official notice of the St. Joseph County decision and the City's request to reply are denied as moot.

3. D&RGHF's February 25, February 29, and March 24 requests for the Board to take official notice will be treated as motions to supplement its protest. D&RGHF's motions to supplement are granted.

4. SL&RG's request to reopen the October 2007 Decision is denied.

5. The City's adverse abandonment application is granted, subject to the employee protective conditions in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), and subject to the conditions that the City shall: (1) retain its interest in and take no steps to alter the historic integrity of all sites, buildings, and structures within the project ROW that are eligible for listing or are listed in the National Register until the section 106 process of the NHPA has been completed; report back to SEA regarding any consultations with the SHPO and any other section 106 consulting parties; and refrain from all 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; and (2) give notice to the National Geodetic Survey at least 90 days prior to the commencement of salvage activities that would disturb or destroy any geodetic station markers.

6. This decision is effective on June 22, 2008.

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

Anne K. Quinlan
Acting Secretary