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SERVICE DATE – DECEMBER 28, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-6 (Sub-No. 383X)

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY–
ABANDONMENT EXEMPTION–IN WASHINGTON COUNTY, OR

Decided: December 21, 2001

In this decision, we will reopen this proceeding and find that the abandonment has been consummated and therefore that the Board no longer has jurisdiction over the property.

BACKGROUND

The Burlington Northern and Santa Fe Railway Company (BNSF) filed a notice of exemption under 49 CFR 1152 Subpart F–Exempt Abandonments to abandon an out-of-service 0.38-mile line of railroad between milepost 27.84 and milepost 28.22 near Banks, in Washington County, OR. Notice of the exemption was served and published in the Federal Register on July 26, 1999 (64 FR 40412-13). The exemption was scheduled to become effective on August 25, 1999.

On July 19, 1999, the Oregon Parks and Recreation Department (OPRD) filed a petition requesting that a trail condition be imposed under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and 49 CFR 1152.29. OPRD submitted a statement of willingness to assume financial responsibility for interim trail use and rail banking. By reply filed August 5, 1999, BNSF indicated its willingness to negotiate with OPRD. Accordingly, by decision and notice of interim trail use or abandonment (NITU) served August 24, 1999, the proceeding was reopened and a NITU was issued imposing a 180-day period for BNSF and OPRD to negotiate a Trails Act agreement. The NITU stated that, if no trail arrangement was reached within 180 days (i.e., by February 21, 2000), BNSF could fully abandon the line.

By letter filed July 20, 2000, BNSF notified the Board that the abandonment authority for this line would be consummated on July 26, 2000. Subsequently, by letter filed on August 9, 2000, BNSF claimed that its earlier letter of July 20 was erroneous, as OPRD had accepted

BNSF's proffered Trails Act agreement on February 23, 2000, and, therefore, BNSF had committed to preserve and transfer the line for rail banking and interim trail use.¹

On June 21, 2001, Joseph A. and Beverly J. Evers filed a petition to reopen alleging new evidence and material error.² Petitioners point out that the parties' Trails Act agreement (which they attached) shows that it was not executed until August 14, 2000, over 6 months after the expiration of the Trails Act negotiation period, and that no extension of the negotiation period had been sought.³ They also point out that the agreement was not executed until after the scheduled July 26, 2000 consummation date for the abandonment.

On July 5, 2001, BNSF and OPRD filed a joint reply in opposition to the petition to reopen. BNSF and OPRD assert that BNSF prepared the agreement for interim trail use/rail banking on January 24, 2000, for OPRD's approval and acceptance, that BNSF accepted OPRD's suggested revisions on February 10, 2000, and that BNSF revised the agreement for OPRD's signature on February 18, 2000. Accordingly, BNSF and OPRD maintain that the parties were in mutual agreement upon all terms for interim trail use/rail banking by the February 21, 2000 NITU expiration date, even though OPRD did not execute the agreement until February 23, 2000,⁴ and BNSF failed to execute it until August 14, 2000. In the alternative, BNSF and OPRD request that we enter an order retroactively extending the 180-day NITU negotiating period for two additional days, through February 23, 2000, with the requirement that the document be fully executed by August 14, 2000.⁵

¹ BNSF stated that its real estate transaction was handled by an outside contract firm, and that it was unaware of the status of the interim trail use/rail banking agreement when it filed its July 20, 2000 letter.

² The Evers also request oral argument. That request will be denied, as oral argument does not appear necessary for the development of a complete and accurate record.

³ It is well settled that the Board may extend the Trails Act negotiation period where the circumstances warrant, so long as the Board retains jurisdiction over the property. Birt v. STB, 90 F.3d 580, 588-89 (D.C. Cir.), reh'g denied, 98 F.3d 644 (1996); Grantwood Village v. Missouri Pac. R.R., 95 F.3d 654, 659 (8th Cir. 1996), cert. denied, 519 U.S. 1149 (1997).

⁴ BNSF notes that February 21, 2000, was Presidents' Day, a national holiday.

⁵ On August 17, 2001, the Evers filed a reply to BNSF and OPRD's reply. The Evers' reply to BNSF's and OPRD's reply will not be accepted, as replies to a reply generally are not permitted. However, the Evers are not prejudiced by our declining to consider their tendered pleading because we are granting the Evers' petition to reopen.

DISCUSSION AND CONCLUSIONS

Petitions to reopen ordinarily may be filed at any time under 49 U.S.C. 722(c). Under 49 CFR 1115.4 and 49 CFR 1152.25(e)(4), which govern petitions to reopen administratively final abandonment actions, a petition must state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances.

When rail abandonment authority is exercised, the Board loses jurisdiction over the property. Hayfield Northern R.R. v. Chicago & N.W. Transp. Co., 467 U.S. 622, 633 (1984). Whether or not abandonment authority has been exercised depends on a carrier's intent. See Fritsch v. ICC, 59 F.3d 248, 253 (D.C. Cir 1995). Because intent may not be clear where, as here, there is conflicting evidence, we added a provision to our regulations, at 49 CFR 1152.29(e)(2), designed to resolve this issue by providing clear evidence of when an authorized abandonment has been consummated. See Aban. and Discon. of R. Lines and Transp. Under 49 U.S.C. 10903, 1 S.T.B. 894 (1996) and 2 S.T.B. 311 (1997). Under that provision, a railroad that obtains abandonment authority must file a notice of consummation within 1 year of receiving its abandonment authorization, to signify that it has exercised the authority granted and fully abandoned the line. Notices are "deemed conclusive on the point of consummation if there are no legal or regulatory barriers to consummation (such as outstanding conditions, including Trails Act conditions)." Id.

BNSF's July 20, 2000 letter stating that it would consummate the abandonment of the line on July 26, 2000, filed after the expiration of the Trails Act condition (the only outstanding condition imposed on the grant of abandonment authority), is therefore treated as dispositive on the point of consummation in this case under 49 CFR 1152.29(e)(2). Whether or not BNSF should have exercised its abandonment authority at that point (i.e., whether or not it had some contractual obligation with OPRD not to do so) is an issue (if at all) for a court under state contract law, not an issue for the Board, as the Board lost jurisdiction over this line as of July 26, 2000. See Becker v. STB, 132 F.3d 60, 62-63 (D.C. Cir. 1997); 49 CFR 1152.29(e)(2). Once the line is no longer part of the national rail network, the Board no longer has jurisdiction to extend the Trails Act negotiation period or to grant any other relief to BNSF or OPRD. See RLTD Railway Corp. v. STB, 166 F.3d 808, 814 (6th Cir. 1999).

In these circumstances, we will grant the Evers' petition to reopen. This abandonment has been consummated and, accordingly, we now lack jurisdiction over the property.

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

It is ordered:

1. The petition to reopen is granted. We find that we lack jurisdiction over the property as the abandonment was consummated on July 26, 2000.
2. The request for oral argument is denied.
3. The Evers' reply to BNSF's and OPRD's reply is rejected.
4. This decision is effective on January 27, 2002.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary