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SERVICE DATE - OCTOBER 27, 1999

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB-167 (Sub-No. 1132X)

CONSOLIDATED RAIL CORPORATION--ABANDONMENT EXEMPTION--BETWEEN
BURGETTSTOWN, WASHINGTON COUNTY, PA, AND COLLIERS,
BROOKE COUNTY, WV

Decided: October 21, 1999

In this decision, we are denying a petition filed by the National Association of Reversionary Property Owners (NARPO) to vacate decisions of the Director of the Board's Office of Proceedings (the Director) granting extensions of the trail use negotiation period in this proceeding.

BACKGROUND

Consolidated Rail Corporation (Conrail)¹ filed a notice under 49 CFR 1152.50 to abandon 9 miles of its Weirton Secondary rail line from milepost 26.7± near Burgettstown, PA, to milepost 35.7± near Colliers, WV. A notice of exemption was served and published in the Federal Register on December 30, 1993 (58 FR 69408). The exemption became effective on January 29, 1994. On January 31, 1994, the National Pike Trail Council (NPTC) filed a petition requesting that an interim trail use condition be imposed in this proceeding and submitted a statement of willingness to assume financial responsibility for interim trail use and rail banking pursuant to the National Trails System Act, 16 U.S.C. 1247(d) and 49 CFR 1152.29. NPTC also acknowledged that the use of the right-of-way as a trail is subject to future reactivation of rail service. By letter filed on February 24, 1994, Conrail agreed to negotiate with NPTC for interim trail use.

By decision and notice of interim trail use or abandonment (NITU) served on March 7, 1994, a 180-day period was authorized for NPTC to negotiate an interim trail use/rail banking

¹ By decision served on July 23, 1998, we approved, subject to certain conditions, the acquisition of control of Conrail, and the division of the assets thereof, by CSX Corporation and CSX Transportation, Inc. (referred to collectively as CSX) and Norfolk Southern Corporation and Norfolk Southern Railway Company (referred to collectively as NS). See CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company--Control and Operating Leases/Agreements--Conrail Inc. and Consolidated Rail Corporation, STB Finance Docket No. 33388, Decision No. 89 (STB served July 23, 1998). Acquisition of control of Conrail was effected by CSX and NS on August 22, 1998. The division of the assets of Conrail was effected by CSX and NS on June 1, 1999. See CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company--Control and Operating Leases/Agreements--Conrail Inc. and Consolidated Rail Corporation, STB Finance Docket No. 33388, Decision No. 127 (STB served May 20, 1999).

agreement with Conrail for the right-of-way. At the request of NPTC, and with Conrail's consent, the negotiation period was subsequently extended by decisions served on August 3, 1994, February 10, 1995, July 21, 1995, December 28, 1995, August 20, 1996, January 8, 1997, July 10, 1997, January 9, 1998, July 10, 1998, and December 23, 1998.²

On January 20, 1998, NARPO filed a "petition for administrative review" arguing that the Board lost jurisdiction over the right-of-way when the December 28, 1995 extension period expired on July 18, 1996. NARPO contends that the Board was without jurisdiction to extend the negotiation period in the Director's August 20, 1996 decision and subsequent extension decisions. According to NARPO, the NITU had already expired and could not be resurrected because Conrail had already abandoned the line by removing rails and ties. In support of its position, NARPO cites Becker v. Surface Transp. Bd., 132 F.3d 60 (D.C. Cir. 1997) (Becker). NARPO also argues that the January 9, 1998 extension violated the due process rights of reversionary landowners along the right-of-way because no notice was provided to them of possible trail use and the extensions of the negotiation period. On February 19, 1998, Conrail filed a reply in opposition to NARPO's petition and, on February 20, 1998, the Harmon Creek Trail Association, Weirton Park and Recreation Board, and West Virginia Rail Authority jointly filed comments in opposition to NARPO's petition and in support of interim trail use.

Conrail in its reply argues that the factual situation in Becker differs from the facts of this proceeding and that, therefore, Becker is not controlling. Conrail points out that, in Becker, when the original 180-day negotiation period ended, the railroad specifically refused to extend negotiations beyond that time. Over 3 months later, a new trail proponent filed a statement of willingness to assume financial responsibility and requested that another NITU be issued. Subsequently, the railroad informed the Board's predecessor, the Interstate Commerce Commission (ICC), that it had reached an agreement with the new trail proponent for interim trail use and also requested that another NITU be issued. According to Conrail, although the ICC issued a new NITU on the basis that the railroad had not consummated its abandonment authority, the court in Becker held that the ICC had lost jurisdiction because the railroad's expressed opposition to extension of the negotiation period, coupled with its cancellation of tariffs and removal of the rail, demonstrated that the abandonment of the line was consummated when the original NITU expired. Unlike the situation in Becker, Conrail submits that it has consistently expressed its intent to continue

² The most recent extension was scheduled to expire on July 4, 1999. The Board has not received a request to further extend the negotiating period.

negotiations, has supported all of NPTC's requests to extend the negotiation period,³ and has had no intent to consummate the abandonment.⁴

Conrail's reply also addresses NARPO's argument that, because adjoining landowners were not provided with individualized notice of the trail use proceeding or the extension requests, due process was not afforded to them. Conrail notes that the Board has considered the argument that individual notice of Trails Act proposals is required and rejected it in Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903, STB Ex Parte No. 537 (STB served Dec. 24, 1996, and June 27, 1997) (10903 Regulations), appeal dismissed National Ass'n of Reversionary Property Owners v. Surface Transp. Bd., 158 F.3d 135 (D.C. Cir. 1998) (NARPO v. STB).

DISCUSSION AND CONCLUSIONS

Pursuant to 49 CFR 1011.8(c)(5), the Director has delegated authority to grant extensions of NITUs, and we consider appeals of the Director's decisions under 49 CFR 1011.2(a)(7).⁵

NARPO's argument that we have lost jurisdiction over the right-of-way is without merit. We agree with Conrail that this case is distinguishable from Becker. As Conrail points out, the court in Becker, citing Birt v. Surface Trans. Bd., 90 F.3d 580, 585-86 (D.C. Cir. 1996) (Birt), explained that objective evidence of a carrier's intent to abandon a line, such as discontinuance of service, cancellation of tariffs, and salvage of track and track materials, is as consistent with temporary cessation of operations and rail banking as it is with permanent abandonment, and we must look to additional behavior signifying one or the other. See Becker, 132 F.3d 62. In Becker,

³ Conrail notes that in 1996, NPTC requested a further 180-day extension on July 6, 1996, of the NITU negotiation period due to expire July 18, 1996. NPTC advised that it had sought an agreement to the extension from Conrail. Conrail in fact did agree, but its consent was not communicated to the Board until August 13th. Conrail explains the hiatus as due to administrative and technical problems at Conrail that delayed its response and not to any disagreement with NPTC's extension request.

⁴ With respect to NARPO's reliance on Conrail's removal of rail and ties from the line, Conrail points out that the Becker court concluded that such actions are equally consistent with a temporary cessation of rail service.

⁵ NARPO filed its petition for administrative review pursuant to 49 CFR 1115.3(a) or, in the alternative, 49 CFR 1011.2(a)(7). The former provision applies to discretionary appeals of entire Board actions, which this is not. The latter provision is the appropriate one, but appeals must be filed within 10 days after service of the Director's decision. Even though NARPO's petition was filed 10 days late under the rule, it raises jurisdictional questions which may be considered at any time. Construing our rules liberally, we will entertain the petition. See 49 CFR 1100.3.

the carrier's additional behavior, i.e., its specific refusal to agree to an extension of the negotiating period, signified abandonment. Here the carrier's behavior does not. Conrail consistently continued to support negotiations with NPTC and never objected to any extension requests. Conrail also explained that, while its agreement to one extension request was filed after the expiration of the negotiating period, NPTC requested the extension before the expiration of the negotiating period and Conrail's delay in responding was due to administrative and technical problems at Conrail and not to any disagreement with the extension. See supra note 3. Accordingly, Conrail never consummated its abandonment authorization, and we continue to have jurisdiction over the right-of-way.

NARPO's position that adjoining property owners should be afforded individual notice of trail use actions was rejected in STB Ex Parte No. 537. See 10903 Regulations, especially the decision served June 27, 1997, slip op. at 1-2, where this issue is discussed at length.⁶ In NARPO v. STB, the U.S. Court of Appeals for the D.C. Circuit granted the Board's motion to dismiss as untimely NARPO's petition for review of the Board's decision not to provide individual notice to landowners in 10903 Regulations, after concluding that the notice to property owners sought by NARPO was essentially the same as that sought unsuccessfully before the ICC in a previous rulemaking and that the 10903 Regulations proceeding did not reopen that issue.⁷ There is no need for us to revisit the notice issue here.

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

It is ordered:

⁶ The Board's 10903 Regulations made various improvements to the ICC's required Federal Register and newspaper notice to facilitate and improve notice to the general public and ensure ample opportunity for full participation by all interested parties in the abandonment/Trails Act process. Under the 10903 Regulations, a notice of every abandonment proposal is published in the Federal Register before the proceeding is instituted. Similarly, a local newspaper notice now must be published in each county affected prior to the filing of every abandonment proceeding. 49 CFR 1105.12. These notices now must specifically alert the public that, following the abandonment and salvage of the line, the line may be suitable for interim trail use. The newspaper and Federal Register notices also must specifically advise how the public may participate in the Board proceeding (pro or con). Moreover, the description of a rail line now must contain the zip codes through which the line runs. 49 CFR 1105.12; 1152.22(i).

⁷ NARPO's request for individualized notice of extension requests is an extension of its general position previously rejected by the ICC and the Board, with the approval of the courts. We continue to reject the argument that individual notice is required for the reasons set forth in those decisions. The reasoning applies as much to extension requests as to initial trail use requests. This continuing rejection of NARPO's arguments should not be deemed to reopen the notice issue.

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1. NARPO's petition for administrative review is denied.
2. This decision is effective on November 26, 1999.

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

Vernon A. Williams
Secretary