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SERVICE DATE - LATE RELEASE FEBRUARY 17, 2000

SURFACE TRANSPORTATION BOARD¹

DECISION

Docket No. AB-303 (Sub-No. 13X)

WISCONSIN CENTRAL LTD.—ABANDONMENT EXEMPTION—
IN BROWN COUNTY, WI

Decided: February 17, 2000

On August 13, 1998, the Fox River Neighborhood Association, et al. (Fox River or petitioners),² filed a petition seeking reconsideration and revocation of the notice of interim trail use or abandonment (NITU) that authorized the Wisconsin Department of Natural Resources (WisDNR) to negotiate an interim trail use/rail banking agreement under section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), with Wisconsin Central Ltd. (WCL) for a 13.9-mile rail line between milepost 183.0 at Greenleaf and milepost 196.9 at Green Bay, in Brown County, WI. WisDNR and WCL jointly replied to the petition. On June 25, 1999, WisDNR updated the record to reflect that WisDNR and WCL entered into an agreement for interim trail use/rail banking on January 15, 1999. On October 14, 1999, Fox River filed a supplement to the petition, to which WisDNR replied. In addition to these filings, we received

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to the Board's jurisdiction pursuant to 49 U.S.C. 10903-04 and 16 U.S.C. 1247(d). Therefore, this decision applies the law in effect prior to ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

² The other petitioners, all individual members of Fox River, are: Terry Watermolen, Judith Watermolen, Lyle DeQuaine, Carol DeQuaine, Zoe Caramahas, Steven Sevenich, Julie Sevenich, Tom Delsart, Robert Hannon, Patt H. O'Connell, John D. O'Connell, Eileen O'Connell, Gene Gillis, Margaret Shade, Bill Hotaling, Rosemary Hotaling, Mark Reinke, Kathy Reinke, Betty Dixon, Terry Dixon, Alman Beemster, Joyce Halron, Don Halron, Fred Hoffman, Barb Hoffman, Tom Murphy, Kathy Murphy, Mike Jelenic, Margaret Jelenic, Randall Lawton, and Kathy Lawton. Fox River claims that the individual petitioners have a direct interest because they own the land over which the rail right-of-way exists.

correspondence from U.S. Senator Herb Kohl and U.S. Senator Russell D. Feingold, urging a resolution of this matter. We will deny the petition.

BACKGROUND

A notice of exemption by WCL to abandon the line at issue was served and published in the Federal Register on October 31, 1994. By a decision served November 25, 1994, the effective date of the exemption was extended until January 9, 1995, and a new procedural schedule was adopted to extend, as pertinent here, the date for filing trail use requests or an offer of financial assistance (OFA) until December 20, 1994. WCL and the Escanaba & Lake Superior Railroad Company (E&LS) jointly sought the extension because they were actively negotiating for sale of the line for continued rail use.³ No OFA was filed however, and the exemption became effective on January 9, 1995. Subsequently, in a decision served February 7, 1995, the proceeding was reopened and a NITU was issued imposing a 180-day period for WCL and WisDNR to negotiate an interim trail use/rail banking agreement if WCL's ongoing negotiations with E&LS failed.⁴ The initial 180-day negotiating period expired on August 6, 1995, but was extended through January 18, 1999, by decisions served December 21, 1995, February 9, 1996, September 12, 1996, February 12, 1997, December 16, 1997,⁵ January 23, 1998, and July 24, 1998.

DISCUSSION AND CONCLUSIONS

Under 49 CFR 1115.3, which governs petitions for reconsideration, and 49 CFR 1115.4, which governs petitions to reopen administratively final actions, a petition must state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances. Petitioners argue that: (1) the requirements established by statute and regulations for proceedings under the Trails Act have not been met; (2) WCL has abused the Trails Act procedures and regulations by repeatedly requesting extensions of the negotiating period for trail use without actually negotiating or attempting to negotiate with any trail entity; and (3) WCL's statements in support of the extension requests that it had not abandoned the line did not prevent consummation from occurring under the circumstances here. Therefore, they ask that we declare

³ E&LS was granted the right of first refusal to acquire the line in an agreement between the parties dated July 10, 1994.

⁴ WisDNR's trail use request was filed on December 15, 1994. In its reply filed January 17, 1995, WCL advised that it was still negotiating with E&LS for sale of the line but was willing to negotiate for interim trail use with WisDNR if its negotiations with E&LS failed.

⁵ According to the reply to the petition, the National Association of Reversionary Property Owners (NARPO) filed a petition dated December 31, 1997, for administrative review arguing that the extension served December 16, 1997, was illegal. WisDNR states that it was not served with a copy of the petition. A search of our records reveals no petition filed by NARPO with the Board in this proceeding.

that the abandonment has been consummated, that we lack jurisdiction over the line, and that the NITU issued on February 7, 1995, is void. Petitioners further argue, in the supplement to the petition, that the purported purchase agreement executed on January 15, 1999, did not close on that date; that no consideration or rights in property were exchanged; and that the parties have not been able to obtain the required funding approval for the transaction from the Wisconsin Legislature's Joint Committee on Finance (JCF) or the Governor of Wisconsin. For the reasons discussed below, we conclude that WCL's conditional agreement to negotiate a trail use agreement for this line with WisDNR did not constitute an abuse of the Trails Act process; that from the onset of this case, WCL did not take any action that would constitute consummation of the abandonment; and that the sales agreement between WCL and WisDNR meets the requirements of the Trails Act.

Trails Act Requirements. Our authority to issue a NITU under the Trails Act is ministerial and extends only to voluntary agreements entered into between the railroad and the trail user. Rail Abandonments— Use of Rights-of-Way as Trails, 2 I.C.C.2d 591 (1986) (Trails), *aff'd*, National Wildlife Federation v. ICC, 850 F.2d 694 (D.C. Cir. 1988). Our discretion under the Trails Act is limited to determining whether the statutory requirements regarding rail banking and the trail user's assumption of financial and managerial responsibility are met. Iowa Southern R. Co.—Exemption—Abandonment, 5 I.C.C.2d 496, 503 (1989). Accordingly, when 16 U.S.C. 1247(d) is properly invoked, we must issue a NITU.

Petitioners argue that WCL's response to the statement of willingness to negotiate failed to meet the minimal requirements in the regulations for issuing a NITU on two counts: (1) its willingness to negotiate was specifically conditioned on a failure to reach an agreement with E&LS; and (2) WCL was legally incapable of making the required commitment to a trail sponsor to negotiate because it was contractually obligated to negotiate with E&LS for sale of the line. Therefore, petitioners submit that the condition imposed on the extension periods would have permitted WCL to take actions defeating the only purpose for which an extension could be granted—implementation of the Trails Act by interim trail use and rail banking.

We disagree. Issuing a NITU conditioned upon the failure of the sale of the line to E&LS did not violate the Trails Act procedures. There is no requirement in our rules that would preclude a railroad from agreeing to issuance of a NITU when it is also pursuing other sale options. An OFA to acquire a rail line for continued rail service always takes priority over interim trail use/rail banking. Trails at 608.⁶ Even the sale of a line for continued rail use outside of the OFA process is consistent with the purposes of rail banking under the Trails Act. Denver Rock Island Railroad—Alternative Rail Service—Lines of Kansas Southwestern Railway, L.L.C., STB Finance Docket No. 33762, slip op. at 4 n.8 (STB served June 16, 1999). Moreover, although a sale for

⁶ For example, when a trail use request is received prior to final action on an abandonment exemption, common practice is either to hold the trail use request in abeyance until the time for filing an OFA has passed, or to issue a NITU, stating that, if a sale under the OFA procedures does not occur, trail use can proceed.

continued rail use took priority here, the State of Wisconsin had a statutory right of first refusal on the right-of-way for purposes, including recreational purposes, pursuant to Wis. Stat. Sec. 85.09. Therefore, issuance of the NITU simply served to expedite the State's rights in case WCL's negotiations with E&LS failed.

Consummation of Abandonment. Petitioners argue that the line has not been used for many years, that the equipment, bridges and other structures have been allowed to deteriorate so that at least since 1994 the corridor has been unsuitable for rail use, and, that more recently tracks and materials have been taken up and no tracks remain upon which a railroad can operate. Therefore, they assert that WCL consummated the abandonment upon the expiration of the NITU negotiating period on August 6, 1995, because the NITU condition on abandonment expired, no negotiations with the trail sponsor WisDNR had occurred or were ongoing, and WCL had not applied for an extension or expressed any interest in further negotiation with a trail group.⁷ Petitioners argue that, in light of the factors indicating abandonment, WCL's mere statement in support of the subsequent extension requests that it "had not abandoned the line," was ineffective to reverse the alleged consummation. Thus, they argue that the ICC lost jurisdiction over the line, and all subsequent actions extending the NITU were void for want of jurisdiction. In reply, WisDNR and WCL argue that, because of E&LS's right of first refusal, WCL could not consummate an abandonment of the line,⁸ and that, when E&LS finally declined to purchase the line, the NITU prevented WCL from consummating the abandonment even if it wanted to do so. Assertedly, WCL did not begin to remove track structures and material from the right-of-way until E&LS finally declined its right of first refusal in January of 1998, and by then WCL and WisDNR had commenced negotiations to convert the right-of-way into interim trail use.

The Trails Act does not impose a time limit for negotiating trail use agreements. Rather, the 180-day standard time frame for negotiating was set in Trails to encourage parties to complete negotiations expeditiously, if possible.⁹ Nothing in the rules precludes an extension of the time

⁷ Petitioners submit that a further extension of the NITU was not sought until November 20, 1995 (the extension was granted in a decision served December 21, 1995). They also note that on two other occasions the negotiating period expired without an agreement or an extension request: (1) on August 1, 1996, the negotiating period expired and was not extended until the decision served September 12, 1996; and (2) on July 27, 1997, the negotiating period expired and was not extended until the decision served December 16, 1997.

⁸ Indeed, if WCL had consummated the abandonment during those negotiations, the right-of-way would have been lost because the reversionary property interests would have vested, and WCL would have been unable to meet its contractual obligation to convey the line to E&LS in the event that the sale was successfully negotiated.

⁹ We note that, in seeking the extension granted in the December 21, 1995 decision, the parties sought to have the 180-day time period commence either from the date negotiations between
(continued...)

period for negotiations where the circumstances warrant. See Grantwood Village v. Missouri Pacific, R.R. Co., 95 F.3d 654, 659 (8th Cir. 1996); Birt v. Surface Transportation Bd., 90 F.3d 580, 589-90 (Birt), reh'g denied, 98 F.3d 644 (D.C. Cir. 1996); and Fox Valley & Western Ltd.—Abandonment Exemption—in Portage and Waupaca Counties, WI, Docket No. AB-402 (Sub-No. 3X) (STB served Mar. 28, 1996). Moreover, even if the parties had waited until the negotiations with E&LS had failed before requesting a NITU, we would have accepted the request as long as we retained jurisdiction over the involved right-of-way and the carrier was willing to enter into negotiations. See Rail Abandonments-Supplemental Trails Act Procedures, 4 I.C.C.2d 152, 157-58 (1987), and SSW Ry. Co.—Aban. In Smith and Cherokee Counties, TX, 9 I.C.C.2d 406 (1992) (SSW) (ICC reopened proceeding more than three years after abandonment became effective to impose Certificate of Interim Trail Use where railroad determined a line, which had been preserved intact for current rail use in connection with ongoing negotiations to sell the connecting rail segment, would not be required by the buyer of the connecting segment.).

Abandonment authority is permissive and the railroad must take action to fully exercise the authority in order for a line to be removed from our jurisdiction. When this abandonment was processed, there was no requirement that WCL consummate the abandonment during any specific time period.¹⁰ The question of consummation is one of fact based upon examination of the carrier's intent. Hayfield Northern R.R. v. Chicago & N.W. Transp. Co., 467 U.S. 622, 633-34 (1984), SSW at 410-11, and Fritsch v. I.C.C., 59 F.3d 248, 253 (D.C. Cir. 1995), cert. denied, 516 U.S. 1171 (1996). In determining that intent, we consider both the carrier's statements and actions taken to retire the line from service: cessation of operations, cancellation of tariffs, salvage of the track and track materials, and relinquishment of control over the right-of-way. SSW at 410.

⁹(...continued)

WCL and E&LS failed or from the effective date of the decision granting the extension. In keeping with agency practice, however, the 180-day period was granted to run from August 6, 1995, the date the prior negotiating period expired. Similarly, the requests supporting the extensions served February 9, 1996, September 12, 1996, February 12, 1997, and December 16, 1997, sought to have the 180-day period run from the date negotiations with E&LS failed but the extensions also were limited to run for 180 consecutive days from the expiration of the previous extension. Moreover, in the extension served January 23, 1998, the parties were encouraged to reach a resolution on the possible sale to E&LS as soon as possible, so that further extensions of the trail use/rail banking negotiating period would not be necessary.

¹⁰ Under our current abandonment regulations, however, the railroad is required to file a notice of consummation with the Board within 1 year of the service date of the decision permitting the abandonment to signify that it has exercised the authority granted and fully abandoned the line. 49 CFR 1152.29(e)(2). See 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).

Under the circumstances here, we conclude that WCL did not take any action to consummate the abandonment during the entire time it was negotiating with E&LS. We also find that WCL's actions to remove track structures and materials in January of 1998 at the same time that it was negotiating under the NITU were consistent with trail use and did not constitute consummation of the abandonment;¹¹ and that, during the subsequent negotiations leading to the January 15, 1999 trail use agreement, the trail use negotiating period was properly extended. See Birt, 90 F.3d at 588-89.

Sales Agreement. In its reply to the supplement to the petition, WisDNR states that the funds for the purchase are set aside and will remain so until closing, that the Natural Resources Board has approved the purchase, that the Brown County Board is on record with its endorsement and agreement to develop and manage the trail, and that JCF has indicated that it will remove its objection to the sale if we dismiss Fox River's petition for reconsideration.¹² Thus, we conclude that the purchase agreement entered into by WCL and WisDNR on January 15, 1999, satisfies the requirements of the Trails Act.

Summary. For all the reasons stated above, we deny the petition seeking reconsideration and revocation of the NITU in this case.

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

It is ordered:

1. The petition is denied.
2. This decision is effective on the date of service.

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

Vernon A. Williams
Secretary

¹¹ It is well settled that, during NITU negotiations, the railroad may discontinue service, cancel tariffs and salvage the track and other equipment consistent with the trail use condition. See 49 CFR 1152.29(c), and Birt, supra, 90 F.3d at 585-86.

¹² Indeed, WisDNR asserts that JCF is withholding action on the funding for this project at Fox River's request because its petition for reconsideration is pending before us.