

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-290 (Sub-No. 293X)

NORFOLK SOUTHERN RAILWAY COMPANY—
ABANDONMENT EXEMPTION—IN NORFOLK AND VIRGINIA BEACH, VA

Decided: December 6, 2007

We are denying the petition for reconsideration/reopening filed by Mr. James Riffin (Mr. Riffin) on November 16, 2007. We are also denying as moot the stay request that was included within the petition.

BACKGROUND

By petition filed on July 19, 2007, Norfolk Southern Railway Company (NSR) sought an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 so that it could abandon an approximately 15.34-mile line of railroad, extending between milepost VB-0.12 in Norfolk, VA, and milepost VB-15.46 in Virginia Beach, VA.

By decision served on November 6, 2007, the Board granted the exemption, thereby permitting the abandonment of the line, subject to environmental conditions and standard employee protective conditions (November 2007 decision).¹ The November 2007 decision also granted NSR's petition for exemption from the Offer of Financial Assistance (OFA) process of 49 U.S.C. 10904 and 49 CFR 1152.27.

On November 16, 2007, Mr. Riffin filed a petition to stay and to reconsider the November 2007 decision as it pertained to the OFA process.² In the petition, Mr. Riffin asserts

¹ The Board's decision became effective 30 days after the date of service. See 49 CFR 1121.4(e).

² Mr. Riffin submitted supplemental filings on November 26, 2007, and November 28, 2007. In his November 28 filing, Mr. Riffin asserts that any review of the OFA process under 49 U.S.C. 10904 should be looked at in accordance with the general appellate procedures at 49 CFR 1115. We disagree. This is an appeal of a Board abandonment decision and, therefore, must be reviewed under our abandonment regulations, as discussed below. South Orient Railroad Company, Ltd.—Abandonment and Discontinuance of Trackage Rights—Between San Angelo and Presidio, TX, STB Docket No. AB-545, slip op. at 1 n.1 (STB served Mar. 26, 1999) (treating petition for reconsideration filed in an abandonment proceeding as a petition for reopening, citing 49 CFR 1152.25(e)(2) and (4)).

that he spoke with shippers who had formerly used the line and a new company that occupied a former shipper's facility and that all would like service returned to the line. NSR and the City of Norfolk filed separate replies on November 21, 2007.³

DISCUSSION AND CONCLUSIONS

Mr. Riffin argues that this appeal should be considered as an appeal of an individual Board member under 49 CFR 1115.2 because the November 2007 decision was not made by the entire Board. Mr. Riffin is incorrect; the November 2007 decision was an entire Board decision even though one Board member did not participate. In any event, an appeal under 49 CFR 1115 is not available, as Board decisions in abandonment proceedings are administratively final on the date served and appeals of these decisions are not entertained. See 49 CFR 1152.25(e)(2). Parties seeking relief from such decisions must file a petition to reopen pursuant to 49 CFR 1152.25(e)(4). We will therefore treat Mr. Riffin's petition for reconsideration as a petition to reopen this proceeding.

Under 49 CFR 1152.25(e)(4), a petition to reopen an administratively final action must state in detail the respects in which the challenged decision involves material error, or is materially affected by new evidence or substantially changed circumstances. 49 CFR 1152.25(e)(2)(ii). Mr. Riffin alleges that information that shippers on the line want continued rail service is new evidence and that exempting this proceeding from the OFA process was material error.

For purposes of reopening, "new evidence" means evidence that was not reasonably available to the parties before the agency's original decision. See Platnick Bros., Inc. v. Norfolk & Western Ry. Co., 367 I.C.C. 782, 785 (1983); Friends of Sierra R.R. Inc. v. ICC, 881 F.2d 663, 667 (9th Cir. 1989). Mr. Riffin claims that the evidence that each of the shippers, still on the line, who formerly used the line would like rail service is new evidence because he could not get the names of these shippers prior to NSR's providing notice to the shippers as required in the November 2007 decision. However, as NSR points out, the name of the most recent shipper to actually use the line, over a year ago, was part of the public record in the discontinuance proceeding. See Norfolk Southern Railway Company—Discontinuance of Service Exemption—in Norfolk, VA, STB Docket No. AB-290 (Sub-No. 269X) (STB served July 7, 2006). Thus, that information is not new evidence.

Moreover, even if the information that Mr. Riffin has provided regarding his conversations with various other former shippers still located on the line could be regarded as new evidence, that information is not sufficiently credible nor would it materially affect our prior decision. NSR points out that those former shippers on this line have not had service for over 5 years. See Norfolk Southern Railway Company—Discontinuance of Service Exemption—in

³ On November 27, 2007, NSR filed a reply to Mr. Riffin's November 26, 2007 filing. Also, on November 29, 2007, NSR filed a reply to Mr. Riffin's November 28, 2007 filing.

Norfolk and Virginia Beach, VA, STB Docket No. AB-290 (Sub-No. 258X) (STB served Nov. 30, 2004). While Mr. Riffin asserts that each of the shippers would like rail service, he has not provided any direct evidence from the shippers themselves to support this assertion. There are no verified statements or letters from any of the shippers. Nor have any of the shippers indicated to the Board that they would like continued rail service. Mr. Riffin's unsupported assertions about conversations that he had with former shippers are insufficient to materially alter our conclusion in the November 2007 decision that there is no overriding public need for freight rail service that would outweigh the specific and substantial plans for the clearly valid public purpose of establishing light rail service on the line.⁴

Mr. Riffin also claims that there is a new shipper, which he declines to identify, that would use the line. But simply making that assertion is not enough to warrant reconsideration or reopening. Mr. Riffin has provided no new evidence regarding this shipper. Mr. Riffin claims that the shipper's information is proprietary and that, if he were to reveal it, NSR would reconsider following through on the abandonment in this proceeding. If that is the case, Mr. Riffin could have filed a request for protective order with the Board that would protect the information regarding this shipper and at the same time provide the Board with the basic information necessary to make a determination. As it stands, no evidence, much less new evidence, has been presented about this particular shipper.

Mr. Riffin also asserts that exempting this proceeding from the OFA process was material error because it contradicts the policy of Congress to ensure the continuation of a sound rail transportation system. The exemption also assertedly undermines Congress' determination that any interested party desiring to preserve a line of railroad proposed for abandonment should be accorded every opportunity to further the preservation of lines of railroad.

However, the November 2007 decision found that, based on the record, Mr. Riffin's true interest was to acquire the freight operating rights on the Cockeysville Industrial Track Line in Baltimore, MD, and Cockeysville, MD,⁵ not the line involved in this particular proceeding. See November 2007 decision at 5. Mr. Riffin offers nothing to show that that finding was erroneous. The OFA provisions are intended to permit a party genuinely interested in providing continued rail service on a line that would otherwise be abandoned to acquire that line for continued rail service. Exemptions from 49 U.S.C. 10904 have been granted when the record shows that a right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service.⁶ Given the lack of persuasive evidence demonstrating shipper interest in

⁴ Because Mr. Riffin did not demonstrate that there are any viable shippers seeking service, his argument that freight and passenger service could feasibly operate together over this right-of-way is irrelevant.

⁵ The Cockeysville Industrial Track Line is otherwise unrelated to this proceeding.

⁶ See CSX Transportation, Inc.—Abandonment—in Barbour, Randolph, Pocahontas, and Webster Counties, WV, STB Docket No. AB-55 (Sub-No. 500) (STB served Jan. 9, 1997) and

(continued . . .)

this line, the November 2007 decision does not contradict Congressional intent concerning OFAs and does not contain a material error.

Finally, Mr. Riffin argues that the Board materially erred in granting NSR an exemption from the OFA process because NSR did not disclose to Mr. Riffin or the Board that there were shippers still interested in rail service. As discussed above, Mr. Riffin has not provided evidence to support his claim that these shippers actually intend to use the line. Thus, Mr. Riffin has not shown that, if he had presented the Board with this same information prior to the November 2007 decision, it would have materially affected the Board's decision to grant the OFA exemption.

Stay request

Mr. Riffin asserts that, as a timely appeal under 49 CFR 1115.2, the November 2007 decision in this proceeding is automatically stayed. As discussed above, this is a reopening request under 49 CFR 1152.25 and a stay under this section is not automatic. A stay request must meet the stay criteria set out in Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958). However, our denial of Mr. Riffin's petition for reconsideration/reopening moots his stay request. Therefore, the stay request will be denied.

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

(. . . continued)

Southern Pacific Transportation Company—Discontinuance of Service Exemption—In Los Angeles County, CA, Docket No. AB-12 (Sub-No. 172X) (ICC served Dec. 23, 1994) (exemption from OFA requirement granted where owner planned to use the rail corridor for mass transit purposes).

It is ordered:

1. The petition for reconsideration/reopening is denied. The stay request that was included with the petition for reconsideration is denied as moot.
2. This decision is effective on the service date.

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

Vernon A. Williams
Secretary