

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35116

R.J. CORMAN RAILROAD COMPANY/PENNSYLVANIA LINES INC.—CONSTRUCTION
AND OPERATION EXEMPTION—IN CLEARFIELD COUNTY, PA

Decided: July 23, 2009

R.J. Corman Railroad Company/Pennsylvania Lines Inc. (RJCP), a Class III rail carrier, seeks to institute rail service over an approximately 20-mile stretch of a rail corridor. Because the status of the corridor's two segments are distinct both legally and operationally (one segment has been abandoned and another has been rail banked), RJCP needs several forms of Board authority to accomplish its goal. In a variety of proceedings, under three docket numbers, RJCP requests authority from the Board: to acquire the rail-banked portion of the corridor; to vacate the rail banking/interim trail use condition that pertains to that portion of the corridor; and to construct and operate the entire line. This docket, STB Finance Docket No. 35116, concerns RJCP's request for construction and operation authority over the entire corridor.

Specifically, on May 20, 2008, RJCP filed a petition, pursuant to 49 U.S.C. 10502 and 49 CFR 1121, for exemption from the prior approval requirements of 49 U.S.C. 10901: (1) to construct and to operate over approximately 10.8 miles of rail right-of-way, previously abandoned by Consolidated Rail Corporation (Conrail), between Wallaceton Junction, PA, and Winburne, PA (the Western Segment),¹ and (2) to reactivate a connecting 9.3-mile portion of rail line to be acquired from Norfolk Southern Railway Company (NS), the successor in interest to Conrail, that is currently rail banked under section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), between Winburne and Gorton, PA (the Eastern Segment).² The

¹ On April 30, 2009, RJCP identified a slightly shorter alternative rail alignment for a portion of the Western Segment. The alternative alignment follows the Western Segment west from Winburne to Munson, PA, but then heads south from Munson to a point near Philipsburg, PA. The Board will conduct an appropriate review of the potential environmental impacts associated with this alternative rail alignment during its environmental review process. The references to "Western Segment" in this decision refer to the original 10.8-mile western segment proposed in RJCP's petition.

² In R.J. Corman Railroad Company/Pennsylvania Lines, Inc.—Acquisition and Operation Exemption—Line of Norfolk Southern Railway Company, STB Finance Docket No. 35143, RJCP seeks to invoke the exemption from 49 U.S.C. 10902 at 49 CFR 1150.41 to acquire the residual common carrier rights and obligations of NS on the Eastern Segment. Its request for waiver of

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Western Segment connects at Wallaceon Junction with RJCP's existing rail line. Together, the Eastern and Western Segments would be operated by RJCP as the Beech Creek Branch Line to serve a new quarry, landfill, and industrial park near Gorton.

With its petition, RJCP filed a motion to dismiss the part of this proceeding pertaining to the reactivation of the Eastern Segment. RJCP asserts that reactivation of the Eastern Segment does not require Board construction and operation authority under section 10901—or an associated environmental review under the National Environmental Policy Act, 42 U.S.C. 4321 et. seq. (NEPA). We find that RJCP does not need authorization under section 10901 to reactivate the Eastern Segment. Accordingly, the motion to dismiss that part of this proceeding will be granted. However, the environmental review process in this proceeding concerning the Western Segment will nevertheless encompass the potential impacts of the rehabilitation and operation of the Eastern Segment, as discussed below.

BACKGROUND

Conrail received authority to abandon a rail line extending between milepost 64.5 near Winburne and milepost 45.5 near Gillintown, PA, a distance of approximately 19 miles in Clearfield and Centre Counties, PA (the Snow Shoe Industrial Track), in Conrail Abandonment of the Snow Shoe Industrial Track in Centre and Clearfield Counties, PA, Docket No. AB-167 (Sub-No. 1004N) (ICC served Feb. 15, 1990). The Eastern Segment is a portion of the Snow Shoe Industrial Track. In a decision in that docket served on November 5, 1993, the Interstate Commerce Commission (ICC) issued a Certificate of Interim Trail Use (CITU), pursuant to which Conrail entered into an agreement for rail banking/interim trail use with the Headwaters Charitable Trust (HCT). Today the Eastern Segment is maintained and operated by HCT as part of a 19-mile trail that encompasses the entire Snow Shoe Industrial Track.³

NS acquired Conrail's rights with respect to the Snow Shoe Industrial Track through the transactions approved by the Board in CSX Corp. et al.—Control—Conrail Inc. et al., 3 S.T.B.

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the labor notice requirements of 49 CFR 1150.41(e) in that docket is currently pending and will be addressed in a separate order.

RJCP also has filed a petition to vacate the outstanding rail banking/interim trail use condition authority for the Eastern Segment in Conrail Abandonment of the Snow Shoe Industrial Track in Centre and Clearfield Counties, PA, Docket No. AB-167 (Sub No. 1004N). This request also remains pending and will be addressed separately.

³ As noted above, RJCP has filed a petition in Docket No. AB-167 (Sub-No. 1004N), seeking vacation of the CITU permitting rail banking/interim trail use on the Eastern Segment, but leaving intact the rail banking/interim trail use agreement over the remaining portion of the Snow Shoe Industrial Track, from milepost 55.2 to milepost 45.5.

196 (1998), and 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 (Sub-No. 94) (STB served Nov. 7, 2003). As noted above, in STB Finance Docket No. 35143, RJCP now invokes the class exemption from the requirements of 49 U.S.C. 10902 under 49 CFR 1150.41 in order to acquire and operate the Eastern Segment.

In 1995, Conrail obtained authority to abandon additional lines in the area. See Consolidated Rail Corporation—Abandonment Exemption—in Clearfield and Centre Counties, PA, Docket No. AB-167 (Sub-No. 1146X) (ICC served Sept. 8, 1995). Those lines, which included what is designated here as the Western Segment, were not rail banked and the abandonments were consummated, thereby removing those lines from the Board’s jurisdiction. Accordingly, RJCP now needs authority under section 10901 to construct and operate a rail line on the Western Segment.

PRELIMINARY MATTERS

On June 13, 2008, People Protecting Communities (PPC), a group of citizens from Centre County, filed three pleadings: a petition for leave to late file a reply to RJCP’s motion to dismiss; a declaration of JoAnn Gillette, a member of PPC, as that reply; and a petition to hold RJCP’s motion to dismiss and the related proceedings in STB Finance Docket No. 35143 and Docket No. AB-167 (Sub-No. 1004N) in abeyance pending a NEPA review by the Board. PPC argues that reactivation of the Eastern Segment and the Western Segment should be considered “connected actions” under NEPA, and that any potential environmental impacts should therefore be analyzed together in a single environmental document. Additionally, PPC argues that reactivation of both the Eastern and Western Segments is “connected” to the larger landfill project for purposes of the environmental review. In support of PPC’s pleadings, letters were submitted by the Cooper Township Board of Supervisors, Pennsylvania State Representative Mike Hanna, and the Pennsylvania Department of Conservation and Natural Resources (PADCN).

RJCP filed a reply opposing PPC’s petition to hold these proceedings in abeyance (RJCP Reply). In support of RJCP’s position, D. Scott Kroh, 50% owner of Sunbury Generation, RES Coal LLC, Robindale Energy Services, Inc., Canoe Valley Limestone, Benjamin W. Hulburt, President and CEO of Rex Energy Corporation, sent the Board letters, and E.B. Abel, Jr. (Mr. Abel), President of Resource Recovery, LLC (Resource Recovery), filed a verified statement. RJCP filed a reply, and Mr. Abel filed a verified statement in response to PADCN’s statement of support.

We will grant PPC's unopposed petition to late file a reply to RJCP's motion to dismiss.⁴ Upon review of PPC's arguments, however, we find that they are not germane to the issues presented by RJCP's motion to dismiss. The issue before us in this decision is whether reactivation of the rail-banked Eastern Segment requires Board authorization under section 10901. PPC's arguments regarding the scope of the environmental review for this project have been, or will be, addressed during the environmental review process, which has begun.⁵ Because this decision will preclude RCJP from activating or operating the Eastern Segment until the NEPA process is completed and the Board issues a final decision that addresses the results of the environmental review, PPC's petition to hold the related proceedings in abeyance is moot.

On November 26, 2008, HCT filed a motion for leave to file a statement and simultaneously filed the statement. HCT details a history of agreements with Resource Recovery, a potential shipper on the line, under which HCT has engaged in maintenance of and improvements to the rail-banked right-of-way. HCT claims that Resource Recovery has not met commitments that it made to HCT. HCT says that it has no objection to the reestablishment of rail service on the rail-banked property if Resource Recovery and RJCP negotiate in good faith to reach agreement on commitments made regarding the trail. RJCP and Resource Recovery filed replies to HCT's statement.

HCT's statement will be treated as a comment, but it has no bearing on the issues before us in this proceeding. The concerns raised involve private agreements between HCT and Resource Recovery, not RJCP, the party seeking Board authority. Furthermore, an appropriate court, and not the Board, is the proper forum to address contract issues such as those raised by HCT.

DISCUSSION AND CONCLUSIONS

There is no question that RJCP needs authorization from the Board under section 10901 to construct and operate the Western Segment of the former Beech Creek Branch Line, as that property was previously abandoned and removed from the national rail system. The issue presented by RJCP's motion to dismiss is whether RJCP needs authority under section 10901 to reconstruct and restore rail operations over the Eastern Segment, or whether it is sufficient that RJCP may obtain authority to acquire and operate the line under the exemption from section 10902 in STB Finance Docket No. 35143 and a Board order vacating the CITU that authorized interim trail use in Docket No. AB-167 (Sub-No. 1004N). As discussed below, we will grant the motion to dismiss the part of this proceeding pertaining to the Eastern Segment because we

⁴ See RJCP Reply note 1.

⁵ On January 8, 2009, the Board issued a Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS) and draft scope of study for the EIS in this proceeding. The NOI stated that the EIS will address potential impacts associated with both the Eastern and the Western Segments.

conclude that RJCP does not need construction authority under section 10901 to reactivate that portion of the line. The exemption from Section 10902 (if granted), combined with vacating the CITU under the Trails Act, would provide RJCP all the authority that it needs to acquire, restore, and reinstitute rail operations over the Eastern Segment. Below, we discuss the relevant limitations on the general requirements for Board approval to acquire, construct, and operate rail lines.

1. General Limitations on Need for Construction Authority and Environmental Review.

It is well settled that, even where track has not been used recently, the owner of an active line may repair, replace, rehabilitate, or rebuild it without needing to obtain Board authorization and environmental review. See, e.g., City of Detroit v. Canadian National Ry. et al., 9 I.C.C.2d 1208, 1214-16 (1993) (City of Detroit) (building a second mile-long rail tunnel 90 feet parallel to an old rail tunnel that it would replace did not require ICC authorization), aff'd, Detroit/Wayne County Port Auth. v. ICC, 59 F.3d 1314, 1316-17 (D.C. Cir. 1995) (only additions and extensions to rail lines and relocations and improvements that invade new territory are rail line constructions that need to be authorized under section 10901). In contrast, proposals to construct and operate new rail lines require Board approval under section 10901 and a NEPA review under the Board's environmental rules at 49 CFR 1105.6(a) or (b)(1).

It is also well settled that a proposal to acquire or operate a rail line typically requires an environmental review only if the particular proposal involves operational changes that would exceed certain threshold levels. See, e.g., Lee's Summit MO v. STB, 231 F.3d 39, 42 (D.C. Cir. 2000); King County, WA–Pet. for Decl. Order–Stampede Pass Line, 1 S.T.B. 731 (1996) (King County), aff'd, City of Auburn v. United States, 154 F.3d 1025, 1031-1033 (9th Cir. 1998) (Auburn), cert. denied, 527 U.S. 1022 (1999); 49 CFR 1105.6(b)(4), 1105.6(c)(i). In such cases, the Board's environmental review is generally limited to the potential effects of the increase in rail traffic. The Board does not consider the impact of upgrading and rehabilitating the line, because the only action requiring approval from the Board is the proposed acquisition, not the continued operation of the line. Auburn, 154 F.3d at 1033.

2. Reactivating a Rail-Banked Line Under the Trails Act.

Under the Trails Act, we “preserve established railroad rights-of-way for future reactivation of rail service” by prohibiting abandonment where a trail sponsor offers to assume managerial, tax, and legal liability for the right-of-way for use in the interim as a trail. See 16 U.S.C. 1247(d); Citizens Against Rails-To-Trails v. STB, 267 F.3d 1144, 1149-50 (D.C. Cir. 2001). The statute expressly provides that, because such interim use is subject to restoration or reconstruction for railroad purposes, “such interim use shall not be treated, for [any] purposes . . . as an abandonment . . .” 16 U.S.C. 1247(d). Instead, the right-of-way is “rail banked,” which means that the railroad is relieved of the current obligation to provide service over the line but that the railroad (or any other approved rail service provider) may reassert control to restore service on the line in the future. See Birt v. STB, 90 F.3d 580, 583 (D.C. Cir. 1996); Iowa

Power–Const. Exempt.–Council Bluffs, IA, 8 I.C.C.2d 858, 866-67 (1990) (Iowa Power); 49 CFR 1152.29(c)(2), (d)(2); Georgia Great Southern Division—Abandon. & Discontin. of Service, 6 S.T.B. 902, 906 (2003) (Georgia Great Southern). In short, a rail-banked line is not abandoned, but remains part of the national rail system, albeit temporarily unused for railroad operations. An interim trail use arrangement is subject to being cut off at any time by the reinstatement of rail service. If and when the railroad wishes to restore rail service on all or part of the property, it has the right to do so, and the trail user must step aside. 16 U.S.C. 1247(d).

Consistent with the plain language of the Trails Act, the ICC held in 1990 that section 10901 is not triggered for the reactivation of service on a rail line that has been rail banked under the Trails Act when the railroad that had sought abandonment prior to the interim trail use is the party restoring active rail service and that railroad could have performed the operations without seeking regulatory approval prior to the interim trail use. Iowa Power, 8 I.C.C. 2d at 866 n.12.⁶ In Georgia Great Southern, 6 S.T.B. at 906, the STB addressed the same issue and found that section 10901 authority is not required for the abandoning railroad's successor either.

We conclude that it follows that any carrier that is authorized to acquire and operate over a rail-banked line under another statutory provision, such as section 10902, need not obtain separate authority under section 10901 to reactivate that line. This approach makes sense under the statutory scheme that exists today. What is now section 10902 did not exist when the ICC decided Iowa Power in 1990; rather, section 10901 applied both to the construction and operation of new rail lines and proposals by both existing and new carriers to acquire and operate existing rail lines. Thus, section 10901 authority would have been required whenever the reactivation involved operations that the same carrier could not have performed without seeking regulatory approval prior to the rail banking/interim trail use. See Iowa Power, 8 I.C.C. 2d at 866 n.12.

Section 10901 continues to apply to all proposals to construct and operate new rail lines. In 1995, however, Congress removed the combined approach to seeking construction and acquisition authority for Class II and Class III carriers by enacting section 10902. That provision provides a separate process for reviewing the acquisition proposals of Class II and Class III carriers, and, as we find herein, includes the acquisition of rail-banked lines such as the Eastern

⁶ As the ICC explained in Iowa Power, rail banking/interim trail use, like discontinuance authority, allows a railroad to cease operating a line for an indefinite period, while preserving the possibility of rail service in the future. If there is rail banking/interim trail use, there is no abandonment of the right-of-way for railroad purposes. Rather, the Board holds in abeyance its authorization to abandon the right-of-way, and the route remains intact and available for future active rail service. It follows that, so long as the abandoning carrier could have performed the operations without seeking regulatory approval, there is no reason why the resumption of service by the same carrier should trigger section 10901. See also Preseault v. ICC, 494 U.S. 1, 5-6 n.3 (1990).

Segment. Therefore, a requirement that all carriers except the original abandoning carrier seek Board approval to reactivate a rail-banked line is no longer necessary. The section 10902 review process allows the Board to address any concerns about the proposed acquisition and operation of an existing rail-banked line—including the environmental effects that would result from the proposed acquisition.⁷

If it is authorized to complete the section 10902 transaction proposed in STB Finance Docket No. 35143 and if it acquires the rail-banked Eastern Segment from NS, RJCP would be the railroad with the right to reactivate service on that segment. The case law holds that, while initial construction of a rail line requires authority from the Board, improvements and upgrades to existing lines do not require an additional license. See City of Detroit. Thus, under the circumstances presented here, it would be contrary to the purpose of the Trails Act to also require RJCP to obtain separate section 10901 construction authority to reactivate the rail-banked Eastern Segment.

For these reasons, we grant RJCP's motion to dismiss the part of this proceeding pertaining to the reactivation of the Eastern Segment. Obtaining construction authority under section 10901 is only required for the previously abandoned Western Segment. The rail-banked Eastern Segment remains available for the reinstatement of rail service by any carrier that is authorized to operate over it. Therefore, section 10901 construction authority is not required for the Eastern Segment.

3. The Remaining Regulatory Process Here.

As noted above, RJCP argues in its motion to dismiss that, because reactivation of the Eastern Segment would not trigger section 10901, the Board's NEPA review should be limited to the Western Segment. However, in the NOI to prepare an EIS in this proceeding issued January 8, 2009, the Board's Section of Environmental Analysis (SEA) determined that environmental review of the Eastern Segment is necessary to satisfy the NEPA requirements of one of the Board's cooperating agencies,⁸ the U.S. Army Corps of Engineers (Corps).

As discussed in the NOI, where environmental review takes place with cooperating agencies, one environmental document includes information necessary to fulfill the requirements of NEPA and related environmental laws for both the lead agency (here, the Board) and

⁷ As discussed above, in section 10902 cases, the proposed acquisition would trigger an environmental review of the effects of increased traffic that would flow directly from the acquisition if the thresholds in the Board's environmental rules would be met (or if the circumstances otherwise warrant it). See King County.

⁸ Pursuant to 40 CFR 1501.5 and 1501.6, agencies that have jurisdiction under other laws or that have "special expertise" may participate as cooperating agencies in the Board's environmental review process.

cooperating agencies that typically make their own decisions regarding a particular project under the statutes they administer. In this case, the Corps has responsibility under the Clean Water Act to analyze potential impacts to wetlands that would result from the construction and operation of the Western Segment, as well as from the reactivation of the Eastern Segment. As part of that review, the Corps will consider the full range of potential environmental impacts and benefits, including the environmental effects of the reconstruction and operation of a rail line on the Eastern Segment. To ensure that the Corps has all of the information it needs to meet its responsibilities, SEA will conduct an environmental review of the entire 20 miles of proposed rail line (i.e., both the Eastern and Western Segments).⁹

The first stage of the EIS process is scoping—an open process for determining the scope of issues that should be studied in the environmental review. A draft Scope of Study was made available for public review and comment in the NOI, and SEA has hosted a scoping meeting in the project area to provide further public involvement and input during the scoping process.

After issuing a final Scope of Study, SEA will prepare a Draft EIS for the project. The Draft EIS will address the environmental issues and concerns identified during the scoping process. It will also contain SEA's preliminary recommendations for environmental mitigation measures. The Draft EIS will be made available upon its completion for review and comment by the public, government agencies, and other interested parties. SEA will then prepare a Final EIS that considers comments on the Draft EIS, sets forth any additional analyses, and makes final recommendations to the Board on any appropriate mitigation measures. In reaching its final decision in this case, the Board will take into account the Draft EIS, the Final EIS, and all environmental comments that are received. Because the environmental review here will encompass both the Eastern and the Western segments, RJCP may not reactivate and operate the Eastern Segment until SEA completes the EIS and the Board issues a final decision that takes into account the results of the environmental review.

CONCLUSION

RJCP does not need section 10901 construction authority to reactivate the rail-banked Eastern Segment.

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

⁹ The Board followed the same process in Dakota, MN & Eastern RR—Construction—Powder River Basin, 6 S.T.B. 8 (2002).

It is ordered:

1. The motion to dismiss the part of this proceeding that pertains to obtaining section 10901 construction authority for the Eastern Segment is granted.

2. RJCP is precluded from activating or operating the Eastern Segment until the NEPA process is completed and the Board issues a final decision that takes into account the results of the environmental review.

3. PPC's petition to late file is granted.

4. PPC's petition to hold the related proceedings in STB Finance Docket No. 35143 and Docket No. AB-167 (Sub-No. 1004N) in abeyance pending the completion of the environmental review process is denied as moot.

5. This decision is effective on its date of service.

By the Board, Acting Chairman Mulvey, and Vice Chairman Nottingham.

Anne K. Quinlan
Acting Secretary