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SERVICE DATE – JUNE 8, 2005

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB-6 (Sub-No. 335X)

BURLINGTON NORTHERN RAILROAD COMPANY  
—ABANDONMENT EXEMPTION—  
BETWEEN KLICKITAT AND GOLDENDALE, WA

Docket No. AB-6 (Sub-No. 346X)

BURLINGTON NORTHERN RAILROAD COMPANY  
—ABANDONMENT EXEMPTION—  
IN KLICKITAT COUNTY, WA

Decided: June 7, 2005

This decision denies: (1) a motion to hold these proceedings in abeyance for up to 120 days; and (2) a petition to reopen the proceedings, declare certain right-of-way segments abandoned, and revoke authority for interim trail use.

BACKGROUND

The Klickitat Branch consists of two contiguous line segments of the Burlington Northern Railroad Company, now BNSF Railway Company (BNSF),<sup>1</sup> that were the subject of two separate abandonment proceedings. The first segment, between milepost 13.80 near Klickitat, WA, and milepost 42.11 near Goldendale, WA, was authorized for abandonment through an exemption granted by decision served February 7, 1992, in Docket No. AB-6 (Sub-No. 335X). On April 3, 1992, a decision and notice of interim trail use or abandonment (NITU) was served, establishing a 180-day period for BNSF and the City of Goldendale 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).

The second segment, between milepost -0.10 near Lyle, WA, and milepost 13.80 near Klickitat was also authorized for abandonment through an exemption granted by decision served May 12, 1993, in Docket No. AB-6 (Sub-No. 346X), and a NITU applying to it was issued in the same decision at the request of the Rails to Trails Conservancy (RTC) after BNSF agreed to

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<sup>1</sup> As a result of the merger approved in Burlington Northern et al.—Merger—Santa Fe Pacific et al., 10 I.C.C.2d 661 (1995), the Burlington Northern Railroad Company became part of The Burlington Northern and Santa Fe Railway Company, which has since been renamed BNSF Railway Company.

negotiate under the Trails Act. By a decision served in both dockets on July 6, 1994, a NITU was reissued for most of the Klickitat Branch, excluding a segment between milepost 30.8 and milepost 42.11 and a segment between milepost -0.10 and milepost 0.38, which BNSF was authorized to abandon. By quitclaim deed, BNSF conveyed to RTC all of its interest in the right-of-way from milepost 0.38 at State Highway 14 in Lyle to milepost 30.8 near Warwick, WA, for interim trail use/rail banking. This more than 30-mile right-of-way constitutes the Klickitat Trail.

RTC later donated its interests in the rail banked line to the Washington State Parks and Recreation Commission (Parks Commission). RTC continues to own a right to reacquire any portion of the line from the Parks Commission that the Parks Commission does not use for interim trail use/rail banking purposes. The Klickitat Trail Conservancy (KTC) provides additional maintenance services pursuant to a cooperative agreement with the Parks Commission. The U.S. Forest Service (Forest Service) also plays a role in administering and managing the trail.

On February 7, 2005, Tracy and Lorraine Zoller, William Giersch, David and Kristen Mattson, and Allen Tooke (petitioners) filed a petition to reopen both abandonment proceedings on grounds that new evidence now demonstrates changed circumstances. They ask the Board to declare certain parts of the right-of-way abandoned and to revoke the authority for interim trail use. The Parks Commission, KTC, and RTC (collectively, Trail Owners) filed a reply in opposition on February 28, 2005. BNSF also replied in opposition on March 7, 2005.<sup>2</sup>

On March 14, 2005, petitioners filed a motion to hold their petition in abeyance for up to 120 days, or until July 12, 2005, to allow them time to respond to allegedly new factual allegations and evidence. The Trail Owners and BNSF opposed the motion in separate replies filed on March 18, 2005, and April 4, 2005, respectively.

The Trail Owners filed a motion to expedite consideration of these matters on March 30, 2005, arguing that petitioners' filings are intended to cast doubt on the status of the trail and thereby prevent the Forest Service from allocating funds to the trail by a June 15, 2005 deadline. Petitioners replied in opposition on April 6, 2005.

#### PRELIMINARY MATTER

Petitioners' motion to hold their petition in abeyance for up to 120 days will be denied. Petitioners have not demonstrated good cause to delay our consideration of their petition. Their stated justification to hold this matter in abeyance is to allow time for petitioners to furnish a response to evidence contained in the replies, but our rules of practice state that a reply to a reply is not permitted. 49 CFR 1104.13(c). We have, on occasion, waived that rule in the interests of a more complete record when no party would be prejudiced. Here, however, petitioners have presented no justification for the relief sought and the opposing parties have shown that they would, in fact, be harmed by a delay.

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<sup>2</sup> BNSF was granted an extension to file its reply by a decision served on March 1, 2005.

Petitioners had complete control over the timing of their petition to reopen under 49 CFR 1115.4 and bear the burden of proof to sustain their claims. See 5 U.S.C. 556(d). They have a responsibility to ascertain and collect prior to filing all of the necessary facts to support their petition. The developments to which they would like to respond are not new facts that were unavailable to them before they filed their petition; rather, they are previously available factual contentions relied on by the Trail Owners and BNSF in their replies, to which petitioners would now like to respond. Thus, petitioners have not established why these proceedings should be held in abeyance as they request.

## DISCUSSION AND CONCLUSIONS

The Board may, at any time and on its own initiative, because of material error, new evidence, or substantially changed circumstances, reopen a proceeding under 49 U.S.C. 722(c), and any interested party may petition to reopen and reconsider an action of the Board under regulations promulgated by the Board. In abandonment cases such as this, the regulations at 49 CFR 1152.25(e)(4) apply and provide that a petition to reopen an administratively final action must state in detail the respects in which the challenged decision involves material error, or is affected by new evidence or substantially changed circumstances. Such a petition will be granted only upon a showing that the challenged action would be materially affected by one or more of those criteria. 49 CFR 1152.25(e)(2)(ii). Here, petitioners have not met their burden. Therefore, their petition to reopen and for other relief will be denied.

Petitioners, who are adjacent landowners, contend that BNSF, by conveying several parcels of land into private hands subsequent to the issuance of the NITU, has sold off all of its interest in the right-of-way south of Lyle and State Highway 14. Thus, according to petitioners, abandonment of the segment between milepost -0.10 and milepost 0.38 has been consummated. Petitioners further argue that abandonment of this segment irrevocably severed the connection between the trail and BNSF's main line and, thus, between the trail and the national rail system. Petitioners claim that such a severance has the effect of removing the trail from the jurisdiction of the Board under RLTD Railway Corp. v. STB, 166 F.3d 808 (6th Cir. 1999) (holding that a rail line that had been severed from the national rail system prior to the time abandonment authority was sought was beyond the regulatory jurisdiction of the Board), and would require revocation of the NITU.

Both BNSF and the Trail Owners dispute petitioners' factual contentions and legal conclusions. Both argue that the interim trail remains available for potential restoration of rail service.

Specifically, BNSF states that, while it has made two sales of excess property south of State Highway 14, it retains a 28.41-foot wide right-of-way connecting the trail and its main line, which with its easement to cross State Highway 14,<sup>3</sup> could serve as a link to the interstate rail network if active rail service on this rail banked line were to be restored. *Batie V.S.* at 5-12. BNSF distinguishes RLTD as concerning whether the Board had jurisdiction over a line segment at the outset of an abandonment proceeding, not whether a properly rail banked line like the

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<sup>3</sup> That BNSF retains an easement to cross State Highway 14 is not in dispute.

Klickitat Branch loses its status as an interim trail if it is severed from the interstate rail system after interim trail use begins.

Trail Owners state that KTC has obtained a 25-foot wide perpetual open space easement immediately south of State Highway 14 from landowner Greg Colt Land Brokers, Inc., which encompasses rights for rail reactivation and which connects the trail to the BNSF property abutting the railroad's main line. Trail Owners add that KTC intends to transfer the easement to the interim trail manager to maintain in conjunction with the trail. *Essley V.S.* at 3; Appendix III. Trail Owners also point out that BNSF would not have retained its 28.41-foot wide right-of-way if it had intended to remove this right-of-way from rail banked status.

The Trails Act "is the culmination of congressional efforts to preserve shrinking rail trackage by converting unused rights-of-way to recreational trails." *Preseault v. ICC*, 494 U.S. 1, 5 (1990). Under the Trails Act, the Board must "preserve established railroad rights-of-way for future reactivation of rail service" by prohibiting abandonment where a trail sponsor agrees to assume full 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) (CART). The statute expressly provides that "if 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 over the right-of-way 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); 49 CFR 1152.29.

The Board's role under the Trails Act is limited and ministerial. *See CART*; *Goos v. ICC*, 911 F.2d 1283 (8th Cir. 1990). Our only responsibility when a request for a NITU is filed is to confirm that the trail sponsor agrees to assume full liability for the property during the interim trail use and to keep the property available for reactivation of rail service. 16 U.S.C. 1247(d); 49 CFR 1152.29(a)(3). We do not decide whether interim trail use is desirable for a particular line. Moreover, we have no involvement in the type, level, or condition of the trail that is used for a particular right-of-way, and we are not authorized to regulate activities over the actual trail. *See Georgia Great Southern Division – Abandonment and Discontinuance Exemption – Between Albany and Dawson, In Terrell, Lee, and Dougherty Counties, GA*, Docket No. AB-389 (Sub-No. 1X), slip op. at 5-6 (STB served May 16, 2003). We have authority to revoke a trail condition only if it is shown that the statutory requirements are not being met (i.e., the Trails Act was not available or the trail sponsor is not meeting its financial obligations for the property and its use as a trail). *See Jost v. STB*, 194 F.3d 79, 89-90 (D.C. Cir. 1999); *Central Kansas Railway, Limited Liability Company–Aband. Exemption–In Marion and McPherson Counties, KS*, STB Docket No. AB-406 (Sub-No. 6X), slip op. at 6-7 (STB served Dec. 8, 1999), *reconsid'n denied* (STB served May 8, 2001) (involving land sales); *Idaho Northern et al.–Abandonment & Discon. Exemption*, 3 S.T.B. 50 (1998).

The claimed changed circumstance that underlies this petition to reopen is a factual allegation that BNSF has sold off all of its interest in the right-of-way south of State Highway

14, thereby allegedly severing the trail from the interstate rail system. But petitioners have failed to provide reliable evidence to support their claims of severance or an intent by either party to terminate interim trail use and abandon the line. To the contrary, both BNSF and the Trail Owners have provided evidence that BNSF specifically retains a connection between the trail and its main line so as to allow for the potential reactivation of active rail service on this rail banked right-of-way, and that KTC has obtained an easement connecting the trail to the national rail system, which encompass rights for rail reactivation in the event active rail service on this line is restored. Thus, we cannot find on the record before us that the trail has been severed from the interstate rail network.<sup>4</sup> See Norfolk and Western Railway Company—Abandonment Exemption—Between Kokomo and Rochester in Howard, Miami, and Fulton Counties, IN, STB Docket No. AB-290 (Sub-No. 168X) (STB served May 4, 2005). Petitioners bear the burden to support reopening, but have provided no basis for granting the relief they seek. Therefore, their petition will be denied.

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

It is ordered:

1. Petitioners' motion to hold the proceedings in abeyance is denied.
2. The petition to reopen and for other relief is denied.
3. This decision is effective on the date of service.

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

Vernon A. Williams  
Secretary

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<sup>4</sup> Both BNSF and Trail Owners argue that an interim trail can remain rail banked even if it becomes severed from the interstate system. Trail Owners further note that BNSF's power of eminent domain would be available to rectify the minimal severance alleged here and allow for rail reactivation. Because we find that petitioners have not established that the trail has been severed from the interstate rail network, we need not determine whether, if it had been severed, the right-of-way would remain eligible for rail banking under the Trails Act.