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SERVICE DATE - APRIL 16, 1999

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB-389 (Sub-No. 1X)<sup>1</sup>

GEORGIA GREAT SOUTHERN DIVISION, SOUTH CAROLINA CENTRAL  
RAILROAD CO., INC.—ABANDONMENT AND DISCONTINUANCE  
EXEMPTION—BETWEEN ALBANY AND DAWSON, IN TERRELL,  
LEE, AND DOUGHERTY COUNTIES, GA

Decided: April 12, 1999

On March 16, 1998, Carlton Company, et al. (Carlton or petitioners),<sup>2</sup> filed a petition<sup>3</sup> seeking revocation of the notice of interim trail use or abandonment (NITU) that authorized the Rails to Trails Conservancy (RTC) 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 the Georgia Great Southern Division, South Carolina Central Railroad Co., Inc. (GGS), for a 13.62-mile rail line between Albany and Sasser, GA. The line segment was conveyed to RTC effective October 16, 1997. RTC replied to the petition. Petitioners contend that the Board overlooked serious

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<sup>1</sup> 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 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.

<sup>2</sup> The other listed petitioners are Jon V. Daniel, Howard T. Daniel, L. Critt Jordan, J. Ladd Jordan, and John Gay. In a pleading filed April 15, 1998, Bruce Properties, a partnership (Bruce), asked to be added as a party to the petition. In a pleading filed March 2, 1998, Terra Industries, Inc. (Terra), joined in Carlton's opposition to interim trail use and sought rescission of the notice of interim trail use or abandonment.

<sup>3</sup> In a subsequent filing on March 26, 1998, Carlton submitted additional documentation in support of the petition.

procedural errors and deviated from established procedure in approving a NITU.<sup>4</sup> We will treat their pleading as a petition to reopen the proceeding and revoke the NITU. We will deny the petition.

#### PROCEDURAL ISSUES

RTC argues that the additional documentation submitted by Carlton on March 26, 1998, as well as any further filings, should be stricken. The March 26 pleading will be accepted in the interest of developing a more complete record. We see no harm to RTC in admitting these materials.

On February 12, 1999, Carlton requested that we add two filings to its petition. The first, filed January 8, 1999, by Geosciences, Inc. (Geosciences), is an assessment of the environmental, ecological, and historical resources of two properties that are adjacent to the rail right-of-way. Geosciences asserts that, under the National Environmental Policy Act (NEPA), the Board is required to consider the environmental impact of constructing the proposed trail. Then, on February 4, 1999, Geosciences forwarded a copy of a letter from the U.S. Army Corps of Engineers (Corps) indicating that the placement of dredged or fill materials into adjacent waterways and wetlands required Department of Army authorization.

Neither pleading nor the February 12 letter contained a certificate of service, as required by 49 CFR 1104.12, or otherwise indicated that copies were served on all parties of record. Therefore, they will not be accepted. However, even if they had been served on all parties as required by our regulations, the pleadings do not raise issues that would be considered in this Trails Act case. Because we lack authority either to force or deny trail use for a particular railroad line, “our issuance of a NITU . . . is only a ministerial act, not a ‘major Federal action’ to which NEPA would apply.” Iowa Southern R. Co.—Exemption—Abandonment, 5 I.C.C.2d 496, 503 (1989) (Iowa Southern), aff’d sub nom. Goos v. ICC, 911 F.2d 1283 (8th Cir. 1990) (Goos). Moreover, the Board undertook an appropriate environmental review of the proposed abandonment, and the decision served August 16, 1996, authorizing the abandonment exemption contained conditions to protect the environment during salvage activities, including conditions that were recommended by the Corps.

#### BACKGROUND

In a decision and NITU served August 16, 1996 (August 16 decision), GGS was exempted from the prior approval requirements of 49 U.S.C. 10903-04 to abandon its 13.62-mile line of railroad between milepost 86.5 at Albany and milepost 72.88 at Sasser and to discontinue service over its 5.38-mile line of railroad between milepost 72.88 at Sasser and milepost 67.5 at Dawson, in

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<sup>4</sup> Petitioners apparently are all adjacent landowners, but, other than Bruce, they do not specifically claim to have reversionary property interests in the right-of-way.

Terrell, Lee, and Dougherty Counties, GA. The NITU provided a 180-day period for GGS and the Chehaw Park Authority (Chehaw) to negotiate an interim trail use/rail banking agreement for the 13.62-mile line segment between Albany and Sasser. Subsequently, in a decision of the Acting Director of the Office of Proceedings served October 25, 1996, RTC was substituted for Chehaw as the negotiating party for the remainder of the 180-day negotiating period through February 12, 1997. The initial negotiating period was extended through August 11, 1997, and then to November 30, 1997, by decisions served February 28, and August 11, 1997.<sup>5</sup>

### DISCUSSION AND CONCLUSIONS

Under 49 CFR 1115.4, a petition to reopen must state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances. Petitioners argue that the Board committed the following errors warranting revocation of the NITU: (1) the Board erred in substituting RTC as a new negotiating party under the NITU because RTC's Trails Act request was not filed by the August 26, 1996 filing deadline for requesting a trail condition imposed in the August 16 abandonment exemption decision; (2) the Board erred in not revoking the NITU in August of 1996, after it was notified that Chehaw's representative had been instructed in 1995 to withdraw Chehaw's NITU request; and (3) because GGS previously sold portions of the rail right-of-way to Bruce, the Board erred in approving a NITU for a rail corridor that is allegedly no longer continuous and on which abandonment purportedly had been consummated.

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), aff'd, National Wildlife Federation v. ICC, 850 F.2d 694 (D.C. Cir. 1988). Our discretion is limited to determining whether the statute has been properly invoked and the statutory requirements regarding rail banking and the trail user's assumption of financial and managerial responsibility are met. Iowa Southern, 5 I.C.C.2d at 503; Goos. Accordingly, when section 1247(d) is properly invoked, we must issue a NITU.

The action to substitute RTC as the negotiating party under the NITU did not violate any established procedures.<sup>6</sup> In its request to be substituted as the negotiating party, RTC stated that it

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<sup>5</sup> Mr. Lee H. Walters, the president of Carlton Company, submitted a letter on September 18, 1997, asking the Board to deny any further extensions to the negotiating period and terminate jurisdiction over the rail line effective December 1, 1997, the day after the second 180-day extension of the negotiating period was due to expire. No further extensions were sought, however, because the line was conveyed to RTC, in accordance with an interim trail use arrangement, in October 1997.

<sup>6</sup> To the contrary, we have long permitted the substitution of trail sponsors so long as the  
(continued...)

had agreed to assume responsibility for negotiating a trail use agreement with GGS after being advised that Chehaw intended to formally withdraw its statement of willingness to assume financial responsibility. RTC also asked that its request be accepted in accordance with our policy of accepting late-filed trail use statements so long as we retain jurisdiction over the corridor.<sup>7</sup> Shortly thereafter, we received a letter from Mr. Tom Seegmueller, Chehaw's Chairman, requesting that Chehaw be removed as a negotiating party under the NITU.<sup>8</sup> Although petitioners argue that the Board erred in not revoking the NITU when Mr. Seegmueller's letter was received, RTC's request to be substituted was pending at that point. Moreover, Mr. Seegmueller did not request that the NITU be vacated. On the contrary, he specifically stated that he understood that action was being taken to substitute RTC as the negotiating party, and he simply requested that Chehaw be removed as a party as soon as possible. Furthermore, RTC had asserted that GGS had consented in RTC's motion to file an interim trail use statement.<sup>9</sup> Therefore, GGS plainly did not indicate an intent to consummate the abandonment. In these circumstances, the request to substitute RTC as the negotiating party for the remainder of the period of the NITU was proper.

Concerning the second issue, we believe that the issue of whether Chehaw's representative, Mr. W. Spencer Lee, should have previously withdrawn Chehaw's "statement of willingness" does

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<sup>6</sup>(...continued)

statutory criteria are met. See T and P Railway - Abandonment Exemption - In Shawnee, Jefferson and Atchison Counties, KS, Docket No. AB-381 (Sub-No. 1X) (STB served Feb. 20, 1997) at 4: "[I]t is not unusual for us to issue a trail use condition where, as here, a new negotiating party asks to be substituted for the original prospective trail user."

<sup>7</sup> The August 16 decision had indicated that additional trail use requests could be filed by August 26, 1996. Although RTC's request was not filed until September 3, 1996, trail use requests can be accepted as long as the Board retains jurisdiction over the involved right-of-way and the carrier is willing to enter into negotiation. See Rail Abandonments—Supplemental Trails Act Procedures, 4 I.C.C.2d 152, 157-58 (1987); Birt v. STB, 90 F.3d 580, 589, reh'g denied, 98 F.3d 644 (D.C. Cir. 1996) (ICC can grant extensions of Trails Act negotiating period retroactively where request for extension has been filed prior to expiration of trail condition); Missouri-Kansas-Texas Railroad Company—Abandonment—In Pettis and Henry Counties, MO, Docket No. AB-102 (Sub-No. 16) (ICC served Apr. 26, 1991). See also 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), where we stated that we will continue our policy of accepting trail use/rail banking filings after the due date when good cause is shown.

<sup>8</sup> Mr. Seegmueller's letter is dated August 21, 1996, but was not filed until September 13, 1996.

<sup>9</sup> In a letter filed September 4, 1996, GGS noted that the NITU had permitted Chehaw to negotiate with GGS and, because of Chehaw's withdrawal, it did not object to the substitution of RTC, provided RTC filed a statement of willingness to assume financial responsibility.

not affect the outcome of this case.<sup>10</sup> The abandonment exemption granted in the August 16 decision did not become effective until September 15, 1996, and GGS would not have been able to consummate the transaction prior to that date. Thus, even if Chehaw's NITU request had been previously withdrawn, the Board would have retained jurisdiction to issue a new NITU in response to RTC's September 3 request because GGS had not consummated the abandonment and was willing to negotiate with RTC.

Petitioners' final arguments relate to the effect of the sale of two parcels of the rail corridor to Bruce on August 14, 1995, and July 11, 1996. Petitioners contend that selling the parcels before the abandonment was authorized, together with the alleged canceling of tariffs and removing tracks, consummated the abandonment. Petitioners also claim that the Board erred in approving a NITU for a rail corridor that allegedly is no longer continuous as a result of the sales. We find that these arguments lack merit.

RTC acknowledges that GGS sold parcels of the rail corridor to Bruce in 1995 and 1996 and furnished a verified statement of Mr. Todd Cecil discussing those sales.<sup>11</sup> According to Mr. Cecil, GGS sold the two parcels to Bruce by quitclaim deeds that retained an easement 30 feet in width to allow for continued rail operations. Both sales evidently took place prior to issuance of the August 16 decision granting the abandonment exemption. Mr. Cecil also states that Bruce was informed at the time of purchase "of the uncertainty that the rail line would ultimately be abandoned."<sup>12</sup> He asserts that the price paid by Bruce was based on the existence of the easement and the fact that it was "perpetual."<sup>13</sup>

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<sup>10</sup> However, because petitioners argue that Mr. Lee acted improperly in handling Chehaw's request, RTC has furnished affidavits on this issue from both Mr. Phillip E. Franklin, the former Chairman of Chehaw, and from Mr. Lee. Mr. Franklin states that he did not consider that Mr. Lee acted inappropriately. He submits that Chehaw's withdrawal was not based on opposition to the trail, and recalls that Mr. Lee indicated that he would find a substitute petitioner. Mr. Lee states that Chehaw's original NITU petition was filed as executed by Mr. Franklin. Thereafter, when Mr. Franklin asked him to remove the petition, Mr. Lee submits that they discussed substituting another petitioner as a matter of accommodation. Mr. Lee claims that he told Mr. Franklin that he would replace Chehaw once a substitute trail entity was found. Assertedly, the August 16 decision and NITU was issued before the parties could take action to substitute RTC as the negotiating party.

<sup>11</sup> Mr. Cecil is the Director-Real Estate for Railtex, the parent company of GGS.

<sup>12</sup> Bruce, however, contends that GGS never mentioned during the sale of the two parcels that it intended to sell or contract with anyone else for trail or other use.

<sup>13</sup> The quitclaim deeds reserved to GGS "an exclusive easement for any and all railroad purposes. . . . [S]aid easement will terminate in the event of [GGS'] removal of all railroad trackage and Track Materials within the easement area."

First, we reject the notion that the line of railroad was no longer continuous because of the sales. Notwithstanding the sale of the two parcels, GGS specifically retained “an exclusive easement for any and all railroad purposes. . . .” The agency has long found that it is consistent with the common carrier obligation of a railroad for the carrier to sell the underlying assets of rail line while retaining an easement that is sufficient for carrying out rail operations. See State of Maine, Department of Transportation--Acquisition Exemption--Certain Assets of Belfast and Moosehead Lake Railroad Company, Finance Docket No. 32764 (ICC served Nov. 14, 1995), and Maine, DOT--Acq. Exemption, Me. Central R. Co., 8 I.C.C.2d 835 (1991). Nothing in the evidence of record here shows that the sales would preclude further rail operations on the line.

Furthermore, a rail easement on property where there are reversionary landowners is not extinguished until the railroad consummates abandonment of the rail line. See Rail Abandonment - Trails Act - Policy Statement, 5 I.C.C.2d 370, 372 (1989). We reject petitioners’ argument that GGS’ activities constituted a consummation of the abandonment. As noted, the quitclaim deeds retained an easement 30 feet in width to allow for continued rail operations. Moreover, Mr. Cecil explains that, from the time that the initial NITU was issued and subsequently, GGS intended to rail bank the right-of-way under the Trails Act, rather than abandon it. GGS transferred the tracks and crossties to RTC, along with rail easements, fee property, and such other property interests held by GGS to allow for both interim trail use and possible future rail use as contemplated by the Trails Act. The evidence of track removal in the record occurred after the line was conveyed to RTC for interim trail use effective October 16, 1997.<sup>14</sup> Track removal following the imposition of a trail condition, standing alone, does not constitute consummation of an abandonment. See Birt, 90 F.3d at 588 n.15.

Terra attached a letter by Carlton contending that, if RTC removed the track and crossties from the parcels purchased by Bruce, Bruce will be able to prevent access to these segments.<sup>15</sup> This argument also lacks merit. The right-of-way remains under our jurisdiction for the duration of the interim trail use because the abandonment authority was suspended when the parties entered into a trail use arrangement for the line segment. See 16 U.S.C. 1247(d). Indeed, if the parties decide to terminate their trail use arrangement in the future, they must request that the Board vacate the NITU and issue a decision reinstating the abandonment exemption. 49 CFR 1152.29(d)(2). Carlton’s suggestion, that a common carrier obligation to provide rail service can be unilaterally extinguished

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<sup>14</sup> The affidavit of Edward Parker and Diane Davis, Attachment 20 of petitioners’ supporting documentation filed March 26, 1998, attests that “on or about March 10, 1998, tracks and ties were removed from Albany to Sasser rail corridor.” Letters from Mr. Walters dated February 24, 1998, that are attached to Terra’s pleading indicate that track was being removed by RTC.

<sup>15</sup> He apparently bases this statement on the following wording in the deeds, “Grantor’s rights to said easement will terminate in the event of Grantor’s removal of all railroad trackage and Track Materials within the easement area.”

by the wording in the deeds, is wrong. It is well settled that a common carrier obligation to provide rail service subject to our jurisdiction remains until appropriate authority for full abandonment is received and the abandonment is consummated. Hayfield Northern R.R. v. Chicago & N.W. Transp. Co., 467 U.S. 622, 633-34 (1984).<sup>16</sup> Removal of the track after a NITU has been issued does not defeat trail use or the possible future restoration of the line.<sup>17</sup> See Birt.

In sum, we conclude that GGS did not consummate the abandonment, that the rail easements in the parcels sold to Bruce remain intact to allow for continued rail service, that the Board retained jurisdiction to issue a NITU to RTC, and that the line is properly rail banked under the Trails Act. Accordingly, we conclude that there is no basis for reopening the proceeding and revoking the NITU.

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

It is ordered:

1. Except for the filings of January 8, February 4, and February 12, 1999, Carlton's petition and additional documentation are accepted, and will be treated as a petition to reopen and revoke the NITU.
2. RTC's motion to strike the additional documentation is denied to the extent indicated.
3. The petition is denied.
4. This decision is effective on its service date.

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

Vernon A. Williams  
Secretary

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<sup>16</sup> Cf. Vermont & VT Ry--Discontinuance--Crittenden Co. VT, 3 I.C.C.2d 903, 907 (1987), aff'd sub nom. Preseault v. ICC, 853 F.2d 145 (2d Cir. 1988), aff'd Preseault v. ICC, 494 U.S. 1 (1990): "Even if the track is physically removed . . . neither the carrier's common carrier obligation [n]or the agency's jurisdiction is terminated."

<sup>17</sup> Although the line remains intact for both trail use and the reinstatement of service, Bruce may have recourse to monetary damages for possible breach of the parties' private agreement regarding the removal of the tracks and the termination of the easement. Such a determination, however, is outside our jurisdiction and must be made in a different forum.