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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-290 (Sub-No. 286)

NORFOLK SOUTHERN RAILWAY COMPANY—ADVERSE ABANDONMENT—
ST. JOSEPH COUNTY, IN

Decided: October 25, 2006

This decision grants in part and denies in part exemption and waiver requests related to a third-party or “adverse” abandonment application petitioners intend to file.

In a petition filed on September 13, 2006, the City of South Bend, IN (the City), the Brothers of Holy Cross, Inc. (the Brothers), and the Sisters of the Holy Cross, Inc. (the Sisters) (collectively, petitioners), jointly seek exemptions from several statutory provisions and waivers of certain Board regulations in connection with their filing of a third-party or adverse application for the abandonment of service over approximately 3.2 miles of railroad lines (the Lines) in St. Joseph County, IN. Included with the petition were a draft notice of intent and a draft Federal Register notice.

On September 15, 2006, Norfolk Southern Railway Company (NSR), the owner of the Lines, filed a reply stating that it does not oppose the waiver and exemption requests to the extent they are consistent with similar requests in previous adverse abandonment proceedings. NSR subsequently filed a detailed reply, which identified specific waiver and exemption requests that it argued should be denied. NSR also objected to certain statements in the petition and the accompanying notices. Petitioners filed a reply and an amended notice of intent, on September 26, 2006, which expanded the proposed abandonment to 3.7 miles and adopted a number of other changes NSR requested.

The Chicago, Lake Shore & South Bend Railway Company (CLS&SB) filed a reply to the petition on October 3, 2006.¹ In that reply, CLS&SB joins NSR in stating that it does not oppose petitioners' requests to the extent they are consistent with similar requests in previous adverse abandonment proceedings. CLS&SB does object, however, to a number of requests that it claims are inconsistent with Board policy and precedent.

BACKGROUND

The Lines extend 3.7 miles between milepost UV 0.0 and milepost UV 2.8 and between milepost Z0 9.6 and milepost Z0 10.5 and include any ownership interest in the spur leading to the University. They traverse properties owned by the Brothers and the Sisters. The Brothers' property is the site of Holy Cross College, Holy Cross Village (a retirement community that is being expanded), and other improvements and uses furthering the Brothers' charitable mission. The Sisters' property is the site of a motherhouse, the international headquarters of the Congregation of the Sisters of the Holy Cross, and the Inn at St. Mary's, and is adjacent to St. Mary's College, which the Sisters sponsor.

Petitioners state that there has been no rail service or requests for service for at least 10 years. Moreover, they claim that there is no foreseeable need for rail service and that sections of track have been paved over and removed. Additionally, they claim that the Lines are physically severed from the national rail system as a result of previous abandonments. See Conrail Abandonment In South Bend Between Milepost 10.5 and Milepost 11.8, St. Joseph County, IN, Docket No. AB-167 (Sub-No. 407N) (ICC served Apr. 22, 1982) and Conrail Abandonment in Berrien County, MI and St. Joseph County, IN, Docket No. AB-167 (Sub-No. 672N) (ICC served Aug. 31, 1984).

According to petitioners, the line between milepost UV 0.0 and milepost UV 2.8 crosses 17 streets in the City, two of which carry significant vehicular traffic, creating a nuisance and significant safety and environmental concerns. They state that the City plans to acquire or condemn the portion of the right-of-way within its jurisdiction for public use. Additionally, petitioners claim that a portion of that line and the line between milepost Z0 9.6 and milepost Z0 10.5 are adversely affecting the Brothers' ability to plan for the future because they run through the heart of its property. The Brothers and the

¹ CLS&SB was granted an exemption to acquire the Lines from NSR and to operate them. See The Chicago, Lake Shore & South Bend Railway Company—Acquisition and Operation Exemption—Norfolk Southern Railway Company, STB Finance Docket No. 34893 (STB served July 6, 2006). CLS&SB wanted to replace the truck transload service that currently supplies coal to the power plant operated by The University of Notre Dame (the University) with rail service and to develop other rail traffic. CLS&SB subsequently requested leave to withdraw the notice of exemption after NSR informed the Board that it would not sell the Lines to CLS&SB and suggested that the exemption be dismissed. CLS&SB's motion to dismiss was granted, and the exemption was vacated, in a decision served on September 11, 2006.

Sisters also assert a claim under Indiana law to a reversionary interest in this section of the right-of-way.

DISCUSSION AND CONCLUSIONS

The Board's regulations require that abandonment applications conform to the requirements of 49 CFR 1152, Subpart C. In appropriate instances, however, such as the filing of a third-party or adverse abandonment application, the Board will waive inapplicable and unneeded provisions. See Napa Valley Wine Train, Inc.—Adverse Abandonment—In Napa Valley, CA, STB Docket No. AB-582 (STB served Mar. 30, 2001), and cases cited therein. Petitioners seek exemptions and waivers with respect to the filing fees and their notice of intent and adverse abandonment application. The exemptions and waivers will be discussed in that order.

Filing Fees. Petitioners state that the City is the lead applicant in this proceeding, and that, as a governmental entity, it is entitled to a waiver of the filing fees required for this petition for waivers and exemptions and the adverse abandonment application that it intends to file. The Board's Secretary, the agency official delegated authority to rule on filing fee waiver requests under 49 CFR 1002.2(e), granted this request on September 13, 2006, in a letter to Richard Streeter, counsel for the Brothers and the Sisters.

Notice of Intent. With respect to the notice of intent, petitioners seek waiver of the following provisions:

Petitioners ask for waiver of the requirements of 49 CFR 1152.21, stating that the prescribed wording for the notice of intent is inappropriate for adverse abandonment proceedings. Instead, petitioners propose to use the alternative language in their amended Attachment A. The notice of intent in their amended Attachment A is in substantial compliance with the requirements of 49 CFR 1152.21. We will grant the waiver request.

Petitioners request waivers from 49 CFR 1152.20(a)(2), which requires service on significant users of the line, and 49 CFR 1152.20(a)(3), which requires posting of a copy of the notice of intent at each agency station and terminal on the line to be abandoned. Petitioners state that there are no known users of the Lines or agency stations and terminals on the Lines. We will grant these waiver requests.

Petitioners request waiver from 49 CFR 1152.20(a)(2)(xii), which requires service on the headquarters of all duly certified labor organizations that represent employees on the affected line. Petitioners claim that there are no known railroad employees who would be affected by the proposed abandonment and, in any event, that employee protective conditions are not imposed in cases involving complete line abandonments, as here. Notwithstanding that this petition involves only a small segment of NSR's larger system and not a complete line abandonment, we will grant the waiver request because there are no known railroad employees.

Petitioners request a waiver from 49 CFR 1152.20(a)(4), which requires newspaper publication of a notice of abandonment. Instead, petitioners state that they will serve copies of this petition, their notice of intent, and the abandonment application on NSR, the University, the entities listed in 49 CFR 1152.20(a)(2)(ii-xi), and CLS&SB. NSR and CLS&SB oppose the request. Newspaper publication is not onerous and ensures that all persons and entities with an interest in the Lines are given notice and the opportunity to participate in any proceedings. Therefore, we will deny the waiver request.

Petitioners request waivers from 49 CFR 1152.20(c), which requires the applicant to submit an environmental and historic report at least 20 days prior to filing an application, and 49 CFR 1105.7 and 1105.8, which describe and pertain to environmental and historic reports. Citing 49 CFR 1105.6(c)(2) and Salt Lake City Railroad Company, Inc.—Adverse Abandonment—Line of Utah Transit Authority in Salt Lake City, UT, STB Docket No. AB-520 (STB served Aug. 26, 1999) (Salt Lake), petitioners state that there are no known railroad structures on the rights-of-way, other than the track, that are over 50 years old, and that the proposed abandonment will not result in any change in carrier operations because there have been no operations for over a decade. Alternatively, petitioners request waiver of the requirements related only to the historic report, 49 CFR 1105.8(e).

NSR and CLS&SB oppose the waiver requests, noting among other things, that these requirements have not been waived for previous adverse abandonment applications. NSR states that it will provide assistance to petitioners in compiling the information needed for an historic report. Petitioners' reliance on Salt Lake is also misplaced. The applicant there represented that rail service would continue over the subject line. The Lines evidently would be salvaged here. The Board generally conducts a full environmental and historic review in adverse abandonment cases. Environmental and historic reports give the Board the information necessary to conduct the appropriate environmental review. See 49 CFR part 1105. Therefore, we will deny these waiver requests.

Adverse Abandonment Application. With respect to the adverse abandonment application, petitioners seek waiver and/or exemption of the following provisions:

Petitioners request waivers from 49 CFR 1152.10-14, which relate to filing, amending, and providing notice to the public through a carrier's system diagram map (SDM), and establish a 2-month waiting period between amendments of the SDM and the filing of a corresponding abandonment application. Additionally, they request waivers from 49 CFR 1152.22(a)(4) and (5) and 49 CFR 1152.24(e)(1), which require submission of a detailed map of the subject line and reference to the carrier's SDM.

CLS&SB opposes the request for waiver from 49 CFR 1152.22(a)(4), contending that it is not onerous to submit a detailed map and that maps are necessary to inform the public. This requirement is customarily waived in adverse abandonment proceedings because the applicant, unlike the railroad, may not have access to such a map. Here,

however, applicants have the map of the Lines which CLS&SB filed in CLS&SB Acquisition, a case in which the applicants participated. It is therefore not burdensome to require the petitioners to submit that map here. Subject to that requirement, we will grant these waiver requests.

Petitioners seek waivers from 49 CFR 1152.22(b)-(d), which require that abandonment applications include information regarding the current physical condition of the line, the service performed on it, and the revenue and cost data attributable to it. Petitioners assert that they lack the necessary information. Because this information is generally not available to an adverse abandonment applicant, we will grant these waiver requests.

Petitioners ask for waiver of 49 CFR 1152.22(f), which requires an applicant to submit information regarding the environmental impact of the proposed abandonment. For the reason stated above, with respect to the waiver requests from the environmental and historic reporting requirements at 49 CFR 1105.8, we will deny the waiver request.

Petitioners request waiver of the requirements of 49 CFR 1152.22(i), stating that the prescribed wording for Federal Register notices is inappropriate for adverse abandonment applications. Instead, they propose to use the alternative language in their Attachment B. The Federal Register notice in petitioners' Attachment B is in substantial compliance with the requirements of 49 CFR 1152.22(i) but does not reflect the mileage and milepost revisions petitioners made in their amended notice of intent. We will grant the waiver request subject to petitioners making conforming revisions to the Federal Register notice.

Finally, petitioners seek waivers from 49 CFR 1152.27-29, the Board's procedures for offers of financial assistance (OFA), public use, and interim trail use, and exemptions from the OFA requirements of 49 U.S.C. 10904 and the public use procedures of 49 U.S.C. 10905 with respect to those portions of the Lines located to the north and northeast of the St. Joseph River. Petitioners contend that these procedures will serve no useful purpose and are not necessary to carry out the rail transportation policy of 49 U.S.C. 10101. With respect to the portion of line located within the City between milepost UV 0.0 and the northeast bank of the St. Joseph River, the City states that it is interested in acquiring the right-of-way for interim trail use pursuant to 16 U.S.C. 1247(d) and 49 CFR 1152.29.

NSR opposes the waiver and exemption requests as premature. CLS&SB does not object to waiving or exempting the provisions relating to public use and interim trail use but does object to waiving or exempting the provisions relating to OFAs. CLS&SB acknowledges that such exemptions are granted from time to time, but claims that they are granted only when it is clear that the right-of-way is needed for a valid public purpose, which assertedly is not the case here. Referring to the Board's statutory duty to preserve and promote rail service, CLS&SB states that it intends to submit evidence demonstrating a continuing need for freight service here and argues that it should not be precluded at this early stage from filing an OFA.

The petition for exemption from 49 U.S.C. 10904 and waiver of the related regulations at 49 CFR 1152.27 will be granted. In a third party abandonment proceeding, the Board withdraws its primary jurisdiction to permit state, local or other federal law to apply where there is no overriding federal interest in interstate commerce. See Kansas City Pub. Ser. Frgt. Operations—Exempt—Aban., 7 I.C.C.2d 216, 225 (1990); Modern Handcraft, Inc.—Abandonment, 363 I.C.C. 969, 972 (1981). Absent an exemption, section 10904 could provide a vehicle for someone to invoke agency processes that the Board has determined are not necessary or appropriate. If the Board ultimately finds that the public convenience and necessity require or permit withdrawal of its regulatory authority in this adverse abandonment proceeding, it would be fundamentally inconsistent to provide for further Board regulation under section 10904, and thereby negate the Board's decision. See East St. Louis Junction Railroad Company—Adverse Abandonment—In St. Clair County, IL, STB Docket No. AB-838 et al. (STB served June 30, 2003) (St. Clair).

We need not, as CLS&SB suggests, resolve the merits of the case before we address the request for an exemption from 49 U.S.C. 10904. A grant of the exemption from section 10904 does not affect the merits of the application. We merely find, as we did in St. Clair, that, under the circumstances presented here, a grant of an adverse abandonment or discontinuance would be frustrated if section 10904 could be invoked in an effort to continue active rail service. If the application fails, the exemption would be mooted.

We will also grant an exemption from the public use provisions of 49 U.S.C. 10905 and a waiver of the implementing regulations at 49 CFR 1152.28. Should we decide to withdraw our primary jurisdiction over the Lines, we should not then allow our jurisdiction to be invoked to impose a public use condition.

Petitioners also ask us to waive the trail use provisions of 49 CFR 1152.29 for a portion of the Lines. In Chelsea Property Owners—Abandonment—Portion of the Consolidated Rail Corporation's West 30th Street Secondary Track In New York, NY, Docket No. AB-167 (Sub-No. 1094)A (Chelsea), the issue of whether the issuance of a certificate of interim trail use (CITU) in an adverse abandonment would be inconsistent with the grant of such an application was discussed and debated at a public hearing held in New York City on July 24, 2003. Briefs were subsequently requested and filed on the issue. Ultimately, the third party applicant, the railroads, and the prospective trail user agreed to the issuance of a CITU. The Board granted the CITU request stating,

Given this change in circumstances, we need not decide whether the Trails Act applies to lines that are the subject of adverse abandonments. The posture of this proceeding at this point is not materially different from other cases where trail conditions have been imposed. . . . interim trail use in this proceeding should now be viewed as a voluntary arrangement Chelsea, STB served June 13, 2005, slip op. at 8.

Because the Board has not yet had occasion to resolve this issue, because we can address the issue, if need be, in a later decision, and because petitioners themselves state that they are interested in acquiring a portion of the right-of-way for interim trail use, we will deny the request for a waiver of the regulations at 49 CFR 1152.29.

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

It is ordered:

1. The petition for exemptions and waivers is granted in part and denied in part, as described above.
2. This decision is effective on its service date.

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

Vernon A. Williams
Secretary