

SURFACE TRANSPORTATION BOARD¹

DECISION

Docket No. AB-88 (Sub-No. 5X)

BESSEMER & LAKE ERIE RAILROAD COMPANY--ABANDONMENT
EXEMPTION--IN ERIE COUNTY, PA

Decided: May 21, 1997

By petition filed on March 3, 1997, Material Recovery of Erie, Inc. (petitioner) seeks to reopen this proceeding for clarification of its compliance with a notice of interim trail use or abandonment (NITU) that was issued by the former ICC on January 8, 1990. The clarification became necessary when petitioner sought to convey the railroad right-of-way it purchased from the Bessemer & Lake Erie Railroad pursuant to the NITU to the Pennsylvania Electric Company (PEC) as part of the liquidation of its estate in a proceeding before the United States Bankruptcy Court, Bankruptcy No. 94-10812-WWB. Adjacent landowners have come forward in the bankruptcy proceeding asserting that their reversionary interests in the right-of-way have vested. We are authorized by 5 U.S.C. 554 to issue declaratory orders to eliminate controversy and we will do so here.

BACKGROUND

Bessemer and Lake Erie Railroad Company (BLE) filed a notice of exemption under 49 CFR 1152 Subpart F--*Exempt Abandonments* to abandon its 5.73-mile line of railroad between Survey Station 308+85, at or near Lexington, and a point near Survey Station 6+00, about 1.5 miles west of Lake City, Erie County, PA. A notice of exemption was served and published in the *Federal Register* on December 5, 1989 (54 FR 50284). The exemption was scheduled to become effective on January 4, 1990.

The December 5 exemption notice provided for the filing of trail use/rail banking requests by December 15, 1989, and public use requests by December 26, 1989. On December 21, 1989, petitioner filed a request for issuance of a notice of interim trail use and for a public use condition. Petitioner satisfied the requirements of 49 CFR 1152.29 by submitting a statement of willingness to assume financial responsibility and by acknowledging that use of the right-of-way is subject to possible future restoration for rail service. Petitioner also satisfied the requirements under 49 CFR 1152.28(a)(2) for imposing a public use condition. Because B&LE indicated its willingness to enter into negotiations with petitioner, a NITU was issued providing directives for implementing interim trail use/rail banking and imposing a public use condition.

Petitioner notes that most acquisitions for trail use are entered into after a NITU is issued. Here, B&LE entered into an agreement of sale on August 14, 1989, and the property was conveyed to petitioner by quit claim deed on December 20, 1989. Petitioner points out that the sale agreement contained provisions making the sale of the right-of-way contingent upon ICC abandonment approval and third party offers to purchase the right-of-way for continued rail service. Petitioner

¹ 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 the 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 the 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 Board 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 the ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

contends that the written exchange--its request for NITU on December 12, 1989, and B&LE's consent on January 3, 1990--effectively modified the terms of the sale agreement. We agree. Transfer of the property could not have legally occurred prior to January 4, 1990 (the effective date of the abandonment exemption). Here, a NITU was imposed *before* B&LE was authorized to effect abandonment, thus preserving the agency's jurisdiction over the right-of-way. Based on the evidence presented, we conclude that the property has not reverted to adjacent landowners. This is only an advisory opinion because the subject property is now under the jurisdiction of the bankruptcy court, which is responsible for a final determination of legal ownership.

Although the right-of-way is subject to liquidation as an asset of petitioner's estate in the bankruptcy proceeding, petitioner states that any agreement of sale between PEC and itself would require the continued preservation of the right-of-way for recreational use by the public or for reconversion to rail use. We agree. Thus, if the court permits the sale of the right-of-way to PEC, then, to ensure continued rail banked status of the right-of-way, petitioner and PEC must comply with 49 CFR 1152.29(f) which says:

(1) When a trail user intends to terminate trail use and another person intends to become a trail user by assuming financial responsibility for the right-of-way, then the existing and future trail users shall file, jointly:

(i) A copy of the extant CITU or NITU; and

(ii) A Statement of Willingness to Assume Financial Responsibility by the new trail user.

(2) The parties shall indicate the date on which responsibility for the right-of-way is to transfer to the new trail user. The Board will reopen the abandonment or exemption proceeding, vacate the existing NITU or CITU; and issue an appropriate replacement NITU or CITU to the new trail user.

It is ordered:

1. This proceeding is reopened and clarified.
2. The 5.73-mile line of railroad between Survey Station 308+85, at or near Lexington, and a point near Survey Station 6+00, about 1.5 miles west of Lake City, Erie County, PA, is rail banked pursuant to 16 U.S.C. 1247(d).
3. This decision is effective on May 28, 1997.

4. A copy of this decision will be mailed to:
United States Bankruptcy Court
for the Western District of Pennsylvania
1602 Federal Building
1000 Liberty Avenue
Pittsburgh, PA 15222

Re: No. 94-10812

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary