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SERVICE DATE – NOVEMBER 19, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-600

YAKIMA INTERURBAN LINES ASSOCIATION–
ADVERSE ABANDONMENT–IN YAKIMA COUNTY, WA

Decided: November 18, 2004

On January 27, 2004, Kershaw Sunnyside Ranches, Inc. (Kershaw or applicant) filed an adverse abandonment application¹ under 49 U.S.C. 10903, asking us to find that the public convenience and necessity (PC&N) require or permit the abandonment of approximately 1 mile of the 11.29-mile Naches Line owned by Yakima Interurban Lines Association (YILA) in Yakima County, WA.² Protests were filed jointly by Yakima County, the City of Yakima, the Town of Naches, and YILA³ (Rail Commenters), and individually by Level 3 Communications, L.L.C. (Level 3), Washington State Department of Transportation (WSDOT), and The Burlington Northern and Santa Fe Railway Company (BNSF). Applicant filed a reply. We will deny the application for the reasons discussed below.

BACKGROUND

The Naches Line passes through approximately 1 mile of Kershaw's property. In 1905, a predecessor in interest to Kershaw granted an easement for railroad purposes to the North Yakima & Valley Railway Company. The description of the segment contained in the deed granting the easement reads as follows:

Said strip of land being a certain strip of land seventy five feet wide across the E.2 of S.W. 4 and the S.W.4 of S.E.4 of Sec. 24 twp. 14 N. R. 17 E. W. M.

¹ Kershaw had previously filed certain components of its application. The application was not considered complete, however, until applicant submitted the final required components on January 27, 2004.

² Notice of the filing was served and published in the Federal Register (69 FR 7283) on February 13, 2004. Applicant's petition for waiver of certain regulations pertaining to the Board's application procedures for obtaining rail line abandonment authority was granted in part by a decision served on February 6, 2004.

³ YILA is a Washington State non-profit corporation.

[A]lso the N.W.4 of the N.W. 4 of Sec. 25 twp. 14 N. R. 17 E. W.M. being a strip of land seventy five (75) feet in width 37½ feet on each side of the center line of the railroad of said company as the same [is now] located and staked out across said premises, together with any and all additional widths that may be necessary to catch the slopes of the cuts and fills of the roadbed of said railroad.

Mileposts for the segment on Kershaw's property are unavailable. The Naches Line was acquired by BNSF in 1996, but was taken out of service in 1997 due to poor track conditions. In 1999, YILA acquired 11.29 miles of the line, from MP 2.97 at Fruitvale, WA, to MP 14.26 at Naches, WA. Yakima Interurban Lines Association–Acquisition Exemption–BNSF Acquisition, Inc., STB Docket Finance Docket No. 33719 (STB served Mar. 4, 1999).

The State of Washington, through WSDOT, subsequently loaned YILA \$516,000 for line rehabilitation. YILA, however, failed to rehabilitate the line and defaulted on the loan. Members of the board of YILA, including its president, have abdicated their positions, and the operations manager has been directed by the members of the association to dispose of YILA's assets. There are currently \$750,000 in liens against the line and there has been no local traffic on the line for the last 7 years. YILA has been negotiating for the last 2 years with Yakima County and the City of Yakima regarding the future of the line.

POSITIONS OF THE PARTIES

Kershaw seeks abandonment authorization for the portion of the Naches Line that crosses its property because, it argues, operation of the line is not economically justified and is detrimental to Kershaw's property interests. Kershaw contends that it is unlikely that any entity could make the line profitable. It estimates that rehabilitation costs needed to meet Federal Railroad Administration (FRA) Class 2 standards, not including the \$750,000 in liens against the line, would exceed \$2 million.⁴ Kershaw maintains that the burden on shippers caused by abandonment would be minimal, as the line has been out of service for 7 years. Kershaw also points out that State Highway 12 is adjacent to the line and, therefore, shippers have transportation alternatives. Further, Kershaw argues that the line is in complete disrepair, is covered in thick vegetation, and has become a community eyesore that poses numerous hazards, including fire, noxious weeds, and pests, in an agricultural area. Citing Modern Handcraft, Inc.–Abandonment, 363 I.C.C. 969 (1981) (Modern Handcraft), Kershaw argues that there is no overriding public interest in continuing service on the line. Kershaw states that, should the Board grant abandonment authority, it would proceed in state court to obtain control of the property.

⁴ See Declaration of Robert Kershaw in Support of Adverse Abandonment Application, Exh. F at 102 (filed Dec. 11, 2003).

In their protest filed on March 12, 2004, Rail Commenters oppose Kershaw's request. Citing RLTD Railway Corp. v. STB, 166 F.3d 808 (6th Cir. 1999), they argue, inter alia, that if abandonment of only the 1-mile segment of rail line on its property were granted, the remainder of the line would be de facto abandoned. Specifically, Rail Commenters assert that granting the 1-mile abandonment proposed would also result in abandonment of the severed line north into Naches and would render the southern remnant at the Yakima end unusable because there are not adequate facilities for storage or turning of equipment on the southern end.

Rail Commenters assert that there is substantial potential for rail service and they present a plan to clear liens from the line, and have Yakima County acquire the line, arrange for rehabilitation, and contract with a third party to reinstate rail service to area shippers. The Toppenish, Simcoe & Western Railroad states that it is willing and able to contract with Yakima County to provide rail service over the Naches Line.⁵ Two area shippers of wood products, Layman Lumber Company, at Naches, and Nepa Pallet & Container Co., Inc., at Yakima, oppose the abandonment, support rehabilitation of the line, and state that they would make use of the line in the future.⁶ As a fallback position, Rail Commenters request that, should we authorize abandonment, we do so for the entire line and also authorize interim trail use/rail banking for the Naches line.

Level 3 also opposes the application in a protest filed on March 15, 2004. Level 3 states that it has contracted with both the current owner of the Naches Line (YILA) and its predecessor (BNSF) for the right to lay fiber optic telecommunications cable in the right-of-way (ROW). Level 3 also states that public utilities use a water main located on the ROW to provide water to the City of Yakima. Level 3 argues that Washington state law recognizes its right, and that of public utilities, to use the ROW to provide essential public services.

In a protest filed on March 12, 2004, WSDOT opposes the abandonment. It agrees with Rail Commenters that, if the 1-mile segment in the middle of the line that crosses Kershaw's property were to be abandoned, the remainder of the line would also have to be abandoned. According to WSDOT, if the line were rerouted around Kershaw's property, the cost of reconstruction would be approximately \$974,480, an amount far exceeding the funds WSDOT expects to have available for rehabilitation of the line.

In a short letter filed on March 12, 2004, BNSF, whose line connects to YILA's portion of the Naches Line at milepost 2.97, supports Yakima County's desire to retain the line for rail service, and BNSF states that it "anticipates that the line will be restored to rail service shortly." BNSF adds that, when this occurs, the line will play an integral role in moving goods to and from customers located on it.

⁵ Appendix I, Exhibit C, to Rail Commenters Joint Protest.

⁶ Appendix I, Exhibit B, to Rail Commenters Joint Protest.

BNSF adds that restoration of rail service will lessen truck traffic on the adjacent highway system in the area.

In a reply filed on May 5, 2004, Kershaw notes that it has only sought to abandon the portion of the line which crosses its property. It argues that the plan to resume rail service is neither economically feasible nor practicable, as there are insufficient funds available to clear liens and rehabilitate the line, and that anticipated future traffic is much too speculative in nature. Kershaw contends that, if Rail Commenters wish to restore rail service, they should file an offer of financial assistance under 49 U.S.C. 10904(c). Kershaw also questions Yakima County's intent to operate a trail over the property in the event of abandonment.

DISCUSSION AND CONCLUSIONS

Applicable Legal Standards

Under 49 U.S.C. 10903(d), the standard governing any application to abandon or discontinue service over a line of railroad, including an adverse abandonment or discontinuance, is whether the present or future PC&N require or permit the proposed abandonment or discontinuance. In implementing this standard, we must balance the competing benefits and burdens of abandonment or discontinuance on all interested parties, including the railroad, the shippers on the line, the communities involved, and interstate commerce generally. See New York Cross Harbor R.R. v. STB, 374 F.3d 1177, 1180 (2004) (Cross Harbor); City of Cherokee v. ICC, 727 F.2d 748, 751 (8th Cir. 1984). In making our determination of what is in the public interest, "the Board shall [also] consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development." 49 U.S.C. 10903(d). And we must take the goals of the Rail Transportation Policy (RTP) into consideration in making our public interest determinations. 49 U.S.C. 10101.

We have exclusive and plenary jurisdiction over abandonments in order to protect the public from an unnecessary discontinuance, cessation, interruption, or obstruction of available rail service. See Modern Handcraft, 363 I.C.C. at 972. Accordingly, we preserve and promote continued rail service where the carrier has expressed a desire to continue operations and has taken reasonable steps to acquire traffic. See Chelsea Property Owners — Abandonment — Portion of the Consolidated Rail Corp.'s West 30th Street Secondary Track in New York, NY, 8 I.C.C.2d 773, 779 (1992) (Chelsea), aff'd Consolidated Rail Corp. v. ICC, 29 F.3d 706 (D.C. Cir. 1994) (Conrail). On the other hand, we do not allow our jurisdiction to be used to shield a carrier from the legitimate processes of State law where no overriding Federal interest exists. See CSX Corporation and CSX Transportation, Inc.—Adverse Abandonment Application—Canadian National Railway Company and Grand Trunk Western Railroad, Inc., STB Docket No. AB-31 (Sub-No. 38) (STB served Feb. 1, 2002).

If we conclude that the PC&N does not require or permit continued operations over the track by the carrier in question, our decision removes that shield, thereby enabling the applicant to pursue other legal remedies to force the carrier off the line. Conrail, 29 F.3d at 709; Modern Handcraft, 363 I.C.C. at 972. But applications for adverse abandonment have historically been denied if there is a potential for continued operations and the carrier has taken reasonable steps to attract traffic. See Cross Harbor, 374 F.3d at 1186; Conrail, 29 F.3d at 711, aff'g Chelsea, 8 I.C.C.2d at 778. In abandonment cases, the applicant (in this case the third party) has the burden of proof. Here, after considering the arguments and balancing the interests of all concerned, we conclude that Kershaw has failed to demonstrate that the adverse abandonment of the 1-mile segment of the Naches Line meets the PC&N test.

PC&N Analysis

The record here does not support a finding that the PC&N require or permit abandonment. It is true that the line has not carried traffic in some years and is in serious disrepair, but this is due to YILA's failure as an operator of the line. Shippers located on the ROW have stated that they would use rail service if restored. The Toppenish, Simcoe & Western Railroad has expressed interest in operating of the line on behalf of Yakima County, and BNSF, the line-haul railroad whose system connects the Naches Line with the interstate rail network, also supports reactivation of the line. The local governments oppose the proposed abandonment and support the restoration of rail service, and they have expressed their willingness to expend the funds necessary to accomplish reactivation. WSDOT has stated that it will provide an estimated \$200,000 in financial assistance to Yakima County to acquire the line from YILA and to clear the liens on the title, and an estimated \$300,000 to complete restoration of the line. This sum is in addition to the \$516,000 loan by WSDOT to YILA, on which YILA defaulted, and appears to be sufficient to return the line to FRA Class 1 standards. See Declaration of Robert Kershaw in Support of Adverse Abandonment Application, Exh. F at 110, 151 (filed Dec. 11, 2003) (providing \$200,000 and \$288,300 estimates). Thus, there is clearly potential for continued rail service over the Naches Line.

This case is similar to City of Colorado Springs—Petition for Declaratory Order—Abandonment Determination, Finance Docket Nos. 31271 and 31230 (ICC served Mar. 22, 1989) (Colorado Springs), where the agency denied a request for adverse abandonment of a line that had been rendered inactive by washouts and over-paving. There, efforts were being made to solicit through traffic for the line, the carrier demonstrated an ongoing interest in preserving the line as part of a longer rail corridor, and substantial public funding had been committed to preservation of the rail corridor as a whole. Id. at 6-7. This case differs from Modern Handcraft, 363 I.C.C. at 971-72, where there had been no traffic over the line for 12 years, the line was physically inoperable, and the carrier had made no serious effort to solicit traffic or reinstate rail service. In contrast here, the governmental entities proposing to reinstate operations have feasible plans to do so. In addition, shippers along the ROW have indicated their interest in using rail service if it were again available over the line.

We realize that Kershaw has legitimate concerns here, related to YILA's management of the property. First, Kershaw cites the expense it incurs in spraying herbicides on the ROW 5-6 times annually. It must incur this expense, applicant maintains, because the unchecked growth of vegetation in the ROW creates a fire hazard and promotes the proliferation of noxious weeds and pests. Second, Kershaw cites difficulty in crossing over the line because parts of it are covered by rocks and debris. These problems should end when rehabilitation of the line is completed and rail service is restored.

Further, granting Kershaw's application would likely defeat local efforts to restore rail service and could have an adverse impact on rural and community development in Yakima County. Conversely, restoration of rail service could have a positive impact by converting truck traffic to rail. Finally, the record also indicates that denial of the proposed abandonment will be consistent with the goals of the RTP, particularly 49 U.S.C. 10101(4), which is to ensure the development and continuation of a sound rail transportation system.

For all of these reasons, we conclude that the public is best served by denying the adverse abandonment application. Given the evidence before us, we cannot find that the prospect for continued rail service, or the need for that service, is as negligible as Kershaw would have us find, and we cannot find that the relief Kershaw seeks outweighs the public interest in rail service on this line. We note that our finding is without prejudice to Kershaw's seeking to reopen or file a new abandonment application, should the proposed rehabilitation and restoration not occur within a reasonable period of time.

Other arguments raised by the parties not relevant to the disposition of this matter have not been discussed here.

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

It is ordered:

1. Kershaw's application is denied.
2. This decision will be effective on December 19, 2004.

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

Vernon A. Williams
Secretary