

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34924

BLACK HILLS TRANSPORTATION, INC., d/b/a DEADWOOD, BLACK HILLS &  
WESTERN RAILROAD—MODIFIED RAIL CERTIFICATE

Decided: January 26, 2010

This decision grants a petition filed on February 9, 2007, by several landowners, seeking to revoke the modified rail certificate of public convenience and necessity (modified certificate) acquired under 49 CFR 1150.21-23 in 2006, by Black Hills Transportation, Inc., d/b/a Deadwood, Black Hills & Western Railroad (the Railroad), to operate approximately 9 miles of rail line extending from milepost 0.0, at Whitewood, to milepost 9.01, at Deadwood, in Lawrence County, SD. The operations were to be conducted pursuant to an agreement between the Railroad and an agency of the State of South Dakota (the State). We find that line was fully abandoned, and thus had already lawfully reverted to private interests before Chicago & North Western Railway Company (C&NW) transferred whatever interest it purportedly held to the State by quitclaim deed in 1972. Thus, we now conclude that the line was not eligible for a modified certificate. Accordingly, the decision granting the modified certificate is vacated and the modified certificate is revoked.

BACKGROUND

In 1890, Fremont, Elkhorn and Missouri Valley Railroad Company (FEMV) acquired a railroad right-of-way (ROW) and built a rail line that ran between Whitewood and Deadwood. The ROW was established in part by the Railroad Right-of-Way Act of 1875 (1875 Act), and in part by private agreements between FEMV and individual land owners. In 1903, FEMV conveyed its interest in the ROW to the C&NW.

The Interstate Commerce Commission (ICC) authorized C&NW to abandon the line in Chicago & North Western Railway Co.—Abandonment—Lawrence County, SD, Finance Docket No. 26079 (ICC served May 20, 1970) (May 1970 Decision). C&NW removed all of the track in 1971. In 1972, C&NW transferred its interest in the ROW to the State by quitclaim deed. In 1985, the State transferred its rights to the South Dakota Department of Game, Fish and Parks (GF&P) by quitclaim deed. In 2003, GF&P, by quitclaim deed, transferred its rights to the ROW to the Northern Hills Regional Railroad Authority (the Authority), a political subdivision of the State.

On August 30, 2006, the Railroad filed a notice with the Board under 49 CFR 1150.23(a), containing the information required by our regulations for a modified certificate to operate,

pursuant to an agreement with the Authority, over the Deadwood–Whitewood line. The Railroad stated that, as operator of the line, it would provide both passenger and freight services, which it said would continue indefinitely. It further stated that the agreement with the Authority would be amended or supplanted prior to actual commencement of freight operations. The Railroad stated that it expected to interchange with Dakota, Minnesota & Eastern Railroad at milepost 0.0, at Whitewood. The Railroad indicated that the line would require reconstruction for the proposed operation. Notice of the modified certificate was published in the Federal Register on September 29, 2006 (71 FR 57600-01) (September 2006 Notice).

On February 9, 2007, Charles Brown (Brown) and several other landowners (collectively, Petitioners) filed a petition to revoke the modified certificate issued in the September 2006 Notice. Petitioners claim that the ROW was abandoned by C&NW in 1970 and that the Board therefore retained no authority to issue the modified certificate. Thus, they assert, the land in which they allegedly held a reversionary property interest has reverted back to them. Petitioners claim that: (1) the Railroad made false and/or misleading representations regarding the nature and status of its purported interest in the Whitewood-to-Deadwood ROW; and (2) the Railroad failed to acknowledge that the proposed usage of the rail line would be solely for an intrastate tourist passenger service, not for freight.

On March 5, 2007, the Railroad replied in opposition to the petition to revoke. It argued that: (1) the ROW was not fully abandoned and is owned by the Authority; (2) the Railroad intends to provide freight service; (3) the petition to revoke was not filed in a timely manner; and (4) the petition should be denied because it does not show new evidence, material error, or changed circumstances.

On May 21, 2007, Petitioners submitted a decision by the South Dakota Supreme Court (the Court),<sup>1</sup> on appeal from the State’s Fourth Judicial Circuit Court, involving some of the landowners who are Petitioners here. In that decision, the Court addressed issues of early Federal law that had granted land patents both to FEMV and to adjacent landowners. The Court found that, when C&NW ceased using the ROW for railroad purposes, C&NW’s property rights in the ROW were extinguished under Federal law.<sup>2</sup> The Court remanded the case to the lower court for a further determination of whether, under state law, the ROW at issue here had been abandoned and to determine the adjacent landowners’ reversionary property interests in conformity with its decision.

The Board was informed that, in a related state court case involving the Petitioners here (brought by other landowners), the Fourth Judicial Circuit Court, guided by the Brown decision, found that the railroad’s property interest in the ROW had been terminated and quieted title in

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<sup>1</sup> Brown v. Northern Hills Railroad Authority, et al., 2007 S.D. 49 (SD 2007) (Brown decision).

<sup>2</sup> See id., slip op. at 7, citing Beres v. United States, 64 Fed. Cl. 403, 428 (Fed. Cl. 2005).

favor of Petitioners. Other property ownership issues were resolved in the Fourth Circuit Court's Default Judgment and Judgment on Stipulated Facts of January 15, 2008,<sup>3</sup> submitted to the Board on March 12, 2008.

On October 31, 2008, Petitioners filed a motion with the Board requesting clarification regarding the scope of the Board's authority to determine whether the State retained title and ownership in the ROW, notwithstanding the state court rulings, because the Authority had presented an argument before the Court and the Fourth Judicial Circuit Court that the Board has the exclusive and preemptive jurisdiction to determine these issues.

### PRELIMINARY MATTER

As previously noted, the Railroad argues that the petition to revoke was untimely and should be rejected. However, a petition to revoke may be filed at any time.<sup>4</sup> Therefore, Petitioners' request to revoke the Railroad's modified certificate was not late and will be accepted. Moreover, Petitioners are not required to show material error, changed circumstances or new evidence under 49 U.S.C. 722. Rather, pursuant to 49 U.S.C. 10502(d), to have an exemption revoked, they need only show that application of a statutory provision is necessary to carry out the transportation policy of section 10101 of the statute.<sup>5</sup> And, if the record before the Board shows that a notice of exemption contained false or misleading information, the Board treats the exemption as void ab initio. 49 CFR 1152.50(d)(3).

### DISCUSSION

A modified certificate is a type of license crafted by the Board's predecessor, the ICC, in a decision entitled Common Carrier Status of States, State Agencies, 363 I.C.C. 132 (1980), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). In that decision, the ICC used its exemption authority at 49 U.S.C. 10505 (now 49 U.S.C. 10502) to authorize states and state agencies to acquire, for the purpose of preserving the opportunity for rail service, rail lines that had been approved for abandonment or had been fully abandoned. The ICC believed that states would be more likely to acquire such lines if the acquisition, and any future termination of service, could be accomplished without the need to comply with traditional regulatory requirements. As part of this process, the ICC established "modified certificates," under which operators over such state-owned lines could obtain and relinquish operating authority merely by providing notice to the agency pursuant to 49 CFR 1150.21-23. To come to the Board for a

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<sup>3</sup> Swaby v. NHRRA, Civ. No. 05-217 (S.D. 4th Jud. Cir. Jan. 15, 2008).

<sup>4</sup> See 49 CFR 1115.4.

<sup>5</sup> See, e.g., Pacific Sun Railroad, LLC—Lease and Operation Exemption—BNSF Railway Company; Watco Companies, Inc.—Continuance in Control Exemption—Pacific Sun Railroad, LLC, STB Finance Docket No. 35173 (STB served May 27, 2009).

modified certificate, however, the state must have acquired the property through purchase or lease. 49 CFR 1150.21.

In its notice, the Railroad asserted that it held a property interest in the ROW appropriate for a modified certificate.<sup>6</sup> The Board issued a modified certificate to the Railroad based on this assertion. Petitioners contend that the failure to include information about pending property interest disputes under the circumstances presented here renders the Railroad's request for a modified certificate false and misleading. The Railroad responds that it provided the information required by section 1150.23 of the Board's modified certificate regulations and was not obligated to provide additional information.

Although the Railroad is correct that it was not specifically required by the regulations to provide information regarding the pending property interest disputes, the issue of whether the State ever actually obtained a property interest in the ROW was key to our authority to grant the modified certificate. See 49 CFR 1150.21. Failure to disclose potential issues regarding ownership of the issue line in a notice could be found to be materially misleading by omission. See, e.g., US Rail Corporation—Lease and Operation Exemption—Shannon G., a New Jersey Limited Liability Company, STB Finance Docket No. 35042, at 3-4 (STB served Oct. 8, 2008). If the State did not have the necessary interest in the ROW, the Railroad would not have been eligible to apply for the modified certificate, and in such circumstances the notice of exemption would have contained false information and would be void *ab initio*.

When an abandonment has been consummated, the agency loses jurisdiction over the property.<sup>7</sup> At that point, the property is no longer part of the national rail transportation system and whatever reversionary interests in the property adjoining landowners may have vest under state law.<sup>8</sup> Accordingly, the Board's authority to issue the modified certificate depends on the Authority having acquired property rights to the ROW.

We find that Petitioners have met their burden of showing that the line was fully abandoned by C&NW and that, thus, the Authority has no property rights to the ROW. Therefore, the Board did not have authority to issue the modified certificate.

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<sup>6</sup> See Notice of Modified Certificate at 1.

<sup>7</sup> See Hayfield Northern v. N.R.R. v. Chicago & N.W. Transp. Co., 467 U.S. 622, 633-34 (1984).

<sup>8</sup> See id. at 633-34; Preseault v. ICC, 494 U.S. 1, 8 (1990) (state law governs disposition of reversionary property interests subject to the Board's jurisdiction to regulate abandonments); Kansas City Pub. Ser. Frgt. Operation—Exempt.—Aban., 7 I.C.C. 2d 216, 225-26 (1990) (issues of real property rights involving lines authorized to be abandoned are within exclusive jurisdiction of the State).

At the time C&NW sought abandonment authority, the Board would have determined whether an abandonment had been consummated by making a case-by-case evaluation of all the facts and circumstances to determine the line owner's intent.<sup>9</sup> Given the totality of circumstances here, we conclude that C&NW fully abandoned the line. The May 1970 Decision, which authorized C&NW to abandon the line, was the first step needed for a full abandonment. Following that authorization, C&NW took further actions showing an intent to consummate the authority to abandon the rail line. C&NW removed all the railroad tracks and facilities. No service has been provided on the line since 1970. The passage of so much time between that date and the request for a modified certificate (more than 30 years) shows a lack of intent to maintain the ROW for potential future rail purposes. Our records also show that C&NW submitted a letter, dated December 31, 1970, to the ICC, attaching its journal entries which indicate the railroad's intent to retire the line and salvage the assets.<sup>10</sup> This is the approach followed at that time to inform the agency when an abandonment had been consummated. We therefore view the journal entries as conclusive evidence that C&NW, in fact, exercised its abandonment authority before it purported to transfer its interest in the property by quitclaim deed to the State in 1972.

In short, we find that Petitioners have met their burden of proof to justify revoking the modified certificate and vacating the September 2006 Notice. Petitioners' contention that the abandonment of the ROW was consummated in or around 1971 is supported by the evidence presented to us following issuance of the modified certificate and by the agency's records in the C&NW abandonment proceeding.<sup>11</sup> The Board issued the modified certificate based on an agreement between the Railroad and the Authority, and based on the representation in the Railroad's notice that the Authority had a property interest in the ROW appropriate for a modified certificate. That representation has been shown to be false. The property interest in the ROW had already reverted back to Petitioners here prior to the purported transfer to the State in

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<sup>9</sup> See Beaufort Railroad Company, Inc.—Modified Rail Certificate, STB Finance Docket No. 34943 (STB served Mar. 19, 2008 and May 20, 2009); 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), slip op. at 6. See also Birt v. STB, 90 F.3d 580, 585 (D.C. Cir. 1996). For rail lines abandoned since 1997, and thus not applicable in this case, the Board has required the filing of a notice of consummation, which is considered to be conclusive evidence of abandonment consummation (if there are no legal or regulatory barriers to consummation, such as outstanding conditions). 49 CFR 1152.29(e)(2).

<sup>10</sup> Our agency records contain a letter from the ICC to C&NW dated January 18, 1971, referring to the December 31, 1970 letter, and an (undated) single page of C&NW's journal entries consisting of salvage valuation accounting information with regard to the line.

<sup>11</sup> Given our findings, the Board need not address Petitioners' allegation that the Railroad intended to use the line for intrastate passenger rather than freight rail service.

1972. Accordingly, the petition to revoke will be granted, and the September 2006 Notice granting a modified certificate is vacated as void ab initio.<sup>12</sup> Given that conclusion, there is no need to address any other issues raised in the petition to revoke or in the motion for clarification. Petitioners' motion for clarification is denied as moot.

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

It is ordered:

1. Petitioners' request to revoke the modified certificate is granted.
2. The September 2006 Notice granting a modified certificate is vacated.
3. The request for clarification is dismissed as moot.
4. This decision is effective on its date of service.

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

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<sup>12</sup> See Central Kansas Railway, Limited Liability Company—Abandonment Exemption—in Marion and McPherson Counties, KS, STB Docket No. AB-406 (Sub-No. 6X) (STB served Dec. 8, 1999), slip op. at 8.