

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34943

BEAUFORT RAILROAD COMPANY, INC.—MODIFIED RAIL CERTIFICATE

Decided: March 18, 2008

This decision denies a petition by several landowners for reconsideration of a December 2006 notice of the filing of a modified certificate of public convenience and necessity (modified certificate) under 49 CFR 1150.21-23 for operation of a rail line in South Carolina. The landowners seek a Board finding that the rail line, extending approximately 25 miles from milepost AMJ-443.26, in Yemassee, SC, to milepost AMJ-468.31, in Port Royal, SC, does not qualify for a modified certificate that would allow Beaufort Railroad Company, Inc. (BRC), to operate over the line. We are denying the petition for reconsideration. We find that the line has not been abandoned, that it remains a part of the interstate rail system, and that the Board retains jurisdiction to authorize BRC's operations pursuant to a modified certificate.

BACKGROUND

This proceeding involves a rail line formerly owned by Seaboard System Railroad, Inc. (Seaboard). The line was authorized for abandonment by the Board's predecessor, the Interstate Commerce Commission (ICC), in 1984.<sup>1</sup> Abandonment authorizations, however, are not self-executing, and here, Seaboard did not exercise its authority to abandon. Rather, after Seaboard was authorized to abandon the line, the line was acquired by the South Carolina State Ports Authority (SCSPA) and then leased to the South Carolina Public Railways Commission (SCPRC), which is now organizationally a part of the State of South Carolina Division of Public Railways (SCDPR) (collectively, South Carolina).<sup>2</sup>

Tangent Transportation Company, Inc. (Tangent), a wholly owned subsidiary of SCPRC, operated the line, pursuant to a modified certificate, from 1985 to 2003.<sup>3</sup> A modified certificate

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<sup>1</sup> Seaboard System Railroad, Inc.—Abandonment—in Beaufort County, SC, Docket No. AB-55 (Sub-No. 110) (ICC served Aug. 23, 1984).

<sup>2</sup> BRC states that it is a subsidiary of SCDPR, a division of the South Carolina Department of Commerce, and that SCSPA is also an instrumentality of the State of South Carolina.

<sup>3</sup> See Tangent Transportation Company—Modified Rail Certificate, Finance Docket No. 30655 (ICC served June 13, 1985).

is a type of license created by the Board's predecessor, the Interstate Commerce Commission (ICC), in a decision entitled Common Carrier Status of States, State Agencies, 363 I.C.C. 132 (1980) (Common Carrier Status), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982) (Simmons). In that decision, the ICC used its exemption authority at 49 U.S.C. 10505 (now 49 U.S.C. 10502) to authorize states to acquire, for the purpose of preserving the opportunity for rail service, rail lines that had been approved for abandonment but where the abandonment had not been consummated. The ICC did so to encourage states to acquire these lines. It believed that states would be more likely to acquire such lines if the acquisition, and any future abandonment, could be accomplished without the need to obtain authority from the ICC. In addition, the ICC established "modified certificates," which operators over these state-owned lines could obtain and relinquish merely by providing notice to the agency.

In 2003, Tangent gave the required 60-day notice to terminate service under its modified certificate,<sup>4</sup> apparently because of the anticipated loss of its primary shipper, which was expected to occur in connection with the imminent closure of the Port of Port Royal (the Port). South Carolina asserts, however, that it has never consummated the abandonment, but rather has maintained the right-of-way (ROW) and kept the line within the national transportation system and the Board's jurisdiction.

On December 1, 2006, BRC filed a notice with the Board under 49 CFR 1150.23(a), Subpart C, containing the information required for a new modified certificate. BRC was authorized to begin operations upon filing that notice.<sup>5</sup> In accordance with the Board's modified certificate procedures, BRC stated that, as operator of the line, it will provide freight services on an "as required" basis, pursuant to an operating agreement with SCSPA and SCDPR. Notice of the filing of the modified certificate was published in the Federal Register on December 28, 2006 (71 FR 78270) (December 2006 notice), pursuant to 49 CFR 1150.23(a).

#### POSITIONS OF THE PARTIES

On January 17, 2007, Delores Coberly, Don Edgerly, John Keith, Dartha P. Pierce, Pender Brothers, Inc., and John Scherer (collectively, Petitioners) jointly filed a petition, under 49 CFR 1115.3, for reconsideration of the Board's December 2006 notice. Petitioners claim that they own the fee interest in parcels of the ROW that, together with other such parcels, comprise a rail line, which they refer to as the Port Royal Railroad (PRR) line. The line extends from a point of connection with CSX Transportation, Inc. (CSXT), at Yemassee, to the Port, a distance of approximately 25 miles. Petitioners argue that the Board lacks jurisdiction to issue a modified certificate for two reasons: first, because the rail segment was fully abandoned in 2003, when Tangent terminated service under its modified certificate, and second, because BRC's proposed operations are wholly intrastate and do not include the transportation of freight to or from a line

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<sup>4</sup> See 49 CFR 1150.24.

<sup>5</sup> See Common Carrier Status, 363 I.C.C. at 138.

in interstate commerce. They contend that any rail service that would be performed would run only between Yemassee and Port Royal, i.e., wholly within the State of South Carolina and therefore wholly within intrastate commerce.<sup>6</sup> Petitioners also contend that the modified certificate was not sought in good faith, but rather, was sought to re-establish the Board's jurisdiction over the line so that the line could be converted to a recreational trail, which Petitioners would oppose.

On January 24, 2007, Diane Burnett and Sarah Walker (together, Intervenors) filed a petition for leave to intervene. Intervenors seek to join Petitioners' request to reconsider the issuance of the December 2006 notice. They state that they are landowners with the same interests as Petitioners.

On February 6, 2007, BRC replied in opposition to the petition for reconsideration. BRC argues that: (1) even though the line had been authorized for abandonment in 1984, and the line has not been operated since 2003, abandonment was never consummated, and the Board continues to have jurisdiction over it; (2) BRC will continue to operate in interstate commerce; (3) BRC will provide the same interstate service that the predecessor operator, Tangent, obtained the right to provide in 1985; (4) BRC will provide freight service on an "as required" basis; and (5) Petitioners failed to provide any evidence of new facts or changed circumstances. In particular, BRC notes that, although the Port was authorized to close in 2004, it has not fully closed down and some shippers remain in the area.<sup>7</sup>

On February 16, 2007, counsel for BRC submitted to the Board a letter from Colonel R. W. Lanham, Commanding Officer of the U.S. Marine Corps Air Station at Beaufort, SC. In his letter, Colonel Lanham projects that resumed rail service is not likely in the near term, but states that it would be in the public interest to maintain the PRR ROW as a government asset by using it for public purposes in the near future, while preserving the ROW as a future transportation option. On February 21, 2007, counsel for Petitioners filed a letter maintaining that Colonel Lanham's letter confirms the primary allegation made by Petitioners that BRC does not intend to provide rail service pursuant to the modified certificate.

On March 22, 2007, Clarendon Farms, LLC, Diane D. Terni, Greedy Children Land, LLC, and Prodigal Son, LLC (jointly, Clarendon Farms Intervenors) filed a petition for leave to intervene, in which they request reconsideration of the issuance of the December 2006 notice and also the initiation of an investigation into the factual matters at issue. Clarendon Farms Intervenors state that they have the same interests as Petitioners. BRC and SCSPA (collectively, BRC) filed a joint reply opposing intervention.

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<sup>6</sup> See Petition at 9. BRC stated in its notice that it did not expect to make any interchange or interline connections with any connecting railroads at that time.

<sup>7</sup> See BRC Reply in Opposition at 9.

## PRELIMINARY MATTERS

Intervenors and Clarendon Farms Intervenors are landowners with an interest in the proceeding; accordingly, we will allow them to intervene. Although the petitions to intervene were late-filed, no one will be harmed by allowing the interested landowners to be heard. However, we will not grant Clarendon Farms Intervenors' request for an investigation. The existing record provides sufficient information for resolution of the issues relevant to this proceeding.

In their petition, Intervenors suggest that BRC should have provided notice of the modified certificate to all individual landowners. Petitioners also argue that, although the December 2006 notice was published in the Federal Register, it was not published in any media outlet where potentially interested parties would have seen it. BRC replies that it was not obligated to serve its notice on individual landowners because publication in the Federal Register and on the Board's website provided sufficient notice. It is well-settled that notice in the Federal Register is sufficient notice<sup>8</sup> under the modified certificate regulations, and BRC has fulfilled the notice requirements.

## DISCUSSION AND CONCLUSIONS

Under 49 CFR 1115.3, a petition for reconsideration will be granted only upon a showing that the prior decision will be affected materially because of new evidence or changed circumstances, or involved material error. Further, such a petition must state in detail the nature of and reasons for the relief requested. We find that Petitioners, Intervenors, and Clarendon Farms Intervenors have failed to satisfy this standard.

Petitioners and all of the intervenors raise three issues. First, they claim that the line was abandoned in 2003 after Tangent terminated service. Second, they allege that BRC does not intend to operate the line as a part of interstate commerce. Third, they argue that BRC's modified certificate notice is an improper device to convert the PRR rail corridor to interim trail use rather than to resume active rail service. We reject all three claims, following a discussion of relevant law on modified certificates. For the reasons discussed below, we find that the line was not abandoned, that it remains a part of the national rail system, and that the modified certificate process here is not being used improperly.

The modified certificate process and the need to preserve local rail service.

Under 49 CFR 1150.21-23, the modified certificate program gives states the opportunity to take over lines that either have been abandoned or have been authorized for abandonment and

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<sup>8</sup> See Friends of Sierra R.R. v. ICC, 881 F.2d 663, 667-68 (9th Cir. 1989).

to keep them in the national rail system without being subject to full regulation.<sup>9</sup> Lines that are eligible for the modified certificate process are subject to the Board’s jurisdiction, although the entry and exit procedures are different than for other types of lines. In particular, the operators of the lines have been exempted from the approval requirements for start-up and termination of operations of the line under 49 U.S.C. 10901 and 10903, respectively.

Under the Board’s modified certificate process, the operator may commence operations simply upon filing a notice for a modified certificate of public convenience and necessity. The notice provides the Board essential information concerning the financial condition of the operator, liability insurance coverage, and the nature of the operations. The Board reviews the filed information for sufficiency and completeness and issues a notice authorizing the operations under the modified certificate.<sup>10</sup> Like the institution of service, cessation of service is also quite simple for lines subject to modified certificates. Board authority under 49 U.S.C. 10903 is not required; rather, an operator may terminate service upon 60 days’ notice.<sup>11</sup>

These entry and exit procedures are so minimal because of the types of lines involved—those that have already been abandoned or authorized for abandonment—and the types of new owners involved—states or state agencies. The modified certificate process was developed “to promote continuation of rail service by removing certain regulatory constraints from the States and thus encouraging rail continuation programs.”<sup>12</sup> It advances the congressional policy “of placing the states at the forefront of the federal effort to preserve local rail service.”<sup>13</sup> The modified certificate process, like offers of financial assistance, the feeder line program, and interim trail use/rail banking, preserves the Board’s jurisdiction over a rail line and rail corridor that would otherwise be allowed to be abandoned.<sup>14</sup>

#### Abandonment Issue.

Of course, lines subject to the modified certificate program—or to any of the other programs designed to keep rail lines within the national rail system—can be abandoned, and

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<sup>9</sup> See Simmons, 697 F.2d at 331; 49 CFR 1150.21.

<sup>10</sup> Id.

<sup>11</sup> See 49 CFR 1150.24.

<sup>12</sup> Common Carrier Status, 363 I.C.C. at 133.

<sup>13</sup> See Simmons, 697 F.2d at 329, 341.

<sup>14</sup> The offer of financial assistance and feeder line programs (see 49 U.S.C. 10904, 10907) provide for the forced sales of rail lines to financially responsible parties willing to provide service, while the National Trails System Act (Trails Act), 16 U.S.C. 1247(d), provides for the use of a rail line for interim trail use while preserving the ROW for future rail use (i.e., rail banking). See Preseault v. ICC, 494 U.S. 1, 5-7 (1990) (Preseault).

once they are, they are no longer part of the national rail transportation system and are beyond the Board's jurisdiction.<sup>15</sup> Here, although Tangent did discontinue service over the line, and for a period of time no other operator stepped in to provide it, temporary discontinuance of service by the operator is not the same as abandonment by the line owner (in the present situation, the State). The Board retains jurisdiction over rail properties until abandonment has been consummated by some action of the owner.

Historically, determining when abandonment authority was actually consummated has sometimes proven elusive, as it depended on a case-by-case evaluation of all the facts and circumstances to determine the line owner's intent. Therefore, in 1997, the Board established by rule a requirement that railroads authorized to abandon lines under 49 U.S.C. 10903 (or 49 U.S.C. 10502) file a notice of consummation of abandonment so that the railroad's intent would be made clear.<sup>16</sup> But here the State, the line owner, has been granted an exemption from the abandonment provisions of the statute in Common Carrier Status. Such an owner need not, and based on our experience does not, file a notice of consummation when it decides to withdraw such a line from the national rail system. The state is free in such cases to consummate abandonment without regulatory oversight. Where, as here, the issue arises as to whether such a withdrawal has occurred, we must look at traditional factors to determine the intent of a state rail line owner to abandon a line.

There is no rigid formula for determining intent; rather, the Board examines the broad spectrum of facts in each case.<sup>17</sup> For example, in Kokomo, the railroad's removal of sections of track was considered in the Board's determination of the railroad's intent to consummate an abandonment, although the removal was not found to have been determinative.<sup>18</sup> In Kansas Eastern Railroad, Inc.—Abandonment Exemption—in Butler and Greenwood Counties, KS, STB Docket No. AB-563 (Sub-No. 1X), slip op. at 2-3 (STB served June 2, 2006), the intent to use the rail property for non-rail uses, including the provision of long-term leases to adjacent landowners, was considered as part of the examination of the railroad's intent to preserve the ROW for future reactivation of rail service.<sup>19</sup> In general, then, when determining whether an

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<sup>15</sup> See Preseault, 494 U.S. at 5 n.3; Hayfield N. R.R. v. Chicago, N.W. Transp. Co., 467 U.S. 622, 633 (1984); Becker v. STB, 132 F.3d 60, 62 (D.C. Cir. 1997).

<sup>16</sup> 49 CFR 1152.29(e).

<sup>17</sup> See 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), slip op. at 6 (STB served May 4, 2005) (Kokomo). See also Birt v. STB, 90 F.3d 580, 585 (D.C. Cir. 1996) (Birt).

<sup>18</sup> See also Birt, 90 F.3d at 586.

<sup>19</sup> See also Burlington Northern Railroad Company—Abandonment Exemption—Between Klickitat and Goldendale, WA, STB Docket No. AB-6 (Sub-No. 335X) et al., slip op. at 3-5 (STB served June 8, 2005).

abandonment has been consummated, the Board looks for a physical act which shows a clear intention on the part of the rail line owner to remove the line from the national rail system and relinquish the property interest.<sup>20</sup>

In considering the facts here, we find no intent on South Carolina's part to abandon the PRR line following Tangent's termination of service in 2003. To the contrary, South Carolina has not only retained the tracks and ties in place, it has maintained them in a state of readiness for service for several years. South Carolina has provided details of its efforts to maintain the line since 2003, and its statements are unrebutted by Petitioners or Intervenors. Specifically, South Carolina states that, since 2003, it has inspected the tracks, maintained and repaired cross ties, patched and paved railroad crossings, controlled weeds and brush, and removed and replaced track.<sup>21</sup> South Carolina further indicates that the line is capable of accepting shipper traffic at this time, although some additional expense would be necessary to fully restore active rail service.<sup>22</sup>

A party intending to take a line out of the national rail system would not spend the time, effort, and money on the line that South Carolina has invested here. Despite the opportunity to do so on reply, Petitioners and Intervenors have not provided any evidence to rebut South Carolina's statements about its maintenance program. In these circumstances, we find that the line has not been abandoned. Accordingly, any reversionary property rights that may be held by Petitioners, Intervenors, or Clarendon Farms Intervenors have not vested. Rather, the line remains subject to the Board's jurisdiction.

We note that in Pennsylvania Dep't of Transp.—Abandonment Exemption—Portion of Valley Branch, Docket No. AB-373X et al., slip op. at 6 n.18 (ICC served Apr. 29, 1993) (PaDOT), the ICC said, in a footnote, that because a state requires no authority to abandon a line acquired under Common Carrier Status, the discontinuance of operations by the state's contract operator under a modified certificate terminates the agency's jurisdiction over the line. The issue in that case, however, was whether further agency authority was needed to abandon certain line segments, not whether discontinuance by a modified certificate operator amounted to consummation of abandonment by the line owner. Moreover, in that case the ICC, in fact, found that it *retained* jurisdiction (i.e., that abandonment had not been consummated) over a previously-abandoned line segment owned by the Commonwealth of Pennsylvania, even though Pennsylvania's contract operator (which was subject to the modified certificate and notice requirements of 49 C.F.R. 1150.22-24 but failed to comply with them) had discontinued service several years earlier. See PaDOT, slip op. at 4, 6. Later, in Wisconsin and Calumet Railroad

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<sup>20</sup> See Vieux v. E. Bay Reg'l Park Dist., 906 F.2d 1330, 1341 (9th Cir. 1990) (citing Vieux v. County of Alameda, 659 F. Supp. 1023, 1030 (N.D. Cal. 1987)).

<sup>21</sup> BRC Reply in Opposition at 11.

<sup>22</sup> Id.

Company, Inc.—Notice of Interim Trail Use and Termination of Modified Certificate, STB Finance Docket No. 30724 (Sub-No. 2) (STB served Mar. 11, 1998), the Director of the Board's Office of Proceedings denied a request for issuance of a notice of interim trail use for a line that previously had been abandoned (unlike the line at issue here), then was acquired by the Wisconsin Department of Transportation and operated under a modified certificate. The Director denied the NITU request on the ground that the Board's jurisdiction over the line ended when the modified certificate operator ceased operations.

Those prior decisions, however, did not establish a general agency policy that an operator's termination of modified certificate operations under 49 C.F.R. 1150.24 amounts to a self-executing consummation of abandonment by the line owner and termination of Board jurisdiction over the line, and we expressly decline to interpret our regulation in that way. Instead, as discussed above, we will consider the question of whether the owner of a line operated under a modified certificate has consummated abandonment of the line following the operator's termination of service by examining the totality of the facts and circumstances in each case. We do so because, first, the question of consummation turns on the intent of the line owner, not its operator. Moreover, our determination that a notice of termination by a modified certificate operator should not be self-executing regarding the question of consummation of existing abandonment authority by the rail line owner is consistent with the larger policy of the Board and with the public interest. The Board, and the ICC before it, have encouraged states to purchase rail lines at risk to preserve them for present or future rail service. We have done so largely by relieving states of the regulatory burdens of entry and exit. It therefore would be at odds with that goal and that philosophy for us to conclude that, once a modified certificate operator's arrangement with a state for providing rail service ends, the state could automatically lose its property and its public investment of funds in the property unless it engages a replacement operator immediately or within a short period of time. In addition, we are particularly reluctant to find that rail ROWs may be inadvertently lost to the national rail network when the nation currently faces insufficient capacity to handle growing rail traffic.

This does not mean that we would never conclude that a line that has been operated by a modified certificate holder has been abandoned. It does mean, however, that the mere failure of a line owner to engage another operator prior to termination of service by an incumbent modified certificate operator will not be considered to be conclusive evidence of the line owner's intent to consummate an abandonment. Rather, it is appropriate to view the totality of the circumstances to determine whether abandonment has occurred, as we did in connection with lines of railroad generally prior to the adoption of the notice of consummation requirement.

Retaining the PRR line in the interstate rail transportation system.

Under 49 U.S.C. 10501(a)(2), the Board has jurisdiction over rail transportation that is performed in a state and a place in the same or another state as part of the interstate rail network. Although BRC stated in its notice that it had no immediate plans to establish an interchange with a connecting carrier, BRC explained in its reply that this statement was due to the fact that it did

not have a shipper with a need for service that would require such a connection at the time it filed its notice.<sup>23</sup> But the line was connected to the national rail system in the past and remains physically connected to a CSXT main line at Yemassee that travels south to Florida and north to other states.<sup>24</sup> BRC's un rebutted position is that the "infrastructure, track, signage, and switch remain and, with appropriate refurbishing, BRC will be able to resume service for a shipper to interchange with CSX."<sup>25</sup> Thus, there is no evidence that the line has been severed from the interstate rail system.<sup>26</sup> Although the Port closure may have eliminated a principal shipper, BRC's modified certificate imposes on it a common carrier obligation to transport any shipper's freight "as required" in interstate commerce until it discontinues service or South Carolina abandons the line. Therefore, the Board properly issued a modified certificate authorizing BRC to operate over the PRR line.

#### Trail use.

Under these circumstances, Petitioners have not shown that BRC's modified certificate notice is a sham that justifies vacating the notice. Should BRC terminate its service obligations and South Carolina find an interested party to use the ROW for interim trail use, that outcome would be permissible, provided that it is pursued under the applicable statutory and regulatory requirements of the Trails Act. Indeed, there is precedent for approving trail use requests once service has been terminated under a modified certificate,<sup>27</sup> and Petitioners concede the legitimacy of that approval.<sup>28</sup> As with the modified certificate process, interim trail use/rail banking preserves a local rail line for future interstate rail service and is in the public interest.

### CONCLUSION

The Board finds that Petitioners and intervenors have failed to meet their burden of showing material error, new evidence or substantially changed circumstances that would justify reconsideration of this proceeding and vacating of the December 2006 notice, and they have not

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<sup>23</sup> See BRC Reply in Opposition at 16.

<sup>24</sup> Id. at 18.

<sup>25</sup> Id.

<sup>26</sup> Cf. RLTD Railway Corp. v. STB, 166 F.3d 808, 812 (6th Cir. 1999) (affirming STB's determination that a line was no longer "linked to and part of the interstate rail system" and a *de facto* abandonment had occurred).

<sup>27</sup> See, e.g., South Dakota Railway Company—Notice of Interim Trail Use and Termination of Modified Rail Certificate, Finance Docket No. 31874 (STB served July 17, 2007); D&I Railroad Co.—Notice of Interim Trail Use and Termination of Modified Rail Certificate, Finance Docket No. 29910 (Sub-No. 1) (STB served Oct. 6, 2004).

<sup>28</sup> See Petition at 6.

demonstrated that any further investigation is warranted. The Board continues to retain jurisdiction over the line, and it properly accepted BRC's modified certificate notice filing. Accordingly, the petition for reconsideration is denied, and the December 2006 notice for a modified certificate remains in effect.

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

It is ordered:

1. The requests for leave to intervene are granted.
2. The request for an investigation is denied.
3. The requests for reconsideration of the December 2006 notice are denied.
4. This decision is effective on its date of service.

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

Anne K. Quinlan  
Acting Secretary