

SURFACE TRANSPORTATION BOARD¹

DECISION

Docket No. AB-33 (Sub-No. 86)

UNION PACIFIC RAILROAD COMPANY--ABANDONMENT--
IN MORGAN COUNTY, CO (JULESBURG SUBDIVISION)

Decided: January 16, 1997

By petitions filed July 8, 1996, Eugene L. Caneva, owner of the Sunnyside Ranch, and The National Association of Reversionary Property Owners (NARPO) seek administrative review of a decision of the Director of the Office of Proceedings, served June 21, 1996. That decision substituted The Rails to Trails Conservancy (RTC) as a new negotiating party for trail use. The decision also extended to December 12, 1996, the time during which the Union Pacific Railroad Company (UP) is precluded from consummating the abandonment authority granted in this proceeding. By decision served December 11, 1996, a further extension to June 10, 1997, was granted. Petitioners contend that UP had already consummated the abandonment and, consequently, that the Board had no jurisdiction to substitute RTC as a new negotiating party or to grant an extension. RTC filed a reply supported by UP.² We conclude that the abandonment

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 under 49 U.S.C. 10903. Therefore, this decision applies the law in effect prior to the ICCTA.

² RTC further argues that petitioners' appeals must be rejected because they were filed 17 days after the Director's decision was served and thus were not timely. NARPO counters that 49 CFR 1115.3 applies here (appeals must be filed within 20 days from the service date) and thus 20 days is the proper time period. However, section 1115.3 applies only to decisions of the entire board, not Director decisions. Because these petitions are appeals from a decision of the Director of the Office of Proceedings under authority delegated under 49 CFR 1011.8(c), section 1011.2(a)(7) is applicable and thus the time limit is 10 days. NARPO also states that its petition was mailed on the 10th day after the June 1996 decision was served. We note, however, that the filing date of a pleading is the date received at the Board and not the date of deposit in the mail. 49 CFR 1104.6. However, due to the importance of the matter, the fact that no party will be prejudiced by our consideration of the appeals, and because the proceeding will not be unduly delayed by such consideration, we will accept the late-filed pleadings.

(continued...)

has not been consummated, that we continue to have jurisdiction over the line, and that the extension was properly granted. We will deny the petitions.

BACKGROUND

UP was authorized to abandon a portion of its Julesburg Subdivision line (decision served and published in the Federal Register at 59 FR 48335 on September 20, 1994) consisting of about 17.68 miles, extending from milepost 81.10, near Union, to the end of the line at milepost 98.78, near Fort Morgan, in Morgan County, CO, subject to conditions. On December 30, 1994, a decision and certificate of interim trail use or abandonment (CITU) was served that authorized a 180-day period for Colorado State Parks (State Parks) and Historic Trails of Morgan (Historic Trails) to negotiate an interim trail use/rail banking agreement with UP for the right-of-way involved in this proceeding. The negotiating period under the CITU was extended by decisions served on July 13, 1995, December 28, 1995, February 27, 1996, April 11, 1996, and June 12, 1996.

By letter filed on May 28, 1996, State Parks informed the Board that it had been unable to reach an agreement with UP on the terms of trail use/rail banking, and that it would be terminating its involvement in trail use negotiations with UP. Also, by facsimile dated June 17, 1996, Historic Trails notified the Board that it was also no longer a party to the proceeding.

By motion filed June 12, 1996, RTC stated that it wished to negotiate a trail use agreement with UP and requested, with UP's consent, an extension of the CITU to December 12, 1996. RTC stated that, in light of State Parks' and Historic Trails' decisions to discontinue negotiations with UP, RTC would assume responsibility to negotiate a trail use agreement with the railroad. RTC submitted a statement indicating its willingness to assume full financial responsibility for tax liability and for managing the right-of-way for trail purposes. RTC also acknowledged that the use of the right-of-way for trail purposes is subject to future restoration for rail service.

Based on these representations and UP's willingness to enter into negotiations with RTC, in the June 1996 decision, the Board, by the Director of the Office of Proceedings, modified the September 20, 1994 decision to the extent necessary to implement trail use/rail banking by RTC, with the trail use negotiation period extending until December 12, 1996. Subsequently, a further extension to June 11, 1997, was granted.

POSITIONS OF THE PARTIES

In somewhat identical pleadings, petitioners argue that the ICC, and consequently the Board, had lost jurisdiction prior to granting the CITU to RTC because UP had allegedly consummated the abandonment prior to that time. They assert that trail use/rail banking conditions thus could not be imposed by the Board in the June 1996 decision.

²(...continued)
Accordingly, we will address the issues contained therein.

In support of this argument, Mr. Caneva states that the ICC lost jurisdiction over this line when UP did not include the line in its January 1995 general tariff; when rails and ties were removed before August 1995; and when the ICC issued a certificate of abandonment in the September 23, 1994 decision.³

NARPO argues that UP consummated this abandonment on either of two occasions. The first occasion was sometime in August 1995, after UP had canceled the tariffs and removed the ties and rails; the second was when the first CITU extension expired on November 26, 1995.⁴

RTC counters that the Board has continuing jurisdiction over the property because the prior extensions were timely requested by State Parks before the expiration of the extended CITU, and that the Board acted on the extension request prior to the expiration of the CITU. UP also agreed to the extensions and to the substitution of RTC as a new negotiating party. Thus, RTC concludes that there was no break in the rail banking negotiating period during which abandonment authorization could have been consummated.⁵

DISCUSSION AND CONCLUSIONS

Section 1247(d) of the National Trails System Act, 16 U.S.C. 1247(d), employs mandatory language to command that "if a [trail

³ Both Mr. Caneva and NARPO also argue that there is no record that RTC supplied a map as required by 49 CFR 1152.29(a)(1). However, we note that RTC fulfilled this requirement by attaching a map to its "Statement of Willingness." Petitioners also argue that 49 CFR 1152.29(f) requires a joint statement by both the existing and future trail users. NARPO also wants RTC to be required to file a statement of financial "strength." RTC filed no such statements. RTC correctly notes, however, that no joint statement was required because there is no existing trail user, nor was a statement of financial strength required. The only mandatory statement is one evidencing the user's willingness to assume full responsibility for managing the right-of-way. 49 CFR 1152.29(a)(1). RTC provided a statement of willingness to assume financial responsibility in its motion to extend the negotiating period, Exhibit B, filed June 12, 1996.

⁴ NARPO appears to believe that the first 6-month extension was granted on February 27, 1995, and expired on November 26, 1995. However, the first extension was granted by decision served July 13, 1995. That decision extended the negotiating period to December 24, 1995.

⁵ RTC also argues that the petitions should be dismissed because neither petitioner is an attorney or practitioner before this Board and thus neither can represent other property owners. We agree that neither petitioner can represent the other property owners since neither is a practitioner or, to our knowledge, an attorney. However, Mr. Caneva is an adjacent property owner and has standing on his own to represent his own interests. Also, the ICC has held in the past that, because NARPO's members are potentially affected by decisions interpreting and applying the Trails Act, NARPO itself has standing in cases such as this. See Southern Pacific Transportation Company--Exemption--Abandonment of Service in San Mateo County, CA, Docket No. AB-12 (Sub-No. 118X) (ICC served June 26, 1990).

user] is prepared to assume full responsibility for management of such right-of-way . . . then the Commission [now Board] shall impose such [trail use] terms . . . and shall not permit abandonment or discontinuance inconsistent or disruptive of such use." Under our procedures, if a prospective trail user requests an interim trail arrangement and the carrier indicates its willingness to negotiate such an arrangement, the Board issues a CITU or, in exemption cases, a Notice of Interim Trail Use. Rail Abandonments--Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 628-30 (1986). Section 1247(d) imposes upon us a ministerial duty to impose trail use conditions where the parties voluntarily agree to such usage. Rail Abandonment--Trails Act--Policy Statement, 5 I.C.C.2d 370 (1989) (Policy Statement); Iowa Southern R. Co.--Exemption--Abandonment, 5 I.C.C.2d 496 (1989), aff'd sub nom. Goos v. I.C.C., 911 F.2d 1283 (8th Cir. 1990); Wisconsin and Calumet Railroad Company, Inc.-- Notice of Interim Trail Use and Termination of Modified Certificate, Finance Docket No. 30724 (Sub-No. 1) (ICC served Mar. 14, 1991).

Under the CITU, the parties have a 180-day period in which to negotiate an interim trail use arrangement. During that period, the railroad may discontinue service, cancel the tariffs, and salvage the track and other equipment. If no trail use agreement is reached, the CITU automatically converts into an effective certificate authorizing abandonment. On the other hand, if a trail use agreement is reached, it is automatically authorized by the CITU. See Policy Statement, 5 I.C.C.2d at 372-73.⁶

Our review of the record leads us to conclude that UP did not demonstrate an intent to abandon the line because from the outset of this case UP has remained willing to negotiate a trail use agreement for this line. A railroad must take action to exercise abandonment authority. Moreover, the Board does not lose jurisdiction over the underlying right-of-way unless the railroad's action is to fully abandon the line as opposed to exercising the lesser-included authority to discontinue service over the line. Here, the parties' expressed desire and intention to continue trail use negotiations beyond the 180-day period, and UP's joining in the requests for more time, and the substitution

⁶ Upon termination of the trail use arrangement, if the railroad does not wish to reinstitute service (or continue to hold the line for possible future use), it must file a request that the CITU be vacated. Under these circumstances, the Board would reopen the abandonment proceeding, vacate the CITU, and issue a full abandonment certificate. 49 CFR 1152.29(c)(2).

of RTC as a negotiating party⁷ show that there was no intent to fully abandon the line.⁸

Petitioners argue that the Board lacked jurisdiction to extend the negotiating period in this case, citing Fritsch v. ICC, 59 F.3d 248 (D.C. Cir. 1995), cert. denied sub nom. CSX Trans. v. Fritsch, 116 S. Ct. 1262 (1996). However, the facts presented in Fritsch are significantly different from the facts presented in this case. In Fritsch, the court held (59 F.3d at 253) that "the [ICC] did not impose any condition [in its decision] on the abandonment . . . that would prevent the reversion of the property interests to the [landowners]." Here, however, a CITU was imposed before UP was authorized to effect abandonment, thus preserving the agency's jurisdiction over the right-of-way. Also, the railroad here indicated its continuing intent not to abandon the line by continually supporting the trail use negotiations. In Fritsch, by contrast, the railroad first told the ICC that it had abandoned the line and indicated that it would not negotiate a rails-to-trails conversion. Six months later, the railroad changed its mind and reached an agreement with the would-be trail sponsor. The ICC ruled that the railroad could not have legally abandoned the line because the public use condition imposed under former 49 U.S.C. 10906 had not expired (see 59 F.3d at 250), but the court ruled that the public use condition did not stay what the court viewed as an already consummated abandonment that served to oust the ICC's jurisdiction over the line.⁹ 59 F.3d at 253.

The facts in this proceeding more closely parallel those in Birt v. STB, 90 F.3d 580, reh'g. denied, 98 F.3d 644 (D.C. Cir. 1996) (Birt). In Birt, the court noted that, while discontinued rail service, salvaged track, and tariff cancellation are actions often taken in connection with abandonment, they also are fully consistent with the lesser action of temporary cessation of rail operations or trail use.¹⁰ Thus, they are entitled to little weight where, as here, UP's actions demonstrate an intent not to abandon by its continued willingness to negotiate.¹¹ See also

⁷ Petitioner Caneva appears to argue that, because RTC did not file within the designated time in the abandonment proceeding, it cannot be substituted for State Parks and Historic Trails. However, as previously discussed, the Board's function in this matter is ministerial. It is up to the carrier whether it will negotiate and with whom it will negotiate. Thus, the railroad may choose the negotiating party and may also choose a substitute party. Here, the carrier has stated that it agrees to negotiate with RTC. Consequently, the Board's action flows from the railroad's determination to negotiate.

⁸ We note that the CITU extensions in this proceeding have not destroyed the continuity of the CITU.

⁹ No public use condition was requested or granted in this case.

¹⁰ Significantly, UP did not cancel tariffs or remove the ties and rails until after the CITU had been imposed.

¹¹ In the Birt case, the court found that the ICC retained jurisdiction although the railroad had referred to the line as "abandoned" in two pieces of correspondence. Here, the carrier
(continued...)

Conrail v. STB, 93 F.3d 793 (D.C. Cir. 1996). In short, neither petitioner has shown that UP's actions evidence an intent to consummate the abandonment. Accordingly, we conclude that UP has not consummated the abandonment and that the Board retains jurisdiction over the property.

Petitioners also question our authority to issue extensions of the CITU. A CITU converts into a certificate of abandonment without further action of the Board if no interim trail use agreement is reached by the 180th day after the CITU is issued. However, the expiration of the 180-day negotiation period in a CITU does not terminate our jurisdiction under a CITU. If the railroad agrees to negotiate and has not fully abandoned the line, the trail use negotiation period may be extended. E.g., Birt; Grantwood Village v. Missouri Pacific Railroad, 95 F.3d 654 (8th Cir. 1996), pet. for certiorari pending. See also Rail Abandonments--Supplemental Trails Act Procedures, 4 I.C.C.2d 152, 157-58 (1987); Missouri Pacific Railroad Company -- Abandonment in Okmulgee, Okfuskee, Hughes, Pontotoc, Coal, Johnston, Atoka, and Bryan Counties, OK, Docket No. AB-3 (Sub-No. 63) (ICC served Jan. 2, 1990) at 3; SSW Ry. Co. -- Aban. in Smith and Cherokee Counties, TX, 9 I.C.C.2d 406, 410 (1992). Here, UP has not fully abandoned the line that is the subject of this CITU. Moreover, UP has been agreeable to the extensions and to the substitution of RTC as a negotiating party. Accordingly, the extension requests were properly considered and granted.

Finally, we note that numerous extensions have been granted in this proceeding. While the record here supports our extending the negotiation period, the court in Birt suggested that extensions could not continue indefinitely. By decision served December 11, 1996, UP and its new negotiating partner, RTC, were granted an extension to June 10, 1997, to complete negotiations. We caution the railroad and RTC that, unless substantial reasons exist to continue negotiations beyond that date, further extensions will not be granted.

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

It is ordered:

1. The petitions for administrative review filed on July 8, 1996, are denied.
2. This decision is effective on the service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

¹¹(...continued)
has never to our knowledge referred to the line as abandoned.