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SERVICE DATE - NOVEMBER 10, 1999

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33705

MISSOURI FRIENDS OF THE WABASH TRACE NATURE TRAIL, INC.

v.

NORTHERN MISSOURI RAILROAD COMPANY, ET AL.
(PETITION FOR DECLARATORY ORDER)

Decided: November 4, 1999

We are denying the petition of the Missouri Friends of the Wabash Trace Nature Trail, Inc. (the Missouri Friends), for an order declaring that we retain jurisdiction over a 28.71-mile segment of right-of-way formerly owned by the Wabash Railroad Company (WRR) and operated by WRR's parent, the Norfolk and Western Railway Company (N&W).

BACKGROUND

By decision served on November 10, 1983, our predecessor agency, the Interstate Commerce Commission (ICC), authorized N&W to discontinue operations over, and WRR to abandon, its 222.3-mile line of railroad known as the Omaha Branch.¹ The Omaha Branch ran between milepost 410.86 near Council Bluffs, IA, and milepost 188.56 near a location called "Kelly," MO.²

By decision served on January 27, 1984,³ the ICC authorized the Northern Missouri Railroad Company (NMR) to lease and operate the 156.15-mile southern portion of the Omaha Branch in Iowa and Missouri running between milepost 344.71, near Blanchard, IA (close to the Iowa/Missouri border) and the Kelly end of the original Omaha Branch. In that decision, the ICC stated that the abandonment and discontinuance authorized for the Omaha Branch by the

¹ See Norfolk and Western Railway Company and Wabash Railroad Company — Abandonment, Discontinuance of Operations, and Discontinuance of Trackage Rights — In Chariton, Linn, Livingston, Daviess, Gentry, Nodaway, and Atchison Counties, MO; Page, Fremont, Mills, and Pottawattomie Counties, IA; and Douglas County, NE, Docket No. AB-10 (Sub-No. 27) (ICC served Nov. 10, 1983).

² "Kelly" is not listed as a city or county on standard road atlases available at the Board, but the name was listed in the 1991 Official List of Open and Prepay Stations as a Missouri station of the Chillicothe-Brunswick Rail Maintenance Authority.

³ Northern Missouri Railroad, Inc. — Exemption from 49 U.S.C. 10901, 11343, and 11301, Finance Docket No. 30348 (ICC served Jan. 27, 1984).

aforementioned abandonment decision (see n.1, herein) had not yet been exercised. The portion of the Omaha Branch to be leased to NMR included the segment at issue here, which runs between Blanchard (milepost 344.71) and milepost 319.0, near Maryville, MO. Subsequently, the Norfolk Southern Corporation (NSC),⁴ by letter filed on February 28, 1984, informed the ICC that the operating railroad had consummated abandonment of the entire Omaha Branch.

NMR was subsequently authorized to discontinue service over the segment at issue (running between Blanchard and Maryville) in two stages. By notice of exemption published on November 21, 1985, NMR was authorized to discontinue service over the northern portion running between Blanchard, IA, and milepost 332.4 near Burlington Junction, MO.⁵ By decision served on September 26, 1986, NMR was authorized to discontinue service over the southern portion running between (a) milepost 331.6 near Burlington Junction, IA, and (b) Maryville, IA (milepost 319.0).⁶

NS removed the track in December 1988. By deed executed on June 27, 1995, and corrected on April 16, 1996, N&W sold the segment at issue to the Missouri Friends. After the Missouri Friends began to establish a road bed for a trail on the segment at issue, that organization was sued in Missouri state courts by adjoining land owners. That litigation is pending.

By petition filed on January 5, 1999, the Missouri Friends request that we declare that the segment is still under the jurisdiction of the Board, arguing that: (1) the authority granted to N&W in 1983 to abandon the segment was effectively rescinded in 1984 when the segment was leased to NMR; (2) N&W never received renewed authorization to abandon the segment; and (3) the line is still under federal jurisdiction and subject to the provisions of the rail banking provisions of the National Trails System Act Amendments of 1983.

On January 19, 1999, NSR filed a reply in opposition to the petition of the Missouri Friends and a motion to dismiss the proceeding. NSR asks that we deny the petition for declaratory order, arguing that: (1) the letter dated February 22, 1984, and filed February 28, 1984, effected an abandonment of the line; (2) the owner of an abandoned line does not assume a common carrier obligation by leasing the line for the resumption of service as long as it does not resume operations

⁴ NSC is the corporate parent of N&W and hence of WRR. NSC is also the corporate parent of Norfolk Southern Railway Company (NSR), the successor by merger to N&W. Herein, the three carriers and the corporate parent will be referenced collectively as NS.

⁵ Northern Missouri Railroad Company — Discontinuance of Service in Iowa and Missouri — Exemption, Docket No. AB-252 (Sub-No. 1X) (ICC published at 50 FR 48142 on Nov. 21, 1985).

⁶ Northern Missouri Railroad Company — Exemption — To Discontinue Operations in Daviess, Gentry, and Nodaway Counties, MO, Docket No. AB-252 (Sub-No. 2X) (ICC served Sept. 26, 1986). The record does not explain why the Burlington Junction mileposts defining the endpoints in this and the prior proceedings were not the same.

itself; and (3) NS's actions since 1984 have been consistent with abandonment. Alternatively, NSR requests that, in the event that we deny its motion to dismiss the proceeding, we dismiss NSC and N&W as defendants.

On January 25, 1999, a group of adjoining landowners jointly filed a reply to the petition, arguing that it must be denied because the property has been abandoned.

DISCUSSION AND CONCLUSION

As noted, the ICC authorized abandonment of the line in November 1983. As also noted, by decision served January 27, 1984, the ICC authorized the lease of the segment at issue in this proceeding to NMR in Finance Docket No. 30348. In its petition for exemption from the requirement for prior ICC approval in that proceeding, NMR indicated that, under the agreement, it would initiate service over the property after the line had been abandoned. NMR also observed that N&W employees adversely affected by the abandonment and discontinuance would receive protection under the employee protective conditions imposed by the ICC in Docket No. AB-10 (Sub-No. 27).⁷ By letter dated February 22, 1984, and filed on February 28, 1984, N&W notified the ICC that the authorized abandonment had been consummated on February 8, 1984. While the record does not provide a specific date for implementation of the lease or for NMR's institution of operations, NMR's subsequent filing of a verified notice of exemption in Docket No. AB-252 (Sub-No. 1X) stated that it had started up operations in February 1984.

Under the circumstances and seeing no evidence to the contrary, we conclude that, following ICC approval of NMR's lease and operation proposal, the parties acted on their proposal by leasing the property following the exercise of the abandonment authorization. Once the line was abandoned, the lease to NMR did not revive N&W's or WRR's common carrier obligation. That conclusion is supported by Wisconsin & Michigan Railway Company — Discontinuance of Service Exemption — In Ashland and Iron Counties, WI and Gogebic County, MI, Docket No. AB-440X (ICC served May 5, 1995, and Sept. 21, 1995; STB served Oct. 8, 1997).⁸

⁷ The conditions were those set out in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979).

⁸ There, Wisconsin Central, Ltd. (WCL), purchased, but never operated over, a segment of former right-of-way that had been abandoned by the Soo Line Railroad Company. WCL subsequently leased the land to the Wisconsin & Michigan Railway Company (WMR), which thereafter obtained an exemption from former 49 U.S.C. 10901 to obtain authority to commence operations over it. Like N&W here, WCL was not a party to the exemption proceeding, and that proceeding did not bestow operating rights on WCL. After operating over the leased segment for about 2.5 years, WMR petitioned to discontinue service over it. In granting authority to discontinue service, the ICC refused to find that the line was exempt from the forced sale provisions of former 49
(continued...)

Moreover, there is no indication that N&W, or any NS affiliate, ever held itself out to provide, or made any attempt to revive, service over the line. In fact, the track was removed in December 1988, and later NS sold the property to the Missouri Friends via quitclaim deed without seeking authority from or notifying the Board.

As a result of NS's exercise of abandonment authority in February 1984, agency jurisdiction as to NS ended at that time. While the Missouri Friends have not attempted to argue that our jurisdiction over the property continues by virtue of NMR's operations over the line between 1984 and 1986, there is no support for a finding of continued jurisdiction on that basis. A lack of traffic justified abandonment in November 1983 and also justified discontinuance of operations in September 1986. After we granted NMR authority to discontinue operations in 1986, of course, there was no traffic on the line at all. As noted, the track was removed in 1988 and the property interest of NS was later conveyed to the Missouri Friends. Thus, we no longer have jurisdiction over the right-of-way.

Because we lack jurisdiction over the property at issue, we cannot now say it is available for use as a trail under the National Trails System Act Amendments of 1983.

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

It is ordered:

1. The petition for a declaratory order is denied.
2. This decision is effective on its date of service.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary

⁸(...continued)

U.S.C. 10905, holding that, when WCL leased the line to WMR, the line "returned to the national rail system" and that, therefore, WCL would need to seek abandonment authority and comply with section 10905. The Court of Appeals overturned this holding, finding WCL did not subject itself to ICC jurisdiction by leasing the line for operations by another rail carrier and had no residual common carrier obligation in these circumstances. Wisconsin Cent., Ltd. v. Surface Transp. Board, 112 F.3d 881 (7th Cir. 1997).