

SERVICE DATE - November 15, 1996

SURFACE TRANSPORTATION BOARD¹

DECISION

Docket No. AB-33 (Sub-No. 70)

UNION PACIFIC RAILROAD COMPANY--ABANDONMENT--WALLACE BRANCH, ID

Decided: October 31, 1996

The Rails-to-Trails Conservancy (RTC) has invoked the Trails Act, 16 U.S.C. 1247(d), and has requested that we issue a certificate of interim trail use (CITU) in this case. Typically, we receive this sort of request when we have authorized a railroad to abandon one of its lines. The effect of issuing a CITU is to permit a railroad seeking to abandon a line time to negotiate with a state or local government or private organization to assume financial and legal responsibility for the track. Under a Trails Act agreement, the railroad's right-of-way may be transferred to the third-party sponsor for interim recreational or conservation purposes. Because this transfer is deemed by statute not to constitute an abandonment of the line, the reversionary interests of adjoining landowners do not vest, even though the railroad ceases service and takes up the tracks. The railroad retains the right to reassert control over the easement at some point in the future if it decides to revive rail service (rail banking).

We issue CITUs if the railroad agrees to negotiate and if the prospective trail user requesting the CITU agrees to rail banking and provides a statement of willingness to assume responsibility for managing the right-of-way, for any legal liability arising out of its use, and for the payment of taxes. See 49 CFR 1152.29(a)(2),(3). For the reasons discussed below, the request for a CITU in this case will be denied.

BACKGROUND

In Union Pacific RR. Co.--Aband.--Wallace Branch, ID, 9 I.C.C.2d 325 (1992), 9 I.C.C.2d 377 (1992), and 9 I.C.C.2d 496 (1993), the ICC found that the public convenience and necessity permitted UP to abandon its 71.5-mile Wallace Branch line between Plummer and Mullan, ID. The ICC provided that the carrier could discontinue service immediately, but stated that UP could not

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC or Commission) and transferred certain functions 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 pursuant to 49 U.S.C. 10903 and 16 U.S.C. 1247(d). Therefore, this decision applies the law in effect prior to the ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

fully abandon the line--salvage the line and permanently remove it from the rail network--until the environmental impact of the proposed abandonment was addressed and resolved. Specifically, the ICC imposed six environmental conditions that require consultation and possible permitting and environmental review by various state and federal environmental agencies prior to any salvage of the track.

On judicial review, the court affirmed the ICC's immediate authorization of discontinuance but remanded the ICC's conditional salvage authorization. State of Idaho et al. v. I.C.C., 35 F.3d 585 (D.C. Cir. 1994). In its decision, the court found that the ICC's environmental analysis was not complete, because the ICC did not have all the information needed to take a "hard look" at the environmental impact of salvage and weigh it against the economic benefits of permitting salvage. By decision issued December 2, 1994, the ICC (1) reopened this proceeding to complete its environmental analysis of salvage; (2) vacated its conditional authorization of salvage, except for the portion of the line which is located within a Superfund site, where section 121(e)(1), 42 U.S.C. 9621(e)(1), relieves UP of the requirement to obtain ICC (or Board) approval if it does so in connection with remediation action carried out in compliance with the Comprehensive Environmental Resource, Compensation and Liability Act (CERCLA); and (3) clarified that UP may not engage in any other salvage activity on this line until it has complied with the six environmental conditions (under agency supervision) and an appropriate environmental document is prepared, taking a final look at the environmental impacts of salvage. As of this date, the necessary environmental analysis has not been completed because UP has not yet submitted the required additional material.

In August 1995, RTC requested the immediate issuance of a CITU to permit trail use under section 1247(d) on the entire 71.5-mile right-of-way, including the portion of the line within the Superfund site. RTC submitted the statement of willingness to assume financial responsibility and liability for the right-of-way required by the agency's Trails Act rules and agreed to rail banking. UP stated that it was willing to negotiate with RTC. In addition, the railroad, in view of the outstanding environmental conditions imposed in this case, stated that, if there is an agreement in principle between UP and RTC or any other group for trail use or other use of this right-of-way, it would request ICC approval of that use prior to execution of any written agreement between the parties.

Given the unusual circumstances of this case, the ICC, in December 1995, published a Federal Register notice asking for comments from all interested parties, agencies, and members of the public as to whether there are any impediments to the issuance of Trails Act authority here. In response, UP, RTC, the Transcontinental Trails Association (TTA), the U.S. Department of Justice (DOJ) (on behalf of the Departments of Interior and Agriculture and the Environmental Protection Agency), the State of Idaho (Idaho), and the Coeur d'Alene Tribe (the Tribe)

submitted comments.² The Tribe objected to the issuance of a CITU prior to this agency's completion of the environmental review process. DOJ stated that it believes the Board may issue the CITU at this point, but asked that the CITU be conditioned upon (1) the successful completion of negotiations among DOJ, the Tribe, Idaho, and RTC, and (2) compliance by the UP with the ICC's order requiring that UP comply with the six environmental conditions (May 14, 1996 pleading at 1). DOJ, noting that a willingness to assume responsibility for the right-of-way is a predicate for the issuance of a CITU, stated that, given the claims for contamination along the Wallace Branch that the United States, the State, and the Tribe, have against UP, ". . . neither the RTC nor, for that matter, any other entity, is likely to agree to accept ultimate responsibility for the Wallace Branch absent a covenant not to sue from the United States, the State, and the Coeur d'Alene Tribe." Id. DOJ added (id. at 2) that it is expected that the trail will be managed--assuming negotiations are successful--by the State of Idaho and the Tribe, rather than RTC. For these reasons, DOJ indicated that it "does not believe that any agreement can successfully be worked out with the RTC alone, and it believes the Board's issuance of the CITU should reflect this fact." Id. at 1. Idaho recommends action similar to that urged by DOJ.

RTC and UP urged the Board to issue the CITU as requested. RTC and TTA claimed that "issuance of a CITU does not bind any party to assume financial and managerial responsibility" (February 5, 1996 pleading at 2) and argued that "[t]he question of management of the resultant trail is appropriately addressed after the CITU is issued." (March 13, 1996 pleading at 2). RTC stated that "we do not see how management can be adequately addressed--whether by RTC or TTA, or by the State or the Tribe--absent the kind of negotiation which occurs after a CITU is issued." RTC added that, "[t]he issuance of a CITU, after all, is designed to permit the parties to seek an agreement; it is not conditioned on an agreement in advance." (March 13, 1996 pleading at 3).

DISCUSSION AND CONCLUSIONS

The comments of DOJ and RTC indicate that, notwithstanding the representations that RTC made in its August 16, 1995 filing,³ RTC is not "prepared to assume" full responsibility for the management of the proposed trail, as specifically required by the statute. Indeed, as its subsequent pleadings of February 5, 1996, and March 13, 1996, make clear, RTC plainly does not purport to assume full responsibility for the management of the trail if a Trails Act agreement can be reached. Rather, RTC's willingness to assume the responsibilities that are the predicate for issuance of a CITU pursuant to 16 U.S.C. 1247(d) and 49 CFR

² The Board also received comments from a number of towns, businesses and individuals, both supporting and opposing the construction of a trail on the Wallace Branch.

³ As noted RTC submitted the statement of willingness to assume financial responsibility and liability for the line required by our Trails Act rules at that point. TTA had filed a statement earlier in these proceedings.

1152.29(a) appear to be contingent on the completion of pending negotiations with DOJ, Idaho and the Tribe.⁴ See DOJ pleadings of April 30, 1996, and May 14, 1996. Indeed, DOJ describes RTC as merely a "nominal party" to those negotiations. In these circumstances, it would be inappropriate for us to issue a CITU at this time.

RTC's assertion that a CITU must be issued to permit these negotiations with DOJ, Idaho, and the Tribe to take place is not supported by the record before us. Issuance of a CITU would be necessary to preserve Board jurisdiction over the line following the issuance of a final decision granting authority to UP to abandon the line (assuming that UP had been authorized, and wanted, to take up the track and take the other actions that normally take place following approval of an abandonment). Here, however, the court of appeals has remanded the ICC's abandonment and salvage authorization, and the agency has reopened that portion of the case, so that the grant of abandonment authority in this proceeding is not final.⁵ RTC and UP therefore do not need a CITU to preserve the Board's authority over the line.

Moreover, there is no impediment to the parties' continued Trails Act negotiations because UP already has discontinuance authority, and that discontinuance authority has been affirmed in court. Under these circumstances, a trail use agreement could be entered into--and interim trail use could be implemented--without our issuing a CITU, provided that the parties' arrangement does not undercut our environmental conditions or the requirement that UP comply with CERCLA on the portion of the line within the Superfund site.

Because UP has been authorized to discontinue service, the railroad need not provide rail service on the Wallace Branch. Use of the right-of-way as a trail would therefore not interfere with UP's common carrier obligation. Nor would the implementation of trail use interfere with UP's remaining obligations under the ICC's decision reopening this proceeding. Also, reversionary property interests cannot vest in the absence of final approval to abandon this line.

UP may not, of course, conduct salvage activities before the carrier completes the environmental compliance process and receives final approval to abandon the line. But this limitation

⁴ None of those parties has filed a statement of willingness.

⁵ As noted, following the court's decision, the ICC issued a decision in this proceeding on December 2, 1994. There, the ICC reopened this proceeding on remand to complete its environmental analysis of the potential impacts of salvage operations on the line. The ICC stated that the UP "may not engage in any other salvage activity on the line until it has complied with our six environmental conditions (under Commission supervision) and appropriate ICC documentation [an Environmental Assessment (EA) or an Environmental Impact Statement (EIS)] is prepared" UP has not yet advised us that it has complied with those conditions and the Board has consequently not issued either an EA or an EIS.

would remain even if we were to issue a CITU prior to the issuance of final abandonment approval. When UP receives final approval to abandon the line, we will expeditiously issue a CITU to RTC, TTA or any other eligible proponent of a trail, upon request, if UP agrees and the liability and railbanking requirements imposed by the statute and our rules are met.

Finally, we emphasize that nothing in this decision excuses UP from complying with the environmental mitigation requirements that have heretofore been imposed in this proceeding. Because of this qualification, we find that 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 of RTC is denied.

2. This decision is effective on November 15, 1996.

By the Board, Chairman Morgan, Vice Chairman Simmons, and
Commissioner Owen.

Vernon A. Williams
Secretary