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SERVICE DATE – OCTOBER 18, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-1014

DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION—
ADVERSE ABANDONMENT—IN MINERAL COUNTY, CO

Decided: October 17, 2007

In a petition filed on June 7, 2007, the City of Creede, CO (the City), seeks exemptions of several statutory provisions as well as waiver of certain Board regulations pertaining to procedures for obtaining abandonment authority.¹ The City indicates that it intends to file a third-party application for “adverse” abandonment of approximately 1.0 mile of rail line (the Line) that is owned and operated by the Denver & Rio Grande Railway Historical Foundation (D&RGHF).

BACKGROUND

The Line in question, part of a larger line known as the Creede Branch, lies within the City limits (between milepost 319.9 and milepost 320.9). In 1998, Union Pacific Railroad Company (UP), the former owner of the Creede Branch, filed a notice of exemption to abandon the Creede Branch, which had been out of service for many years prior to UP’s filing its notice. The Board received several offers of financial assistance (OFA) to purchase the Creede Branch. The Board approved the sale of the Creede Branch from UP to D&RGHF, and dismissed the abandonment exemption. See Union Pacific Railroad Company—Abandonment Exemption—in Rio Grande and Mineral Counties, CO, STB Docket No. AB-33 (Sub-No. 132X) (STB served May 11, 1999). Pursuant to that decision, the Creede Branch was sold to D&RGHF in May 2000. The City contends that, in the 7 years since D&RGHF acquired the Line as part of its purchase of the Creede Branch, D&RGHF has not been able to rehabilitate the Creede Branch or restore rail service, and that D&RGHF is unlikely ever to do so. Accordingly, the City claims that the Line could be used to better serve the public interest if it were abandoned.

In a reply filed on June 19, 2007, D&RGHF states that it intends to oppose the City’s adverse abandonment application, but it does not oppose the City’s requests for exemptions and waivers, with two exceptions. Specifically, D&RGHF opposes the City’s request for waiver of the requirements in 49 CFR 1152.22(b), that the applicant provide a description of the physical condition of the line, and in 49 CFR 1105.7, 1105.8, 1150.20(c), and 1152.22(f), that the applicant submit a report on the environmental and historic impact the abandonment would have.

¹ The City amended its petition by a letter filed on June 12, 2007.

DISCUSSION AND CONCLUSIONS

The Board's regulations require that abandonment applications conform to the requirements of 49 CFR 1152, Subpart C. When appropriate, however, such as the filing of a third-party or adverse abandonment application, the Board may waive inapplicable and unneeded provisions. See Napa Valley Wine Train, Inc.—Adverse Abandonment—in Napa Valley, CA, STB Docket No. AB-582 (STB served Mar. 30, 2001), and cases cited therein. Additionally, the Board may exempt a party from the application of certain statutory requirements under appropriate circumstances. See 49 U.S.C. 10502(a). While waiver of the obligation to produce certain information required by the Board's regulations and exemption from related statutory provisions are appropriate here, the requested waiver of other provisions will be denied, as discussed below.

Filing Fees. The City states that, as a governmental entity, it is entitled to a waiver of the filing fees for this petition and for the adverse abandonment application that it intends to file. The Board's Secretary, who is the agency official delegated authority to rule on filing fee waiver requests under 49 CFR 1002.2(e), has granted this request.

Notice of Intent. The City asks for waiver of the requirements of 49 CFR 1152.21, stating that the prescribed wording for the notice of intent is inappropriate for adverse abandonment proceedings. Instead, the City proposes to use the alternative language in its amended Attachment A. The notice of intent in the amended Attachment A is in substantial compliance with the requirements of 49 CFR 1152.21 and the proposed changes are reasonable and make sense in the context of the City's application. Accordingly, the waiver request will be granted.

The City seeks relief from the requirements in 49 U.S.C. 10903(a)(3)(D)² and 49 CFR 1152.20(a)(2), which require that the notice of intent be served on significant users of the line. The City also requests exemption from 49 U.S.C. 10903(a)(3)(B) and waiver of 49 CFR 1152.20(a)(3), which require that a copy of the notice of intent be posted at each agency station and terminal on the line to be abandoned, or, if there are no agency stations on the line, at any agency station through which business for the line is received or forwarded. The City states that there are no known users of the Line or agency stations and terminals on the Line. The City also notes that, because the Line has been out of service for many years and D&RGHF has never performed railroad operations on the Line, there are no terminals or agency stations at which to post a notice of intent. Therefore, these requests will be granted.

Adverse Abandonment Application. The City requests exemption from 49 U.S.C. 10903(c) and waiver of 49 CFR 1152.22(a)(5), which require that the track sought to be abandoned be identified on the carrier's system diagram map or narrative. As the City notes,

² The City's request for "waiver" of 49 U.S.C. 10903(a)(3)(D) shall be considered an exemption request.

because it is not a carrier, it does not have a system diagram map. Accordingly, these requests will be granted.

The City also asks for waiver of 49 CFR 1152.22(b), which requires the applicant to provide a description of the physical condition of the line, including the costs of deferred maintenance and any needed rehabilitation. The City claims that it does not possess detailed information regarding this requirement, but states that it intends to submit photographs of the Line that demonstrate that the Line is in poor condition. D&RGHF opposes this waiver request. D&RGHF argues that the condition of the Line and the cost necessary to rehabilitate the Line are factors that underlie the City's burden of showing that the public convenience and necessity warrant abandonment of the Line.

The City asserts that D&RGHF has not been able to rehabilitate the Line and thus is unlikely ever to restore rail service to the Line. Because the Line's physical condition is relevant to that determination, this requirement should not be waived. In fact, claims by the City that are based on the amount of rehabilitation and deferred maintenance would need to be supported by evidence. As the City notes, it may lack direct access to information regarding the costs of rehabilitation and deferred maintenance. But the City has means to acquire such information, for example, by seeking discovery from D&RGHF. Moreover, the Line is only 1 mile long. The City could perform a physical inspection of the Line, which should provide sufficient information for the City to make at least some assessments regarding the maintenance and rehabilitation required for the Line.

Accordingly, the component of 49 CFR 1152.22(b) that requires information regarding the cost of deferred maintenance and needed rehabilitation will be waived, but the City will not be relieved of its obligation to support any claims based on the amount of rehabilitation needed or maintenance deferred with evidence. The City also will still be required to comply with the remainder of 49 CFR 1152.22(b) by submitting evidence on the physical condition of the Line. At this juncture, the Board makes no finding as to the merits of any potential claims by the City regarding these issues.

The City also seeks waiver of 49 CFR 1152.22(d), that the applicant submit information pertaining to the carrier's revenues and costs. The City explains that it does not possess this information and that no such data may exist, as there are no shippers on the line. This waiver request will be granted.

The City requests waiver of 49 CFR 1105.7, 1105.8, 1152.20(c), and 1152.22(f), which require an applicant to submit a report on the environmental and historic impact the abandonment would have. The City claims that abandonment of this line would have no environmental impact, as the Line has not been used for 38 years. The City also notes that the Board's Section of Environmental Analysis prepared an environmental assessment (EA) for this line in 1999, in connection with UP's notice of exemption to abandon, and found that abandonment would have no adverse environmental impact. The City asserts that there is one historical structure along the line—a former train depot that has been converted to a museum—

but argues that abandonment of the line would have no impact on the ownership or use of the depot.

D&RGHF opposes this waiver request. D&RGHF notes that abandonment of the Line may lead to removal of track, which could cause ground disturbance that could lead to adverse environmental or historic impacts. D&RGHF also argues that the EA relied on by the City is outdated—having been issued over 8 years ago—and not pertinent, as the assessment involved a different carrier (UP). D&RGHF also asserts that the Line itself may qualify for listing in the National Register of Historic Places. Because the prior EA may be stale and because abandonment of the Line could have environmental or historic impacts that are not readily apparent, the City’s waiver request for this requirement will be denied.

The City also requests waivers of two requirements that would otherwise apply if the abandonment application is granted. They appear in 49 CFR 1152.24(f), which requires the filing of a consummation notice, and 49 CFR 1152.29(e)(2), which sets a 1-year time limit on the exercise of abandonment authority. The City states that these waivers are warranted because it may not be able to control when the abandonment is consummated and may need to resort to state or federal law to require D&RGHF to vacate the line. The City’s request for waiver of the requirement that the City file a consummation notice will be denied because the Board needs to know if and when a rail line is removed from its jurisdiction. However, waiver of the 1-year time limit on abandonment authority specified at 49 CFR 1152.29(e)(2) will be granted. This regulation presupposes control by the applicant over the timing of consummation once the Board issues a final decision regarding abandonment. But that is not the case in a third-party abandonment because, as the City correctly states, there is the potential need to invoke other legal process to obtain control of the property.

The City also seeks exemption from and waiver of the OFA provisions of 49 U.S.C. 10904 and 49 CFR 1152.27, respectively; exemption from the feeder line provisions of 49 U.S.C. 10907; exemption from and waiver of the public use provisions of 49 U.S.C. 10905 and 49 CFR 1152.28, respectively; and waiver of the interim trail use provisions of 49 CFR 1152.29.

The requests for exemptions from and waivers of the OFA, feeder line, and public use provisions will be granted. The purpose of the third-party abandonment process is to withdraw the Board’s primary jurisdiction so as to permit state, local or other federal law to apply where there is no overriding federal interest in interstate commerce. See Norfolk Southern Railway Company—Adverse Abandonment—St. Joseph County, IN, STB Docket No. AB-290 (Sub-No. 286) (STB served Oct. 26, 2006) (St. Joseph County). In contrast, the purpose of the OFA and feeder line provisions is to keep a rail line within the Board’s jurisdiction for the purpose of providing service. The public use condition also keeps the line under the Board’s jurisdiction for the purpose of preventing a railroad, upon abandonment or discontinuance of service, from disposing of rail properties found to be appropriate for other public uses. Thus, should the Board ultimately find that the public convenience and necessity require or permit withdrawal of its regulatory authority in this adverse abandonment proceeding, the OFA, feeder line, and public

use provisions would be fundamentally inconsistent with the purpose of the Board's adverse abandonment decision. See East St. Louis Junction Railroad Company—Adverse Abandonment—in St. Clair County, IL, STB Docket No. AB-838 et al. (STB served June 30, 2003) (addressing 49 U.S.C. 10904).

With respect to the City's request for waiver of the trail use provisions of 49 CFR 1152.29, as the City notes, the Board has never addressed fully the issue of whether trail use provisions can and should apply in cases where adverse abandonment authority has been granted. See St. Joseph County, slip op. at 6-7. The City argues, however, that this case would be appropriate for waiver of the trail use procedures because "the land in question is within the city limits and is owned by the City." Despite the City's argument, there is no need to waive the trail use provisions at this time. These trail use provisions would be applicable only if and when the Board grants the City's adverse abandonment application. Therefore, this issue can be addressed, if need be, in a later decision.

Finally, the City requests waiver of 49 CFR 1152.22(i), stating that the language it proposes in its Attachment B is more appropriate for Federal Register notices in adverse abandonment application proceedings. The Federal Register notice in the City's Attachment B deletes references to the requirements for which the City has sought exemption and waiver, including to the trail use provisions. Because the City's request for waiver of the trail use provisions has been denied, deletions of references to these provisions are inappropriate. However, the City's Attachment B is in substantial compliance with the requirements of 49 CFR 1152.22(i) in all other respects. Accordingly, the waiver request is granted, subject to the City making revisions to the Federal Register notice that conform to this decision.

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

It is ordered:

1. The City's petition for exemption and waiver is granted in part and denied in part, as described above.
2. This decision is effective on its service date.

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

Vernon A. Williams
Secretary