

2 12 6 5
DO

Service Date - December 6, 1996

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB-6 (Sub-No. 207)

BURLINGTON NORTHERN RAILROAD COMPANY--
ABANDONMENT--IN GRAYS HARBOR COUNTY, WA

S.B. Docket No. AB-6 (Sub-No. 378X)

BURLINGTON NORTHERN RAILROAD COMPANY--ABANDONMENT
EXEMPTION--IN GRAYS HARBOR COUNTY, WA

Decided: November 29, 1996

By petition filed August 30, 1996, in Docket No. AB-6 (SubNo. 207), Burlington Northern Railroad Company (BN) seeks to reopen the proceeding for clarification of the status of its abandonment authority. EN previously filed an abandonment application in 1984. The application was granted and a certificate of abandonment was served on February 25, 1985. Although the authority permitted the abandonment of a 10.26-mile line between South Aberdeen Junction, WA (milepost 3.00) and Markham, WA (milepost 13.26), EN continued to serve a shipper on the line until April 1995.¹

Concurrently, in STE Docket No. AB-6 (Sub-No. 378X), EN has filed a petition for exemption from 49 U.S.C. 10903 under 49 U.S.C. 10502, seeking to abandon a 1.18-mile line of railroad referred to as the South Aberdeen trackage between mileposts 1.82 and 3.00 in South Aberdeen, WA. The 10.26-mile and the 1.18-mile

¹ The Sub-No. 378X abandonment exemption **was** filed in 1996 and, consequently, is subject to the ICC Termination Act Of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA). The ICCTA **was** enacted on December 29, 1995, and took effect on January 1, 1996. it abolishes the Interstate Commerce Commission (ICC or Commission) 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. While the initial application was filed in 1984, BN's recent filing appears to seek either new abandonment authority for the same line segment or a determination that no further abandonment authority is needed for that segment because abandonment authority **was** previously granted and exercised. if the Board determines **tile-7-** the abandonment has been consummated and the line is no longer a line of railroad, there would be no jurisdictional basis for imposing public use or trail use conditions with respect to that 10.26-mile segment. if, on the other hand, the Board determines that EN requires abandonment authority for the segment, the provisions of the ICCTA would apply to the Board's consideration of the petition for exemption for the abandonment (and public use and trail use conditions could be imposed if the petition is granted).

² BN states that, when , its tariffs were canceled in March, 1986, it "effected discontinuance authority for transportation subject to the ICC jurisdiction but did not act on its abandonment authority" since it continued to operate the line after that date as a contract carrier...." Petition to reopen at 4.

lines connect at South Aberdeen. Both lie wholly within Grays Harbor County, WA.

In the Sub-No. 207 proceeding, Grays Harbor County, WA has requested public use and interim trail use conditions. In the Sub-No. 378X proceeding, the City of Aberdeen, WA also seeks public use and trail use conditions.

This decision requires BN to submit additional information to permit the Board to determine whether it continues to have jurisdiction over the 10.26-mile line. The focus of that inquiry is whether or not BN has previously consummated the abandonment authority granted for that line. A ruling on the public use/trail use requests will be made in a subsequent decision.

BACKGROUND

As stated, the February 1985 abandonment certificate permitted BN to abandon the 10.26-mile line. In its petition to reopen, BN has set out the circumstances that occurred after the certificate of abandonment was served. On March 20, 1986, BN canceled its tariffs for the station of Markham. The only customer on the line, Ocean Spray Cranberries, Inc. (Ocean Spray), operates a processing plant at Markham. BN and Ocean Spray subsequently negotiated for continued rail service on the line. An agreement was reached whereby BN would provide contract service to Ocean Spray which would pay a \$500 per car surcharge. This arrangement continued from 1986 until April 7, 1995, when the Union Pacific Railroad Company embargoed its bridge over the Chehalis River from Aberdeen to South Aberdeen, cutting off the only rail access to the Markham line. Also affected by this embargo is a shipper on the 1.18-mile segment, Weyerhaeuser, which operates a sawmill in South Aberdeen. EN placed the South Aberdeen trackage from MP 1.82 to MP 3.00 in category 1 on its June 1, 1995 amended system diagram map. Because BN can no longer service the two remaining shippers on the segment, it seeks to abandon the entire 11.44-mile line. BN indicates that, in April 1995, both shippers began transloading their rail shipments at alternate locations. It adds that neither shipper opposes abandonment of these line segments.

DISCUSSION

BN has asked the agency to clarify the status of its abandonment authority in the Sub-No. 207 proceeding. To do so, the agency will need to resolve the issue of whether BN consummated abandonment of the 10.26-mile line when the railroad canceled its tariffs on March 20, 1986, and resumed operations as a contract carrier. Because this agency has found that a carrier can abandon a line and still provide contract service there over, the fact that EN provided such service here is not dispositive of the issue. See Consolidated Rail Co-oration@-Petition for Declaratory Order, 1 I.C.C.2d 284 (1984), and Conrail Abandonment in Jeannette, PA, 366 I.C.C. 384 (1982). However, the present record is insufficient to reach a determination as to whether BN has actually consummated the abandonment of this line segment. Consequently, BN will be required to address the issue more fully in a supplemental filing. The courts and this agency have held that, whether a line has been fully abandoned (i.e., whether consummation has taken place) is a question of the carrier's intent. Indicia of intent to consummate that have been identified include whether a certificate of public convenience and necessity has been issued, whether operations have ceased, whether tariffs have been canceled, whether a letter has been filed with the Commission/Board that the abandonment has been consummated, and whether the track and ties have been salvaged. The courts, the ICC, and this agency have also made it clear that a determination of consummation must be made on a case-by-case basis after a review of the facts, and that a particular finding on one or more of the elements is not necessarily dispositive of the issue. See, e.g., Melinda Birt v. Surface Transportation Board, 90 F.3d 580 (D.C. Cir. 1996); Black v. I.C.C., 762 F.2d 106, 113 (D.C. Cir. 1985); RLTD Railway Corporation--Abandonment Exemption --In Leelanau County, MI, Docket No. AB-457X (S.B. served Aug. 23, 1996).

As stated, however, the present record does not contain sufficient evidence for the Board to evaluate BN's intent here. Consequently, BN will be directed to present a more detailed discussion of the circumstances following the issuance of the certificate of abandonment, and the reasons why the abandonment has or has not been consummated base on the above discussion. The carrier's response should specifically include whether a consummation letter was sent to the ICC; when the BN/Ocean Spray contract was entered into and if and when it was filed with the ICC; and the status and type of land ownership involved here.

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

It is ordered:

1. BN is directed to respond as outlined above within **20** days from the service date of this decision.
2. This decision is effective on the service date.

By the Board, David M. Konschnik, Director, office of Proceedings.

Vernon A. Williams
Secretary