

38975
EB

SERVICE DATE – AUGUST 27, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-290 (Sub-No. 286)

NORFOLK SOUTHERN RAILWAY COMPANY—ADVERSE ABANDONMENT—
ST. JOSEPH COUNTY, IN

Decided: August 26, 2008

On March 28, 2008, the City of South Bend, IN (the City), and two religious Orders, the Brothers of Holy Cross, Inc. (the Brothers), and the Sisters of the Holy Cross, Inc. (the Sisters) (collectively, Petitioners) filed a petition under 49 CFR 1115.4 asking the Board to reopen this proceeding pursuant to 49 U.S.C. 722 and authorize the adverse abandonment of two Norfolk Southern Railway Company (NSR) rail lines (Lines) in St. Joseph County, IN. The Board had denied the application for adverse abandonment in a decision served on February 14, 2008 (February 2008 Decision). The Chicago, Lake Shore and South Bend Railway Company (CLS&SB) filed a reply.¹ We are denying the petition to reopen.

BACKGROUND

The Lines measure approximately 3.7 miles in length. The UV line extends 2.8 miles between milepost UV 0.0 and milepost UV 2.8, where it connects with the ZO line. The ZO line extends 0.9 miles to the north from milepost UV 2.8 onto the Sisters' property, where it connects at milepost ZO 9.6 to an industrial spur. The spur extends easterly onto the campus of the University of Notre Dame (the University), where there is an inactive rail station, and terminates at the University's on-campus, coal-fired power plant. NSR currently delivers coal to a transload facility in the South Bend area for delivery by truck to the University's power plant.

In their application, Petitioners emphasized that there has been no rail service on the Lines, or requests for rail service, since the mid-1990's, when the University turned to truck transloading. They claimed that NSR has made no effort to solicit traffic or reinstitute service since Norfolk Southern Corporation, its corporate parent, acquired the Lines in June 1999. Petitioners pointed to a survey conducted by the City's Economic Development Specialist and

¹ CLS&SB, on November 21, 2006, filed a verified notice pursuant to 49 CFR 1150.31 *et seq.* invoking a class exemption to acquire and operate 3.2 miles of the Lines. The Board stayed the effectiveness of the exemption shortly after the notice was filed in 2006 and later lifted the stay on the same day it denied the adverse abandonment application. See The Chicago Lake Shore and South Bend Railway Company—Acquisition and Operation Exemption—Norfolk Southern Railway Company, STB Finance Docket No. 34960 (STB served Feb. 14, 2008).

cited statements made by the University's Executive Vice President and the Orders to show that that there is no current or future need for rail service and that it would be economically infeasible to reinstate service.

Petitioners also claimed that the Lines' rights-of-way present health hazards and that a resumption of rail operations would interfere with the City's vehicular traffic and otherwise result in a nuisance. Additionally, they asserted that the rights-of-way are needed for the installation of a federally mandated separate storm and sanitary sewer system and a recreational trail and that the Lines are interfering with the Orders' ability to develop their campuses.

In the February 2008 Decision, we found that the public interest would be served best by denying Petitioners' application. We found a real potential for renewed rail service on the Lines. As we explained, the record showed that there is coal traffic suitable for rail that could move over the Lines; that there is a railroad, CLS&SB, willing and eager to operate the Lines; and that there is at least one shipper, the University, that has a significant and increasing need for coal and has formerly received, and remains capable of receiving, coal over the Lines. Further, we noted that NSR remained willing to sell the Lines to CLS&SB, and that CLS&SB was prepared to spend \$476,000 to rehabilitate the track and rights-of-way. We also noted that it would be more efficient and no more costly for the University to resume receiving coal by rail. Instead of the 3,500 truck loads a year (14 truckloads a day 5 days a week) that currently move coal to the University in transload service, there would be only 2 weekly trains of 15 cars each.

Additionally, we found that the sewer and recreational trail projects could proceed without removing the Lines from the national rail transportation system. We also found it unlikely that the City would suffer significantly, or that the Orders would be prevented from using or developing their properties to carry out their missions, if service on the Lines were to resume. Further, we found that the City's concerns about the noise, danger and interference with vehicular traffic that would result from renewed service did not afford a basis for authorizing an adverse abandonment, as any operations over the Lines would be subject to safety rules imposed by the Federal Railroad Administration. Finally, we found unpersuasive the City's arguments that the adverse abandonment was needed to address the alleged health hazards created by the currently unused rights-of-way. We observed that the City could exercise its police powers to rectify these problems and that a resumption of rail service would likely mitigate such concerns.

DISCUSSION AND CONCLUSIONS

Under 49 CFR 1115.4, petitions to reopen administratively final actions may be filed at any time. Such petitions must state in detail the respects in which the proceeding involves new evidence, substantially changed circumstances, or material error.

Petitioners contend that new evidence has become available which demonstrates that there is no overriding Federal interest warranting or justifying the further protection of the Lines as part of the national rail system. Specifically, they submit a letter, dated March 26, 2008,

from the University's Executive Vice President, which advises that he has reviewed the February 2008 Decision and states as follows:

Please let me be clear in this correspondence that the University of Notre Dame du Lac does not currently ship using this line, nor does it intend in the future to utilize this rail line for any shipping purposes, whether to receive or deliver goods to or from the University. We currently receive our coal shipments off of the Norfolk Southern Railway via trucking from a transload facility. This has and will continue to serve our needs very well. Further, there is no need for rail delivery of any other commodity to the university.

We do not believe that renewed rail service along the line proposed to be abandoned is in the best interests of the University nor the community at large. We have no contract with nor do we have any intent to contract with any rail operator along this line.

According to Petitioners, this letter "has negated whatever validity the Board's prior conclusions may have had." Petitioners contend that their application should be granted without further delay.

That letter, however, is not new evidence within the meaning of section 722(c), namely, evidence that was "not reasonably available to the party when the record was developed."² That the March 26 letter was written in response to the Board's February 2008 Decision does not make it new evidence; Petitioners could have solicited, and the University could have submitted, such a letter prior to our original decision. Moreover, in substance, the letter reiterates views that were already in the record in another form at the time the Board issued its original decision. The adverse abandonment application included an article from the South Bend Tribune that quoted the University's Executive Vice President in June 2006, as he related his discussions with the mayor of South Bend, as saying: "The University has no intention of entering into an agreement with the South Bend short-line railway company to deliver coal. . . . Now and in the foreseeable future, we'll have our coal delivered by truck."³ Thus, that article, while containing some equivocal language that we cited in the February 2008 Decision, also reported substantially the same views that the University has now provided to Petitioners in the March 26 letter in support of reopening. The University's assertion that it had no intention of receiving coal by rail was already part of the record at the time of our initial decision denying adverse abandonment; it was

² See Toledo, Peoria & Western Ry. v. STB, 462 F.2d 734, 753 (7th Cir. 2006); accord Friends of Sierra R.R. Co. v. ICC, 881 F.2d 663, 667 (9th Cir. 1989).

³ See Application, Attachment I, Margaret Fosmoe, "Notre Dame drops coal by rail option," South Bend Tribune, June 22, 2006.

cited, or relied on, by Applicants and NSR in a number of places in the record,⁴ and we noted that reliance in our original decision.⁵

As we stated in the February 2008 Decision, a party seeking Board authorization for an adverse abandonment (i.e., one granted without the consent of the railroad owning the line) must meet a heavy burden. That is why, even absent current traffic, we will not authorize an adverse abandonment if, as here, there is a reasonable potential for future railroad use and there is no showing that retaining the line imposes any significant burden on the local community.

Even though the University has again stated that it is not currently interested in receiving future rail service, we are not persuaded that there is no reasonable potential for future rail use. CLS&SB now has authority to acquire the Lines, see supra note 1, and is eager to restore service. By denying this adverse abandonment, we will have safeguarded the potential for the University to reevaluate its shipping needs and for some future shipper(s) to benefit from rail service.⁶ And, as we also stated in the February 2008 Decision, should the transfer, rehabilitation, and restoration of operations not occur within a reasonable period of time, or should traffic fail to develop, Applicants may then seek to reopen the proceeding or file a new abandonment application. In the meantime, the University's letter does not provide a sufficient basis for revisiting this matter.

For all of the above reasons, the petition to reopen will be denied.

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

It is ordered:

1. The petition to reopen this adverse abandonment proceeding is denied.

⁴ See, e.g., Application, Attachment F, verified statement of Andrew R. Laurent at 3, "According to public statements made by the University of Notre Dame, it has no intention of receiving coal by rail" and NSR's Comment at 6, "The University's public withdrawal of support for the proposed operation before NSR and CLS&SB concluded their transaction effectively negated the objective of that transaction."

⁵ See February 2008 Decision at 4 (citing Application, Attachment F, Laurent V.S. at 3).

⁶ See, e.g., CLS&SB Reply, Exhibit A, verified statement of Robert S. Harris at 2, and Exhibit C, verified statement of John P. Hankey at 3.

2. This decision is effective on its service date.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey. Vice Chairman Mulvey dissented with a separate expression.

Anne K. Quinlan
Acting Secretary

Vice Chairman Mulvey, dissenting:

I dissent from the majority's decision because I believe it was material error for the Board to have denied the application for adverse abandonment in the February 2008 Decision. I had misgivings about that decision, and reluctantly voted in favor of it. Upon consideration of the petition to reopen, I now believe that we erred by giving too much weight to the University's equivocal statement about its future intention to receive coal by rail.

In the February 2008 Decision, we quoted from a South Bend Tribune article reporting on a University executive vice president's position on the resumption of rail service, as follows:

I assured the mayor at that stage that if the city and county were strongly opposed to the railroad proposal, the university would not go forward . . . If the rail line reopened, the city supported it, safety issues were addressed and neighborhood residents didn't mind it, Notre Dame would consider using rail service again for coal deliveries, depending on the cost. February 2008 Decision, slip op. at 5 n.14.

While the Board relied on this statement as evidence of the potential for future rail service, I note that there are five serious caveats to this statement, none of which have been resolved.

In light of the letter submitted in support of the petition to reopen, it is my view that the Board should have accorded another statement of the same University official – also quoted in the South Bend Tribune article but not in the February 2008 Decision – greater weight:

The university has no intention of entering into an agreement with the South Bend shortline railway company to deliver coal . . . Now

and in the foreseeable future, we'll have our coal delivered by truck.⁷

Had we done so, we might not have presumed that the University *should* want to receive coal by rail, which is a theme of the February 2008 Decision. February 2008 Decision at 4-5, 7.

The evidence submitted in support of the petition to reopen, which confirms evidence in the record prior to the February 2008 Decision, tips the balance of the factors we weigh in considering an adverse abandonment application. The University is not an unsophisticated organization without business sense. It does not want and will not take rail service. It has not received coal by rail since the mid-1990s, nor has there been any other rail traffic to any other shipper during this period. Id. at 2. Indeed, we note that a recent survey indicated no shipper interest in rail service over the lines at issue. Id. at 4. There is no reasonable potential for future rail use of the lines at issue. A decade of non-use is a reasonable period of time under the circumstances in this case on which to base a finding that there is no present or future public need for rail service that is not outweighed by other interests. Enough is enough.

The petition to reopen afforded the Board another opportunity to examine the record in this case. I regret that the majority did not see fit to reopen and reverse the February 2008 Decision based on material error, as the agency has done on occasion in the past.⁸

⁷ Margaret Fosmoe, "Notre Dame drops coal by rail option," South Bend Tribune, June 22, 2006, Application, Attachment I & CLS&SB Reply, Exhibit B.

⁸ See, e.g., Railroad Ventures, Inc.—Abandonment Exemption—Between Youngstown, OH and Darlington, PA, in Mahoning and Columbiana Counties, OH, and Beaver County, PA, STB Docket No. AB-556 (Sub-No. 2X), 2007 WL 482683 (S.T.B.) (STB served Feb. 15, 2007); Union Pac. R.R.—Abandonment in Fremont & Teton Counties, ID, ICC Docket No. AB-33 (Sub-No. 56), 1990 WL 287419 (I.C.C.) (Feb. 22, 1990), aff'd Idaho v. ICC, 939 F.2d 784, 789 (9th Cir. 1991).