39053 SERVICE DATE – MAY 20, 2009
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SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Finance Docket No. 34943

BEAUFORT RAILROAD COMPANY, INC.—MODIFIED RAIL CERTIFICATE

Decided: May 19, 2009

This decision denies a petition by several landowners for reconsideration of a March 19, 2008 decision (March 2008 Decision)[1] and grants a request for a notice of interim trail use (NITU) that would permit rail banking/interim trail use under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), for the majority of the line at issue in the March 2008 Decision. That decision denied reconsideration of a December 2006 notice of the filing of a modified certificate of public convenience and necessity (modified certificate) under 49 CFR 1150.21-23 for operation of a rail line in South Carolina. The landowners claim that there was material error in the Board's finding in the March 2008 Decision that the line has not been abandoned and that the Board retains jurisdiction over the property because it remains part of the interstate rail system. We are denying the petition for reconsideration because we find that there was not material error in the March 2008 Decision.

BACKGROUND

This proceeding involves a rail line, referred to as the Port Royal Railroad (PRR) line, extending approximately 25 miles from milepost AMJ-443.26, in Yemassee, SC, to milepost AMJ-468.31, in Port Royal, SC, formerly owned by Seaboard System Railroad, Inc. (Seaboard). The line was authorized for abandonment by the Board's predecessor, the Interstate Commerce Commission (ICC), in 1984.[2] Abandonment authorizations, however, are not self-executing, and, here, Seaboard did not exercise its authority to abandon. Rather, after Seaboard was authorized to abandon the line, the line was acquired by the South Carolina State Ports Authority (SCSPA) and then leased to the South Carolina Public Railways Commission (SCPRC), which is now organizationally a part of the State of South Carolina Division of Public Railways (SCDPR). Neither SCSPA nor SCDPR obtained the authority to operate the line or assumed a common carrier obligation.[3] Beaufort Railroad Company,

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[1] Beaufort Railroad Company, Inc.—Modified Rail Certificate, STB Finance Docket No. 34943 (STB served Mar. 19, 2008).

[2] Seaboard System Railroad, Inc.—Abandonment—in Beaufort County, SC, Docket No. AB-55 (Sub-No. 110) (ICC served Aug. 23, 1984).

[3] The acquisition of an active rail line and of the common carrier obligation that goes with it ordinarily requires Board approval under 49 U.S.C. 10901, even if the acquiring entity is

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Inc. (BRC), is a subsidiary of SCDPR, a division of the South Carolina Department of Commerce. SCSPA is also an instrumentality of the State of South Carolina (BRC and SCSPA will be collectively referred to as the State).

Tangent Transportation Company, Inc. (Tangent), a wholly owned subsidiary of SCPRC, operated the line, pursuant to a modified certificate, from 1985 to 2003.[4] A modified certificate is a type of license that operators of state-owned lines can obtain and relinquish merely by providing notice to the Board.[5] In 2003, Tangent gave the required 60-day notice to terminate its service under the modified certificate,[6] apparently because of the anticipated loss of its primary shipper, which was expected to occur in connection with the imminent closure of the Port of Port Royal.

On December 1, 2006, BRC filed a notice with the Board under 49 CFR 1150.23(a), Subpart C, containing the information required for a new modified certificate. BRC was authorized to begin operations upon filing that notice.[7] Notice of the filing of the modified certificate was published in the Federal Register on December 28, 2006 (71 FR 78270) (December 2006 notice), pursuant to 49 CFR 1150.23(a).

On January 17, 2007, Delores Coberly, Don Edgerly, John Keith, Dartha P. Pierce, Pender Brothers, Inc., and John Scherer (collectively, Initial Petitioners) jointly filed a petition (Initial Petition), under 49 CFR 1115.3, for reconsideration of the Board's December 2006 notice. Initial Petitioners claimed that they own the fee interest in parcels of the right-of-way (ROW) of the PRR. Initial Petitioners argued that the Board lacks jurisdiction to issue a modified certificate because the rail segment had been fully abandoned in 2003, when Tangent terminated service under its modified certificate. Initial Petitioners also argued that the modified certificate was not sought in good faith, but rather was sought to re-establish the Board's jurisdiction over the line so that the line could be converted to a recreational trail, which Initial Petitioners would oppose. The State replied in opposition to the petition for reconsideration.

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a noncarrier. See Common Carrier Status of States, State Agencies, 363 I.C.C. 132, 133 (1980) (Common Carrier Status), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). Board authorization is not required, however, when the common carrier rights and obligation that attach to the line will not be transferred. See Maine, DOT—Acquisition Exemption—Maine Central R. Co., 8 I.C.C.2d 835, 836-37 (1991).

[4] See Tangent Transportation Company—Modified Rail Certificate, Finance Docket No. 30655 (ICC served June 13, 1985).

[5] See Common Carrier Status; March 2008 Decision, slip op. at 1-2.

[6] See 49 CFR 1150.24.

[7] See Common Carrier Status, 363 I.C.C. at 138.

On March 22, 2007, Clarendon Farms, LLC; Diane D. Terni; Greedy Children Land, LLC; and Prodigal Son, LLC, stating that they had the same interests as Initial Petitioners, filed a petition for leave to intervene (Supplemental Petition), in which they asked the Board to reconsider the issuance of the December 2006 notice and also to initiate an investigation into the factual matters at issue. The State filed a reply opposing intervention.

Although the Supplemental Petition was late-filed, we accepted and considered it in the proceeding. However, we denied both petitions for reconsideration of the December 2006 notice in the March 2008 Decision and found that the Board retains jurisdiction over the PRR line and that it is still part of the national rail system. The March 2008 Decision explained (slip op. at 5-9) that Tangent's 2003 termination of service on the line did not amount to consummation of an abandonment of the line by the State rail line owner, and that therefore (1) the Board properly accepted BRC's modified certificate filing and (2) the December 2006 notice for a modified certificate remains in effect. In addition, we addressed the concerns raised by Initial Petitioners about the State's possible use of the ROW for rail banking/interim trail use. After citing our precedent for accepting trail use requests in conjunction with notices to terminate service under a modified certificate, we found that, if BRC terminated its service obligations, and the State found an interested party to use the ROW for interim trail use, that outcome would be permissible provided that it was pursued under the applicable statutory and regulatory requirement of the Trails Act.[8]

POSITIONS OF THE PARTIES

On April 8, 2008, Clarendon Farms, LLC; Diane D. Terni; Greedy Children Land, LLC; and Prodigal Son, LLC (jointly, Petitioners), filed a petition (Petition) under 49 CFR 1115.3 for reconsideration of the Board's March 2008 Decision. Petitioners argue that we erred in that decision in holding that the Board retained jurisdiction to accept BRC's modified certificate filing. Specifically, Petitioners argue that it was material error not to find that Tangent's termination of service was an act of the line's owner, the State. Petitioners claim that, because Tangent is a subsidiary of the State, the termination of service was an act by the owner and that abandonment was thereby consummated. Petitioners also contend that an STB employee told them that the Board does not retain jurisdiction over the PRR line.[9]

Petitioners also claim that it was material error for the Board to accept representations made by BRC that were disputed by the other parties in the filings before the March 2008 Decision. Petitioners argue that, contrary to the Board's finding, the State has not maintained the tracks and ties in a state of readiness for service for several years. Specifically, Petitioners contend that the line is, and has for many years been, totally out of service; at least one bridge needs repair; portions of the track are not secured to ties and some ties are not well secured to

[8] See March 2008 Decision, slip op. at 9.

[9] See Petition at 5.

ballast and road bed or are missing or rotten; portions of the road bed suffer from severe washing and erosion; there has been little clearing of vegetation and weeds along the line for years; trees are growing between some ties or have fallen onto the line and not been removed; and crossings have not been properly maintained.[10] Petitioners ask for a Board investigation to resolve factual discrepancies regarding the condition of the line and what actions the State has taken to maintain it.

On April 28, 2008, the State filed a reply in opposition to the Petition. The State argues that Tangent's termination of service was only a temporary discontinuance, which did not amount to consummation of abandonment, and, as a result, the State ROW over the Petitioners' land remains intact. The State claims that it has spent approximately $30,000 since February 2007 to maintain the line—which it would not have done if it intended to take the line out of the national transportation system—and notes that this expenditure is a part of the record and is unrebutted. In addition, the State asserts that the STB employee's statement about the abandonment of the PRR line referenced by Petitioners was an informal and non-binding response to a question that contained inaccurate facts.[11] The State also contends that Petitioners have offered no new evidence to meet the criteria required for a petition to reconsider under 49 CFR 1115.3.

In May 2008, Petitioners filed a response to the State's Reply (Response) disputing that the State has maintained the PRR line and providing photographs to support their contention. Petitioners also assert for the first time that BRC's December 2006 notice did not meet Board regulations. In addition, also in May 2008, Petitioners filed a supplemental submission of two news articles that discuss the possible transfer of the PRR line to Beaufort-Jasper Water and Sewer Authority (BJWSA) and the possible rail banking of the line by BJWSA to support their contention that the State never intended to reactivate rail service on the PRR and that the modified certificate therefore was not sought in good faith. They again ask for the Board to initiate an investigation to determine the State's true intentions with respect to the line.

On June 4, 2008, the State filed a reply in opposition to the Response and supplemental submission. The State acknowledges that there has not been any shipper request for service since December 2006, and that SCSPA had plans to file a notice of termination of service by BRC. The State also acknowledges that SCSPA planned to file a notice of its intent to transfer the PRR line to another state agency that intended to seek a NITU. The State argues that this action is permissible under Board rules and agency precedent. The State also argues that it has acknowledged it would need to incur additional expenses to restore active rail service on the line and that the pictures merely show areas requiring rehabilitation.

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[10] See Petition at 7-8.

[11] See BRC reply in opposition at 7.

On June 17, 2008, Petitioners filed a response to the State's June 4, 2008 reply in opposition to Petitioners' Response and supplemental submission. The Petitioners again argue that the State's actions with regard to the PRR show that they never intended to reactivate rail service.

On July 17, 2008, William Thomas Logan, an adjoining property owner, filed a letter with the Board raising concerns regarding the transfer of the ROW between state agencies and the potential rail banking of the line and use in the interim as a trail. He states that there is a continued opportunity for active freight rail and tourist/recreational train operations on the line.

On July 16, 2008, the State filed a notice of intent to terminate service by BRC and a request for issuance of a NITU. On August 22, 2008, Petitioners filed a response and motion to strike the State's notice of intent and NITU request. On September 11, 2008, the State filed a reply in opposition to Petitioners' response and motion to strike.

PRELIMINARY MATTERS

The Board normally does not accept a reply to a reply,[12] but we will consider the May 2008 Response and supplemental submission to address Petitioners' claims regarding prior PRR proceedings. We will also accept the State's June 4, 2008 reply and Petitioners' June 17, 2008 response as part of the record on reconsideration as they address issues raised in the May 2008 Response and supplemental submission.

DISCUSSION

Under 49 U.S.C. 722(c), a petition for reconsideration will be granted only upon a showing that the prior decision involved material error or that it will be affected materially because of new evidence or changed circumstances. Such a petition must state in detail the nature of and reasons for the relief requested. We find that Petitioners have failed to demonstrate any grounds for reconsideration.

Petitioners raise two issues in their petition and subsequent pleadings. First, they contend that the Board materially erred in its determination that the State did not abandon the line. We provided in the March 2008 Decision, slip op. at 6-7, the standard for determining whether a rail line such as this one has been abandoned: an act by the owner, not the operator, that shows a clear intent to remove the line from the national rail system and relinquish the property interest. Petitioners claim that Tangent is a subsidiary of the South Carolina government and that therefore Tangent's termination of service on the line was an act by the State that shows an intent to consummate abandonment. Second, they allege that the Board's inquiry into the facts was

[12] See 49 CFR 1104.13(c).

insufficient and request that we institute an investigation to determine the State's intent with regard to abandonment. We reject both claims. For the reasons discussed below, we reaffirm our previous decision that the line was not abandoned, and that the modified certificate process here was not used improperly.

Abandonment

Petitioners' argument that Tangent's termination of service shows an intent by the State owner to abandon the line because Tangent is a subsidiary of a department of the South Carolina government is unpersuasive. As the March 2008 Decision explained, there is no rigid formula for determining intent and the Board looks to the totality of the facts and circumstances of each case.[13] Indeed, in direct contradiction to Petitioners' argument, the March 2008 Decision specifically states that "the mere failure of a line owner to engage another operator prior to termination of service by an incumbent modified certificate operator will not be considered to be conclusive evidence of the line owner's intent to consummate an abandonment."[14] Our determination that a notice of termination by a modified certificate operator is not enough to show an intent to abandon is consistent with the larger policy of the Board and with the public interest. As we explained in the March 2008 Decision (slip op. at 8), the Board, and the ICC before it, have encouraged states to purchase rail lines at risk to preserve them for present or future rail service. We have done so largely by relieving states of the regulatory burdens of entry and exit. It would be at odds with that goal and philosophy for us to conclude that, once a modified certificate operator's arrangement with a state for providing rail service ends, that state could automatically lose its property and the public investment of funds in that property unless it engages a replacement operator immediately or within a short period of time.

Additionally, we find tenuous the argument that Tangent is able to act for the State with respect to abandonment.[15] Petitioners correctly note that 49 CFR 1150.21 defines "State" to include "States, political subdivisions of States, and all instrumentalities through which the State can act."[16] But section 1150.21 and the definitions therein deal with the *operation* of rail lines under a modified certificate, and not with abandonment. Tangent's responsibility with regard to the line is solely operational and thus its actions, as the operator of the line, only reflected the State's intent to discontinue service.

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[13] See March 2008 Decision, slip op. at 6, 8.

[14] Id. at 8.

[15] Petitioners and the State have different understandings as to where Tangent fits into the overall hierarchy of State organization. Petitioners imply that Tangent is a wholly owned subsidiary of SCSPA; the State claims that Tangent is a wholly owned subsidiary of SCPRC. However, this has no bearing on our decision, as Tangent, SCSPA, and SCPRC are all subsidiaries of the State.

[16] See Petition at 5.

Request for Investigation

Petitioners request an investigation to resolve factual discrepancies between what they contend the State has done to maintain the line since 2003 and what the State claims, and also to determine the State's motivation with regard to the PRR line. Petitioners assert that it was material error for the Board to accept the State's representations on the maintenance of the line.

The Board took note of all pleadings in holding in the March 2008 Decision that we retain jurisdiction over the PRR line. The Board analyzed the entire record, including Petitioners' claims about maintenance. We also accounted for Petitioners' claims and the State's counterclaims about statements attributed to an STB employee in the March 2008 Decision.

It is not necessary for us to obtain additional evidence to resolve this case. We affirm our prior finding that BRC complied with all of the requirements of 49 CFR 1150.23 when it filed notice with the Board of its modified certificate,[17] and we have a sufficient record to resolve the issues at hand. The photographic documentation of the condition of the line provided by Petitioners merely shows that certain areas of the line require rehabilitation before rail service can resume, a fact that the State has acknowledged. Thus, no further information is needed in this regard. As we explained in the March 2008 Decision, "when determining whether an abandonment has been consummated, the Board looks for a physical act which shows a clear intention on the part of the rail line owner to remove the line from the national rail system and relinquish the property interest."[18] Because discontinuation of service and lack of maintenance standing alone are not physical acts sufficient to show an intent to relinquish permanently the right to use a line for rail service, the State's actions, even as alleged by Petitioners, do not demonstrate that intent.[19]

Nor is it necessary to request further information as to the State's motivation. Petitioners provide news articles indicating that the State intends to rail bank the PRR. Petitioners contend that this motivation indicates that the State never intended to restore rail service and is misusing the Board's processes to maintain the ROW. However, neither these articles, nor the actual State NITU request, show that the modified certificate, at the time it was issued, was sought in bad faith. Even if Petitioners were correct that the State's motivation in recent years has been to use the line as a trail, rail banking in the form of interim trail use is a legitimate use of the Board's

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[17] See 71 FR 78270.

[18] See March 2008 Decision, slip op. at 6-7.

[19] See Norfolk and Western Railway Company—Abandonment Exemption—Between Kokomo and Rochester in Howard, Miami, and Fulton Counties, IN, STB Docket No. AB-290 (Sub-No. 168X), slip op. at 6 (STB served May 4, 2005) (railroad's removal of sections of track was not determinative of intent to abandon where other evidence shows a lack of intent to abandon).

regulations. The purpose of rail banking/interim trail use is to keep lines that would otherwise be abandoned available for future rail use; thus, rail banking, which has been used in the past in similar situations,[20] promotes the Board's stated goal of encouraging the preservation of rail corridors that might otherwise be lost to the national rail network for future rail service.

Notice of Interim Trail Use

On July 16, 2008, BRC filed a notice of its intent to terminate service under the modified certificate over the entire line,[21] and the State filed a joint request with BJWSA for issuance of a NITU to rail bank under the Trails Act the majority of the line between milepost AMJ-443.37, near Yemassee, and the southern boundary of Ribaut Road, Beaufort and Port Royal, near milepost AMJ-467. BJWSA has submitted a statement of willingness to assume financial responsibility for management of the right-of-way as required by 49 CFR 1152.29, and has acknowledged that use of the right-of-way as a trail is subject to possible future reactivation for rail purposes. The parties also indicate that they have entered into a rail banking/interim trail use agreement, contingent upon the issuance of a NITU.

Trail use requests may be accepted as long as the Board retains jurisdiction over the right-of-way, which it does here, and the carrier is willing to enter into negotiations. BRC's termination of service[22] does not show an intent by the State to consummate the abandonment because the NITU request shows an intent to preserve the right-of-way for potential future rail service consistent with the Trails Act. Moreover, the Board has jurisdiction to issue a NITU in a proceeding where a notice is filed under 49 CFR 1150.24 to terminate operations under a modified certificate. See Sammamish; Wisconsin and Calumet Railroad Company, Inc.—Notice of Interim Trail Use and Termination of Modified Certificate, Finance Docket No. 30724 (Sub-No. 1) (ICC served Aug 8, 1989).

Because the parties have met the requirements of 49 CFR 1152.29, a NITU will be issued covering the portion of the line described above. Although the parties indicate that they have already reached a rail banking agreement, they will be given the full 180-day period prescribed below to finalize or modify any such agreement. If they reach (or have reached) a mutually acceptable final agreement, no further Board action is necessary. If no agreement has been

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[20] See Sammamish Transportation Company—Notice of Interim Trail Use and Termination of Modified Certificate, STB Finance Docket No. 33398 (Sub-No. 1) (STB served Feb. 26, 1998) (Sammamish).

[21] Under 49 CFR 1150.24, an operator must provide 60 days' notice of its intent to terminate service over a line covered by a modified certificate.

[22] The termination of service became effective on September 14, 2008, 60 days after the July 16, 2008 filing.

reached by the end of the 180-day period, the line may, but need not, be fully abandoned. Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

CONCLUSION

The Board finds that Petitioners have failed to meet their burden of showing material error, new evidence, or substantially changed circumstances that would justify reconsideration of the March 2008 Decision finding that the PRR line has not been abandoned and that the Board continues to retain jurisdiction over the property. Petitioners also have not demonstrated a need for additional evidence. Accordingly, the petition for reconsideration will be denied, and the request for a NITU, which was filed in compliance with the requirements of the Trails Act and our Trails Act rules, will be granted.

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

It is ordered:

1. Petitioners' May 2008 Response and supplemental submission are accepted as part of the record on reconsideration.

2. The State's June 4, 2008 reply, and Petitioners' June 17, 2008 response are accepted as part of the record on reconsideration.

3. The request for reconsideration of the March 2008 Decision is denied.

4. The request for an investigation is denied.

5. The request for a NITU under 16 U.S.C. 1247(d) and 49 CFR 1152.29 is granted.

6. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

7. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.

8. If interim trail use is implemented and the user subsequently seeks to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

9. If an agreement for interim trail use/rail banking has been reached by the 180th day after service of this decision and notice, interim trail use may be implemented. If no agreement is reached by that time, the line may be fully abandoned. See 49 CFR 1152.29(d)(1).

10. This decision is effective on its date of service.

By the Board, Acting Chairman Mulvey, and Vice Chairman Nottingham.

Anne K. Quinlan
Acting Secretary