

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 678

CONSUMMATION OF RAIL LINE ABANDONMENTS THAT ARE SUBJECT TO
HISTORIC PRESERVATION AND OTHER ENVIRONMENTAL CONDITIONS

AGENCY: Surface Transportation Board.

ACTION: Statement of Board Policy.

SUMMARY: The Surface Transportation Board is issuing this policy statement to clarify when, under the agency's regulation at 49 CFR 1152.29(e)(2), a carrier may "consummate" abandonment and file a "notice of consummation" of the abandonment of a rail line where the Board has imposed conditions on its abandonment authorization in order to satisfy section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. 470f, or the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* (NEPA). In cases where a condition is imposed under NHPA, a notice of consummation should not be filed for any part of the line until the historic review process is completed and the condition is removed. However, where a NHPA condition is needed only for a segment of the line or for a particular structure or structures, the railroad may request that the Board modify the condition to allow the railroad to salvage the portions of the line not affected by that condition. In contrast, a condition imposed under NEPA that is related to salvage activities is not a regulatory barrier to consummation of an abandonment.¹ A notice of consummation may be filed prior to satisfying such a salvage condition. However, filing a notice of consummation in that situation does not remove the condition, which must still be satisfied if and when salvage activities are conducted. If a property encumbered with salvage conditions changes ownership, the new owner must show that it agrees to abide by the salvage conditions at the time of conveyance by referencing the conditions in the instrument of conveyance, and providing a copy of the instrument of conveyance to the Board so that it can be filed in the pertinent abandonment proceeding. Additionally, railroads are cautioned to comply fully with section 106 of NHPA.

EFFECTIVE DATE: This policy statement is effective on April 23, 2008.

¹ See, e.g., Consummation notice filed by the Santa Clara Valley Transportation Authority (SCVTA) on May 8, 2007, in Santa Clara Valley Transportation Authority—Abandonment Exemption—In Santa Clara and Alameda Counties, CA, STB Docket No. AB-980X (notifying the Board of SCVTA's consummation of abandonment authority although it had not yet engaged in salvage activities and, therefore, had not yet complied with a salvage condition that the Board had attached to that authority).

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 245-0395, [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.]

SUPPLEMENTARY INFORMATION:

The Board is issuing this policy statement to address when a “notice of consummation”—required under the agency’s regulation at 49 CFR 1152.29(e)(2) to signify that a railroad intends to fully abandon a line and remove it from the national rail transportation system—may be filed in cases where the Board has imposed conditions on its abandonment authorization to satisfy section 106 of NHPA or to satisfy NEPA. This policy statement discusses each of these situations.

A railroad may not “abandon” a rail line (i.e., be relieved of its common carrier obligation to provide rail service over that line and dispose of the property for non-rail use) without express permission from the Board. Chi. & N. W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 321-22 (1981). Under 49 U.S.C. 10903, the Board may affirmatively approve the abandonment of a line by determining that the public convenience and necessity require or permit the proposed abandonment. Alternatively, the agency may authorize abandonment by granting an exemption (individually or by class of rail lines) under 49 U.S.C. 10502. See 49 CFR 1152.50 and 1152.60. Under either procedure, the Board must meet its responsibilities under other Federal statutes, including NEPA, NHPA, and the National Trails System Act (Trails Act) at 16 U.S.C. 1247(d). To meet those responsibilities, the Board may need to impose conditions that limit or postpone the carrier’s ability to exercise its abandonment authorization in whole or in part.

The abandonment authority issued by the Board is permissive authority that the railroad may or may not decide to exercise. The agency retains jurisdiction over rail properties until abandonment authority has been consummated. Hayfield N. R.R. Co. v. Chi. & N. W. Transp. Co., 467 U.S. 622, 633-34 (1984). Thus, it is important to be able to determine with certainty when abandonment authority is exercised.

To exercise the authority and “consummate” an abandonment, a railroad must manifest a clear intent to abandon through its statements and actions, including discontinuing operations and “salvage” of the line (removing rails and other materials from the property). See Birt v. STB, 90 F.3d 580, 585 (D.C. Cir. 1996) (Birt). Since 1997, under the Board regulation at 49 CFR 1152.29(e)(2), a railroad is required to file a “notice of consummation” with the agency within 1 year of the service date of the decision permitting abandonment to signify that it has exercised the authority granted and intends that the property be removed from the interstate rail network. Under the regulation, a notice of consummation is deemed conclusive on the issue of consummation if there are no legal or regulatory barriers to consummation (such as outstanding conditions, including Trails Act conditions that permit rail banking and interim trail use on railroad rights-of-way that would otherwise be abandoned). The regulation provides that if, after 1 year from the date of service of a decision permitting abandonment, consummation has not been effected by the railroad’s filing of a notice of consummation, and there are no legal or regulatory barriers to consummation, the authority to abandon automatically expires (unless the

Board has granted an extension). Once abandonment authority expires, a new proceeding would have to be instituted if the railroad wants to abandon the line. If, however, any legal or regulatory barrier to consummation exists at the end of the 1-year time period, the notice of consummation is due to be filed not later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier. A railroad can file a request for an extension of time to file a notice, for good cause shown, if it does so sufficiently in advance of the expiration of the deadline to allow for timely processing.

Until 49 CFR 1152.29(e)(2) was adopted, there was no rigid formula for determining whether a railroad intended to exercise its permissive abandonment authority; rather, where there was an issue regarding consummation, the Board and the courts examined the facts on a case-by-case basis. Birt, 90 F.3d at 585-86; Black v. ICC, 762 F.2d 106, 112-13 (D.C. Cir. 1985). Nor was there any specific time period during which abandonment had to be consummated. The notice of consummation requirement was added to provide certainty and reduce litigation (primarily in cases involving the Trails Act) regarding whether a railroad's actions demonstrated its intent to abandon the line after an abandonment authorization had become effective. Compare Becker v. STB, 132 F.3d 60, 63 (D.C. Cir. 1997) and Fritsch v. ICC, 59 F.3d 248, 253 (D.C. Cir. 1995) (trail conditions could not be imposed because abandonments had already been consummated) with Birt, 90 F.3d at 588 (Board retained jurisdiction to impose a trail condition because railroad's actions did not show an intent to abandon).

Recently, however, there has been some confusion regarding how the notice of consummation requirement applies to abandonment cases where conditions have been imposed to meet the Board's obligations under NHPA or NEPA. Because 49 CFR 1152.29(e)(2) does not specifically address those situations, the Board is issuing this policy statement to clarify when a notice of consummation may be filed (if the railroad wishes to consummate the abandonment) in such cases.

Historic Review Conditions Under NHPA. Where the historic review process is ongoing, the Board generally imposes a condition prohibiting the railroad from selling the line, altering any sites or structures on the line, or conducting salvage activities on the line until the historic review process is complete and the Board removes the condition. This maintains the status quo pending completion of the historic review process. In some instances, where it becomes apparent that mitigation (i.e., documentation of the historic resources) is necessary only for a portion of the line or for a particular structure or structures, the Board may modify the condition to allow salvage of the rest of the line. But otherwise, abandonment may not be consummated, and potentially historic property may not be disturbed for any part of the line, until either there is a formal final determination by the Board's Section of Environmental Analysis (SEA) (acting on behalf of the Board) that the project would have no adverse effect on historic resources or a Memorandum of Agreement is entered into that sets forth the appropriate mitigation (i.e., documentation) to satisfy section 106 and the historic review condition is removed.

In some instances, railroads have sought to consummate the abandonment of part or all of a railroad line before the historic review process required by section 106 of NHPA is complete and the historic preservation condition imposed by the Board has been modified or removed. By this policy statement, the Board clarifies that, regardless of whether a section 106 condition

applies to the entire line or is more limited, an historic preservation condition is a regulatory barrier to consummation. Therefore, a railroad should not file a notice of consummation seeking to remove the property from the Board's jurisdiction until the historic review process has been completed and the Board has removed the section 106 condition.

The Board recognizes that in some cases there can be an overriding need for partial consummation and that partial consummation could be in the public interest (for example, where a portion of the line is needed to complete a highway project that is important to the community and the historic preservation condition applies only to another part of the line or to a structure that would not be disturbed by the highway project), or could further a legitimate private interest. Therefore, the Board's policy will be that, for good cause shown, a railroad may make a request to file a notice of consummation for a portion of the line prior to formal removal of a section 106 condition. The Board would then consider, on a case-by-case basis, whether to waive its no-partial-consummation policy. The Board's primary concern in considering such requests will be to assure that partial consummation would not compromise satisfactory completion of the historic preservation process.

In some cases railroads have taken actions affecting rail property without first seeking abandonment authority. When this occurs on inactive lines, we generally do not discover these actions until after the fact when the carrier seeks abandonment authority. Such actions are unlawful. Not only is the rail line unlawfully severed from the national transportation system when this occurs, but the Board's ability to carry out its obligations under NEPA and NHPA may then be adversely affected. The Board will continue to carry out its obligations under those statutes and will take whatever steps necessary to enforce compliance with them. Railroads that take such actions may find not only that obtaining abandonment authority is delayed, but that the Board will require historic preservation training for the railroad's staff members who are involved with abandonment projects and require the railroad to document the in-house measures that it will implement to prevent such actions from occurring in the future. Other possible actions the Board may take include restricting the railroad's future ability to employ expedited procedures to obtain abandonment authority, imposing a financial penalty, and seeking a legal remedy against the railroad in a court of law.

Other Environmental Conditions. Most other environmental conditions imposed by the Board in abandonment cases relate to salvage activities. As discussed above, salvage activities can be one indicium of a railroad's intent to abandon. However, it is not necessary for a railroad to salvage a rail line in order to consummate abandonment authority. A railroad may decide not to salvage the line immediately upon being relieved of its service obligations, but rather to leave the track and ties in place. Therefore, the Board's policy is that a salvage condition,² unlike a section 106 condition, typically is not a regulatory barrier to the filing of a notice of consummation, and thus the existence of a salvage condition has no bearing on the consummation deadline. However, the salvage condition remains in place as a condition that

² Salvage conditions are imposed on a case-by-case basis, but examples of conditions imposed in the past include permitting the railroad to salvage the line only during a particular time of year and requiring the railroad to provide notice to, or consult with, appropriate agencies prior to salvaging the line.

attaches to the property and applies to salvage activities whenever they occur, even if salvage is conducted years later by a successor interest. Therefore, our policy will be to require any successor interest to agree to the condition by referencing the condition in the purchase contract or other instrument of conveyance, and by submitting a copy of that instrument of conveyance to the Board so that it can be filed in the docket of the relevant abandonment proceeding.

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

Regulatory Flexibility Certification

Pursuant to 5 U.S.C. 605(b), we conclude that our action in this proceeding will not have a significant economic impact on a substantial number of small entities. This action clarifies that conditions imposed by the Board under section 106 of NHPA are barriers to abandonment consummation, while NEPA salvage conditions are not. It also requires successor interests in properties encumbered with salvage conditions to reference the conditions in the instruments of conveyance, and to provide a copy of the instrument of conveyance to the Board so that it can be filed in the pertinent abandonment proceeding docket. These requirements will require little additional work and should not have a significant economic impact on a substantial number of small entities.

Decided: April 16, 2008.

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

Anne K. Quinlan
Acting Secretary