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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-863X

CITY OF VENICE–ABANDONMENT EXEMPTION–
IN VENICE, IL AND ST. LOUIS, MO

Decided: June 22, 2004

The Board is dismissing, for lack of jurisdiction, a notice of exemption filed by the City of Venice, IL (City), under 49 CFR 1152 Subpart F–Exempt Abandonments. In the notice, the City seeks to abandon a 2-mile line of railroad, running over the McKinley Bridge and its elevated rail approaches that span the Mississippi River, between milepost 0.55 near Branch Street Yard in St. Louis, MO, and milepost 0.0 at the state line at Venice, IL, and between milepost 0.00 at Venice and milepost 1.45 at McKinley Junction, IL. The notice was served and published in the Federal Register on December 29, 2003 (68 FR 75021).

The Terminal Railroad Association of St. Louis (TRRA) filed comments on December 29, 2003, and a petition for reconsideration on January 21, 2004, claiming that the City is not a railroad and that the notice of exemption should be rejected. TRRA also sought to stay the effectiveness of the exemption by a petition filed January 6, 2004, to which the City replied on January 13, 2004. The City replied to TRRA's December 29 comments on January 23, 2004, and to TRRA's petition for reconsideration on February 4, 2004.

In a decision served on January 26, 2004, the effective date of the exemption was stayed to permit resolution of issues that were raised by TRRA. TRRA filed an additional reply on February 11, 2004, and the City replied to that filing on February 18, 2004.[1]

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[1] TRRA also filed a petition for leave to file its reply to the City's reply, noting that a reply to a reply is not permitted by 49 CFR 1104.13(c). TRRA contends that the City distorts the evidence of record and misrepresents the holdings of decisions on which the City relies. The City opposes TRRA's petition, but alternatively, has requested leave to submit an additional response to TRRA's reply, which it has submitted. In the interests of having a complete record, these pleadings will be accepted and considered. Neither party will be prejudiced by such action.

BACKGROUND

The City acquired the line from the former Illinois Terminal Railroad Company (IT) in 1958 in a transaction that was the subject of a decision by the Board's predecessor, the Interstate Commerce Commission (ICC), in Illinois Term. R. Co. Abandonment, 327 I.C.C. 70 (1958) (1958 Decision). The 1958 Decision authorized IT to: (1) abandon its line over the McKinley Bridge and elevated rail approaches by sale to the City; and (2) acquire from the City the right to use and operate over the subject tracks and facilities on the bridge and elevated railroad approaches pursuant to a lease. The City financed the purchase by issuing revenue bonds, from which IT received the cash proceeds. Under the lease agreement, the City granted to IT exclusive rights to operate its trains over the bridge and rail line for an initial period of 50 years and for successive 50-year periods. The lease agreement could have been terminated early by IT if the bonds had been retired or refunded, and if IT met certain other conditions. IT was obligated to maintain the line at its own expense and pay a basic rental not exceeding $250,000 per year.

In 1981, Norfolk & Western Railway Company (N&W) acquired IT in a transaction approved by the ICC in Norfolk & Western Ry. Co.–Pur.–Illinois Term. R. Co., 363 I.C.C. 882 (1981). As part of that transaction, N&W assumed IT's liability for the McKinley Bridge rent. N&W subsequently filed a notice of exemption under 49 CFR 1152 subpart F to abandon the line and other lines in the vicinity in Norfolk & Western Railway Company–Abandonment Exemption–in Madison and St. Clair Counties, IL, and the City of St. Louis, MO, Docket No. AB-290 (Sub-No. 139X) (ICC served Mar. 29, 1994), and published at 59 FR 14669 (N&W Abandonment). Madison County Transit District (MCT) negotiated a trail use agreement, finalized in 1997, for some of these other lines but not for the line that is the subject of this proceeding.

The City claims that, when it purchased the line from IT, it acquired a common carrier obligation for the line, even though the line was to be operated by IT under a lease agreement. The City asserts that its purchase was similar to other transactions where government entities purchasing rail lines, but not intending to operate the lines, were deemed to have acquired a common carrier obligation. In support, the City relies, in particular, on Common Carrier Status of States, State Agencies, 363 I.C.C. 132, 133 (1980), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982) (Common Carrier); Southern Pacific Transp. Co.–Abandonment, 8 I.C.C.2d 495 (1992), aff'd. 9 I.C.C.2d 385 (1993) (Southern Pacific); Onondaga County Industrial Development Agency–Acquisition and Operation Exemption–Lines of Consolidated Rail Corporation, Finance Docket No. 32287 (ICC served July 7, 1994) (Onondaga); and City of Austin, TX–Exemption–From 49 U.S.C. Subtitle IV, Finance Docket No. 30861(A) (Sub-No. 1) (ICC served Apr. 23, 1987) (City of Austin).

In the City's view, its proposed abandonment would extinguish its residual common carrier obligation over the line and also facilitate plans by the Illinois Department of Transportation (IDOT) and Missouri Department of Transportation (MDOT) to rehabilitate the McKinley Bridge. The City notes that the McKinley Bridge had been used as a toll bridge for motor and rail traffic, but was closed in October 2001 when it was deemed unsafe. Also, wooden trestles on the rail approaches to the bridge have deteriorated, requiring extensive and expensive reconstruction to support future rail traffic.[2] The City indicates that IDOT and MDOT plan to renovate the McKinley Bridge and its motor vehicle approaches so it could again be used for motor carrier traffic moving to and from St. Louis. The project includes a bicycle and pedestrian pathway, but apparently does not include continued rail use.

The City indicates that it wants to preserve the rail corridor for continued public use as a light rail line, trail or freight rail line. To that end, the City says that it has agreed to convey the remaining railroad property to MCT for public purposes, including interim trail use, while preserving the corridor for possible future use for rail and passenger service.[3]

In its response, TRRA asserts that the City purchased the right-of-way and improvements of an abandoned line pursuant to the 1958 Decision. TRRA contends that the common carrier obligation to provide rail transportation service on the line was acquired by IT alone under that decision. In addition, TRRA points out that the City has never held itself out as a common carrier to provide rail service on the line.

According to TRRA, the transaction described in the 1958 Decision is similar to transactions following the precedent established in Maine, DOT-Acq. Exemption, Me. Central R. Co., 8 I.C.C.2d 835 (1991) (State of Maine), that ICC and Board authorization is not required when public agencies acquiring railroad rights-of-way and improvements do not acquire the common carrier rights and obligations for the line or hold themselves out to provide service.[4] In

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[2] In its comments, TRRA indicates that an elevated segment of the line between Venice and McKinley Junction is located on land that it owns. According to TRRA, the wood and steel trestles carrying the line have deteriorated and are unsafe and that trestles across its Madison Yard need to be removed for a road relocation project.

[3] On December 9, 2003, MCT filed a Statement of Willingness to Assume Financial Responsibility for the subject line. As noted, in N&W Abandonment, MCT acquired for interim trail use most of the rail lines that N&W had proposed to abandon in that proceeding, but did not acquire the subject line.

[4] See, e.g., North Carolina State Ports Authority-Acquisition Exemption–North Carolina Ports Railway Commission, STB Finance Docket No. 34258 (STB served Oct. 31, 2002); State

(continued...)

State of Maine transactions, the public agency acquires the physical assets in the line, while the operating carrier acquires or retains a permanent and unconditional easement to conduct rail transportation service. TRRA argues that the City cannot again seek abandonment authority for a line that already has been abandoned by the N&W in N&W Abandonment.

TRRA also objects to MCT's request to acquire the right-of-way for interim trail use. TRRA notes that MCT had the opportunity to acquire the line for interim trail use in connection with N&W Abandonment, but did not do so even though MCT acquired other N&W lines involved in that proceeding for interim trail use. TRRA argues that MCT cannot now seek to acquire the right-of-way for interim trail use.

DISCUSSION AND CONCLUSIONS

The City did not acquire a rail common carrier obligation, residual or otherwise, as a result of the 1958 Decision. That decision authorized IT to abandon the line by sale to the City. The decision also authorized IT to acquire and operate the abandoned line pursuant to a lease arrangement with the City. The decision did nothing more. The 1958 Decision did not authorize the City to acquire the subject line or grant the City an operating certificate to provide rail service on the line. Those were the only vehicles available for noncarriers such as the City to become a carrier and acquire a common carrier obligation to provide rail service. See Iowa Term. R. Co. Acquisition and Operation, 312 I.C.C. 546, 549 (1961) (Iowa).

The 1958 Decision noted that IT had questioned the ICC's jurisdiction over the proposal, claiming that it was not abandoning service but was going to continue to operate the line under a lease with the City. Therefore, IT reasoned, the proposed sale to the City did not constitute an abandonment, and, there being no abandonment, there was no acquisition by IT of a line of railroad within the meaning of the statute. Without a transaction requiring agency approval, IT argued that its application should be dismissed.

The ICC rejected IT's argument, finding that it did have jurisdiction over the proposal. The ICC found that there were two transactions involved: (1) IT's abandonment of the line, effected by conveying title to the right-of-way to the City, disposing of all IT's rights in the line;

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[4](...continued)
of Wisconsin Department of Transportation–Petition for Declaratory Order, STB Finance Docket No. 34181 (STB served Aug. 1, 2002); State of Georgia, Department of Transportation–Acquisition Exemption–South Carolina Central Railroad, Inc., STB Finance Docket No. 34057 (STB served Apr. 30, 2002); and City of Oshkosh, WI and Wisconsin Central LTD.–Petition for Declaratory Order, Finance Docket No. 32452 (ICC served June 8, 1994).

and (2) IT's acquisition from the City of the right to operate over the line under the lease agreement.[5] In making its jurisdictional findings, the ICC expressed concern that, were it to hold otherwise, a railroad could dispose of a rail line and disable itself from fulfilling its common carrier obligations without agency approval. But at no point in the 1958 Decision did the ICC indicate that the City would be acquiring a rail common carrier obligation, residual or otherwise. Thus, the 1958 Decision authorized IT to abandon the line, terminating its operating rights as owner of the line by selling the property to the City,[6] and then granted IT new operating authority to provide rail transportation service over the line under the lease agreement. But, in doing so, the 1958 Decision did not grant any form of authority to the City or confer any sort of common carrier obligation on the City.

The Southern Pacific, Onondaga, and the City of Austin decisions cited by the City all involved transfers of active rail lines and relied on the well-established principle that, when a noncarrier, including a state or local government, acquires an active rail line, it ordinarily must seek approval under 49 U.S.C. 10901. Accord Common Carrier, citing United States v. California, 297 U.S. 175 (1936); and Iowa, 312 I.C.C. at 549. In contrast, as determined by the ICC on the record before it at that time, IT's sale of its property interest to the City effected abandonment of the line and, thus, the sale to the City did not require ICC approval because it involved the transfer of a fully abandoned rail line. See Common Carrier, 363 I.C.C. at 135.

The City also cites Southern Pacific and related cases for the proposition that the public body that retains an interest in a line may be deemed to have retained or obtained control and thus to have subjected itself to the Board's jurisdiction. But the City acquired no such control here. The agreement between the City and IT, as described in the 1958 Decision, gave IT complete operating control of the line. There was nothing in the 1958 Decision indicating that the City could have interfered with IT's ability to fulfill its common carrier obligation for the line or could have assumed that obligation itself. The lease agreement provided IT with the full common carrier rights to provide rail service. And, on this record, the City never held itself out as a common carrier to perform rail service on the line.

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[5] The ICC indicated (327 I.C.C. at 74) that the transactions were similar to those where a carrier had been authorized to abandon its own line and then acquired rights to use parallel lines of another carrier. In those cases, the ICC determined that its approval was required for both the abandonment and the use of parallel tracks, citing Sacramento N. Ry. Trackage Rights, 290 I.C.C. 145 (1953) and 290 I.C.C. 229 (1954).

[6] In approving the abandonment, the ICC also imposed the employee protective conditions typically prescribed at that time, set forth in Chicago, B. & Q. R. Co. Abandonment, 257 I.C.C. 700 (1944).

IT's rights under the lease agreement are comparable to permanent easement interests that were discussed in the State of Maine line of decisions. The City attempts to distinguish the State of Maine precedents by noting that it did not follow procedures described in that decision because it did not seek a prior determination by the agency of whether it would acquire a common carrier obligation by its purchase and, by not following those procedures, it assumed a residual common carrier obligation. The City's attempt to distinguish the State of Maine cases is unpersuasive. It would be anomalous to hold that the City should have followed a procedure that was developed in 1991 in a transaction that occurred in 1958. Finding on this record that the City did not acquire a common carrier obligation is consistent with the agency's State of Maine precedent. See 8 I.C.C.2d 835. In any event, the Board's decision here need not rest on a comparison with the State of Maine cases. The agency's jurisdiction was thoroughly examined in the 1958 Decision.

The City's mere ownership of the abandoned line over which IT acquired authority to commence operations pursuant to a lease with the City also did not confer on the City a common carrier obligation. See Wisconsin Central Ltd. v. STB, 112 F.3d 881 (7th Cir. 1997); State of Vt. and Vermont Ry., Inc., Acquisition and Op., 320 I.C.C. 609 (1964) (State of VT).

By not acquiring a common carrier obligation, the City was not obligated to comply with the ICC's reporting and accounting requirements[7] and was not required to obtain ICC approval to issue the revenue bonds that were used to finance its purchase. See State of VT, 320 I.C.C. at 616. The lack of any evidence in the record of the City's ever attempting to comply with those requirements, or of the agency's even questioning whether the City should do so, further supports the conclusion that the City did not obtain a common carrier obligation as a result of the transactions approved in the 1958 Decision. Similarly, the fact that N&W sought, and the ICC granted, abandonment rather than discontinuance authority to terminate N&W's (as successor to IT) common carrier obligation for the line in N&W Abandonment shows that no one considered the City to have held any sort of common carrier obligation for the line.

Finally, the City states that it seeks to extinguish any residual common carrier obligation over the line to facilitate plans by IDOT and MDOT to rehabilitate the McKinley Bridge. The Board's determination that the City has no such obligation to extinguish should, if anything, benefit the efforts of IDOT and MDOT to rehabilitate the bridge.

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[7] Accounting and reporting requirements for Class III railroads and railroad lessors were not eliminated until 1981. See Reduction of Accounting and Reporting Requirements, 46 FR 9114 (Jan. 28, 1981).

The Board concludes that the City is not a rail carrier subject to its jurisdiction. Accordingly, the City's notice of exemption seeking abandonment of the subject line will be dismissed for lack of jurisdiction.

Because the line was abandoned by the N&W in N&W Abandonment, the City has no authority to consent to trail use on the line. Such consent would have had to be obtained from the N&W before the abandonment was consummated, at which time the Board's jurisdiction over the line ended. MCT's request to negotiate a trail use agreement with the City, therefore, cannot 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. The City's notice of exemption in this proceeding is dismissed for lack of jurisdiction.

2. MCT's request to negotiate a trail use agreement with the City is denied.

3. This decision is effective on its service date.

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

Vernon A. Williams
Secretary