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SERVICE DATE - APRIL 28, 1999

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-493 (Sub-No. 7X)

TRACK TECH, INC.--ABANDONMENT EXEMPTION--IN ADAIR AND
UNION COUNTIES, IA

Decided: April 26, 1999

By decision and notice of interim trail use or abandonment (NITU) served on July 2, 1998, a 180-day period was authorized under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act) and the Board's Trails Act regulations, for the Iowa Trails Council, Inc. (ITC), to negotiate an interim trail use/rail banking agreement with Track Tech, Inc. (Track Tech), for a 19.70-mile line of railroad between milepost 1.45 near Creston, and milepost 21.15 at the end of the line in or near Greenfield, in Adair and Union Counties, IA.¹ The line had formerly been owned and operated by The Burlington Northern and Santa Fe Railway Company (BNSF). Thereafter, pursuant to the offer of financial assistance provisions of 49 U.S.C. 10904 and 49 CFR 1152.27, Green Valley Chemical Company was authorized to acquire the portion of the line between milepost 1.45 and milepost 5.45.² By decision served on September 21, 1998, the Board approved the purchase and dismissed the exemption with respect to the part of the line between milepost 1.45 and milepost 5.45. The NITU remained in effect for the remainder of the line between milepost 5.45 and milepost 21.15. The 180-day negotiating period under the NITU expired on December 29, 1998.

By letter dated December 30, 1998, and filed on January 8, 1999, ITC requested an extension of the NITU negotiating period for an additional 180 days. On February 2, 1999, ITC filed a letter that it had received from BNSF, in which BNSF indicated its agreement to a 90-day extension of the negotiating period. Track Tech, the entity that had the common carrier obligation to provide service over the line and the entity to which the exemption to abandon the line was granted, initially did not file a response with the Board stating whether it was willing to continue negotiations with ITC. By decision served on February 11, 1999, Track Tech was directed to notify the Board within 10 days of the service date of the decision whether it agreed to an extension of the NITU negotiating period for the portion of the line between milepost 5.45 and milepost 21.15. On February 12, 1999, Track Tech advised the Board that Track Tech and BNSF agreed to an extension of the NITU negotiating period for an additional 90 days. By decision served on February 19, 1999, the negotiating period under the NITU was extended for an additional 90 days to March 29, 1999.

¹ Notice of the filing of the petition was published in the Federal Register on April 6, 1998 (63 FR 16859).

² See Track Tech, Inc.--Abandonment Exemption--in Adair and Union Counties, IA, STB Docket No. AB-493 (Sub-No. 7X) (STB served Aug. 17, 1998).

By letter dated March 19, 1999, and filed on March 23, 1999, Track Tech provided “formal notice” to the Board that it was no longer willing to negotiate for interim trail use for the portion of the line between milepost 5.45 and milepost 21.15. Track Tech stated that it had consummated and exercised the abandonment authority granted to it and had fully abandoned the line on March 12, 1999. According to Track Tech, all negotiations for interim trail use ceased on or before March 12, 1999, and, therefore, it requested that the Board terminate the NITU negotiating period effective as of March 12, 1999, the date of Track Tech’s intention to consummate its abandonment authority.

By letter filed on March 29, 1999, however, ITC requested an extension of the NITU negotiating period for an additional 14 days. Track Tech responded by letter filed on March 31, 1999, stating that, notwithstanding its letter filed on March 23, it had consulted with BNSF and ITC and now agreed to an extension of the NITU negotiating period for an additional 14 days. On April 12, 1999, ITC filed another request to extend the NITU negotiating period to May 1, 1999. By letter filed on April 13, 1999, Track Tech stated that it agrees to the additional extension.

On April 14, 1999, a petition for leave to intervene in this proceeding was filed by the 32 members of an organization of landowners known as the Farmers Group, including Leo and Darlene Cheers (collectively referred to as the intervenors).³ The intervenors argue that the Board lacks jurisdiction to extend the NITU negotiating period, contending that Track Tech filed formal notice that it had consummated its abandonment of the portion of the line at issue here on March 12, 1999, thus depriving the Board of jurisdiction to issue or extend a NITU.

Whether or not a line has been abandoned depends on a carrier’s intent. See Fritsch v. I.C.C., 59 F.3d 248, 253 (D.C. Cir. 1995) (Fritsch). The Board’s regulations adopted in Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903, STB Ex Parte No. 537 (STB served Dec. 24, 1996, and June 27, 1997), include a provision at 49 CFR 1152.29(e)(2) that is designed to provide clear evidence of when an authorized abandonment has been consummated, thus, avoiding litigation over whether or not a line has been abandoned. Under 49 CFR 1152.29(e)(2), a railroad that receives authority from the Board to abandon a line is required to file a notice of consummation with the Board within 1 year of its abandonment authorization to signify that it has exercised the authority granted and fully abandoned the line. Notices will be deemed conclusive on the point of consummation if there are no legal or regulatory barriers to consummation (such as outstanding conditions, including Trails Act conditions).

Track Tech’s March 23, 1999 “formal notice” to the Board that trail use negotiations had ceased, that it was no longer willing to negotiate, and that it had exercised the abandonment authority and fully abandoned the line on March 12, 1999, is conclusive on the point of consummation. While there is some question as to whether Track Tech should have consummated the abandonment before the removal of the outstanding condition, the courts have held that clear

³ The petition for leave to intervene will be granted.

statements by a carrier that the carrier intends to consummate abandonment govern. E.g., Fritsch. And Track Tech's subsequent letters agreeing to further trail use negotiations do not negate Track Tech's prior statement that it had abandoned the line on March 12. Once the Board's jurisdiction over a line is lost, the carrier's change of mind concerning trail use does not restore the Board's jurisdiction under the Trails Act, and the negotiating period may not be extended. See Becker v. Surface Transp. Bd., 132 F.3d 60, 62-63 (D.C. Cir. 1997) (Becker). The line is no longer part of the interstate railway system and the Board has no jurisdiction to impose or extend a trail use negotiating period. See RLTD Railway Corp. v. Surface Transp. Bd., 166 F.3d 808, 814 (6th Cir. 1999), citing Becker. Accordingly, the requests to extend the NITU negotiating period are 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 for leave to intervene is granted and accepted into the record in this proceeding.
2. The requests to extend the NITU negotiating period filed by ITC on March 29, 1999, and April 12, 1999, are denied.
3. This decision is effective on its service date.

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

Vernon A. Williams
Secretary