

40658
EB

SERVICE DATE – JUNE 16, 2010

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1036

THE CITY OF CHICAGO, ILL.
– ADVERSE ABANDONMENT –
CHICAGO TERMINAL RAILROAD IN CHICAGO, ILL.

Decided: June 15, 2010

The Board is granting the application of the City of Chicago, Illinois (the City), seeking the third-party or “adverse” abandonment of 2 railroad lines in the City owned by the Chicago Terminal Railroad (CTR), subject to the environmental and labor protection conditions described below.

BACKGROUND

By application filed under 49 U.S.C. § 10903 on February 1, 2010, the City seeks the adverse abandonment of 2 CTR line segments in the City: (1) a portion of the Kingsbury Branch from its southern terminus at the intersection of Kingsbury, Division, and Halstead Streets, to, but not including, the point at which the Goose Island Branch diverges from the Kingsbury Branch at or near Willow Street, a distance of approximately 6 city blocks (.75 miles) (the Kingsbury segment); and (2) a portion of the Lakewood Avenue Line between the southwest right-of-way line of Clybourn Avenue and the Line’s northern terminus at Diversey Parkway, a distance of approximately 7 city blocks (.875 miles) (the Lakewood segment).¹ These segments either run parallel to, or, for much of their length, are located within the right-of-way of 2 city streets – Kingsbury Street and Lakewood Avenue. The segments are parts of 4.5 miles of rail line that CTR acquired from Soo Line Railroad Company (part of the Canadian Pacific Railway) in December 2006.²

¹ Before the application was filed, the Board granted various waivers and exemptions requested by the City. See The City of Chicago, Ill. – Adverse Aban. – Chicago Terminal R.R. in Chicago, Ill., AB 1036 (STB served July 10, 2009). Among these exemptions granted were 2 exemptions affecting the conditions that could be imposed if the application were granted: (1) an exemption from 49 U.S.C. § 10904, governing offers of financial assistance (OFA); and (2) an exemption from 49 U.S.C. § 10905, governing a sale for public use. However, the agency postponed ruling on the City’s request for waiver of the trail use provisions of 49 C.F.R. § 1152.29.

According to the City, adverse abandonment is justified because: (1) there is no present or reasonably foreseeable future need for rail service on the segments; (2) the properties adjacent to these city streets have become largely residential and retail in recent years; (3) the City and the local alderman have received complaints that the trackage in those streets has caused personal injury and property damage; and (4) the presence of the trackage increases the cost of reconstruction or realignment of those streets. In particular, the City states that it will save some \$1.3 million in the planned reconstruction of Kingsbury Street by having the Kingsbury Street track removed or by paving over it.

Notice of the application was served on February 18, 2010, and published in the Federal Register on February 23, 2010, at 75 Fed. Reg. 8179.

By decision served on March 4, 2010, the Board held this proceeding in abeyance and extended all procedural dates by 30 days to facilitate settlement discussions between the City and CTR. CTR had indicated its opposition to adverse abandonment at the waiver stage of the proceeding, arguing that: (1) it was actively seeking to develop traffic; (2) the neighborhood has future traffic potential; (3) the lines were needed for empty car storage; (4) the lines could be used for holding future inbound loads prior to delivery; and (5) the traffic-increasing effects of “climate legislation” and higher fuel prices should be considered.

On March 18, 2010, comments were filed by Andrew Morris, “an individual resident of the City of Chicago.” Mr. Morris opposes abandonment of the Kingsbury segment but appears to support abandonment of at least a portion of the Lakewood segment.

By letter filed on March 29, 2010, CTR informed the Board that CTR and the City have negotiated a settlement of their differences in this proceeding. CTR stated that, pursuant to the settlement, it would not oppose the City’s application and that CTR and the City were requesting that the Board terminate its abeyance of the proceeding and establish a revised procedural schedule. By letter dated March 30, 2010, CTR also asked to withdraw 2 motions in light of the settlement agreement. In those motions, CTR had requested (1) remedies and sanctions for the City’s alleged involvement in the prior removal of track on the Lakewood segment and (2) rejection of verified statements submitted by the City in support of its application. By decision served on April 13, 2010, the Board terminated its abeyance of this proceeding, reinstated a revised procedural schedule, and granted CTR’s request to withdraw the 2 motions.

On April 30, 2010, the City filed a statement in rebuttal to the comments of Mr. Morris. In its rebuttal statement, the City asks the Board to reject his comments for lack of standing and also addresses the substance of his comments.

On that same date, CTR filed a letter seeking expeditious consideration of the application and a decision approving it by May 30, 2010, effective on its service date. On May 17, 2010, the

² See Chicago Terminal R.R. – Acquis. and Operation Exemption – Soo Line R.R., d/b/a Canadian Pac. Ry., FD 34968 (STB served Dec. 22, 2006).

Deputy Commissioner of the Department of Transportation for the City (Deputy Commissioner) filed a similar request. The Deputy Commissioner states that the City is anxious to move forward with the track removal and street repairs.

PRELIMINARY MATTER

The City argues that we should reject the comments of Mr. Morris because he lacks standing to file them. The City maintains that Mr. Morris does not have standing because he has neither alleged nor shown that the proposed abandonment would injure him in any way. As authority for its argument that standing is required to oppose an abandonment at the Board, the City cites cases applying the constitutional minimum requirements for standing to raise issues in the federal courts.³ But those cases do not address adjudications before regulatory agencies like the STB that seek comments from the public on whether a requested Board action is in the public interest. Our regulations allow interested persons to file comments in abandonment proceedings addressing public interest matters and expressly provide that the commenter need not be an actual user of the line at issue.⁴ Mr. Morris has demonstrated that he is interested in this transaction because he believes that there is a public need for continued rail service over the Kingsbury segment. Therefore, we will accept the comments of Mr. Morris.

DISCUSSION AND CONCLUSIONS

Legal standard. Under 49 U.S.C. § 10903(d), the standard governing any application for authority to abandon a line of railroad is whether the present or future public convenience and necessity (PC&N) require or permit the proposed abandonment. In applying this standard in an adverse abandonment context, we consider whether there is a present or future public need for rail service over the line and whether that need is outweighed by other interests.⁵ As part of our PC&N analysis, we must consider whether the proposed abandonment would have a serious,

³ The City cites: Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); American Petroleum Inst. v. EPA, 216 F.3d 50, 63 (D.C. Cir. 2000); and Sierra Club v. EPA, 292 F.3d 895, 898 (D.C. Cir. 2002).

⁴ See 49 C.F.R. § 1152.25(a)(1) (“... Interested persons may become parties to an abandonment or discontinuance proceeding by filing written comments or protests with the Board...”)(Emphasis added). Under § 1152.25(a)(1)(ii)(B), if a protestant does not use the line, the protest must contain “information concerning the group or public interest it represents” (emphasis added).

⁵ See New York Cross Harbor R.R. v. S.T.B., 374 F.3d 1177, 1180 (D.C. Cir. 2004) (New York Cross Harbor); City of Cherokee v. I.C.C., 727 F.2d 748, 751 (8th Cir. 1984). See also Seminole Gulf Ry. – Adverse Aban. – in Lee County, Fla., AB 400 (Sub-No. 4) (STB served Nov. 18, 2004); Norfolk Southern Ry. – Adverse Aban. – St. Joseph County, Ind., AB 290 (Sub-No. 286) (STB served Feb. 14, 2008), reopening denied (STB served Aug. 27, 2008), aff’d sub nom. City of South Bend v. United States, 566 F.3d 1166 (D.C. Cir. 2009).

adverse impact on rural and community development. We also consider the environmental and energy impacts of the proposed abandonment, and, pursuant to 49 U.S.C. § 10903(b)(2), we must ensure that affected rail employees will be adequately protected.

We have exclusive and plenary jurisdiction over rail abandonments.⁶ We typically preserve and promote continued rail service where a carrier has expressed a desire to continue operations and has taken reasonable steps to acquire traffic.⁷ On the other hand, we do not allow our jurisdiction to be used to shield a line from the legitimate processes of state law where no overriding federal interest exists.⁸ In an adverse abandonment case, if we conclude that the PC&N does not require or permit continued rail operation over the line, our decision removes the shield of our jurisdiction, enabling the applicant to pursue other legal remedies to force the carrier off a line.⁹

PC&N analysis. Applying these principles, we find, on balance, that the present or future PC&N requires or permits the proposed abandonment. CTR, the affected rail carrier, now supports this finding, and no shippers have opposed the proposed abandonment. As explained below, there is no present need for rail service over the line segments and little likelihood of a need for future rail service over them. The record shows that abandonment of the segments would not adversely affect rural and community development. The City has demonstrated that the Chicago-area public has a substantial interest in termination of rail use of the involved right-of-ways.

Present need for rail service. There is no present need for rail use of the line segments. No rail traffic is currently originated, terminated, or bridged over the segments, and no shipper has opposed the abandonment proposal. Except for a single test shipment of firewood in 2007, there has been no rail service over the Kingsbury segment for the last 10 years.¹⁰ There has been no freight traffic over the Lakewood segment since the Peerless Confection Company ceased operations 3 years ago.¹¹ The record shows that CTR does not need the line segments to store

⁶ See Modern Handcraft, Inc. – Aban., 363 I.C.C. 969, 972 (1981) (Modern Handcraft).

⁷ See Chelsea Property Owners – Aban. – Portion of the Consol. Rail Corp.’s West 30th Street Secondary Track in New York, N.Y., 8 I.C.C.2d 773, 779 (1992) (Chelsea), aff’d sub nom., Consol. Rail Corp. v. I.C.C., 29 F.3d 706 (D.C. Cir. 1994) (Conrail).

⁸ See Kansas City Pub. Serv. Freight Operation – Exemption – Aban. in Jackson County, Mo., 7 I.C.C.2d 216 (1990) (Kansas City). See also CSX Corp. and CSX Transp., Inc. – Adverse Aban. Application – Canadian Nat’l Ry. and Grand Trunk W. R.R., AB 31 (Sub-No. 38) (STB served Feb. 1, 2002).

⁹ See Conrail, 29 F.3d at 709; Modern Handcraft, 363 I.C.C. at 972.

¹⁰ V.S. Zalmezak 3.

¹¹ Id.

cars.¹² The carrier does not contest the lack of present need for rail service on those segments, but, rather, now supports a finding that the PC&N requires or permits abandonment of the segments.

Future need for rail service. We find that it is highly unlikely that there will be a need for future rail service over either segment. Again, no shipper has opposed the City's application or stated a need for future rail service. Relocation of future shippers into the area is unlikely, because the segments are located in a densely populated urban area that has transitioned from industrial to predominantly retail/residential, with the area's zoning largely discouraging uses that would generate rail traffic.¹³ Also, any future movement of rail cars over the Kingsbury segment could be inefficient and require safety mitigation, as the line is located in the middle of a public street that is being developed for retail use.¹⁴ A portion of the Lakewood segment tracks is also located in the middle of the street. Any restoration of service would require repairs to the track and spurs in several places on both segments.¹⁵ The record shows that the segments are not needed for the future transloading of truck or boxcar traffic from nearby locations.¹⁶ CTR does not contest the lack of future need for rail service over either segment. Concerning the Lakewood segment, Mr. Morris acknowledges that there is no reasonable prospect for any future rail shipping or receiving on the Lakewood line under the current zoning plan.¹⁷

Mr. Morris disputes the City's claim that the Kingsbury segment serves no public need. In his statement, Mr. Morris argues that there is a carrier (CTR) that is "ready, willing, and able" to operate over the Kingsbury segment and that adverse abandonments are seldom granted where this is true. Concerning the Kingsbury segment's future traffic potential, Mr. Morris disputes what he maintains to be the City's position that its zoning code has closed the 2 parcels in the south end of the Kingsbury segment (referenced on page 12 of witness Zalmezak's testimony) to industrial use and asserts that, for the small, oddly shaped parcel, it may be possible for the City to obtain a creative proposal for a manufacturing facility for the property.

¹² V.S. Zalmezak 6-10.

¹³ V.S. Zalmezak 10-14. Two Kingsbury segment parcels are zoned for commercial or light industrial use, but witness Zalmezak has shown that these parcels are not likely to attract future rail service. V. S. Zalmezak 12-13.

¹⁴ Retail properties adjacent to the Kingsbury segment include a new Whole Foods grocery complex, Fantasy Kingdom (a children's birthday party facility and indoor play center), a British oriented educational facility (V.S. Zalmezak 2-3), and a bicycle equipment company that attracts bicycle riders (V.S. Alonzo 2).

¹⁵ V.S. Alonzo 2 and Appendix JBA-2.

¹⁶ V.S. Zalmezak 14-16.

¹⁷ Morris Comments 6.

We find unpersuasive Mr. Morris' attempt to show that there is a public need for rail service over the Kingsbury segment. In light of the settlement reached between the City and CTR, Mr. Morris is incorrect in positing that CTR remains willing to operate over the Kingsbury segment. Mr. Morris has not refuted the City's statement that, except for an isolated test shipment of firewood, there has been no rail use of the Kingsbury segment for 10 years. Moreover, the mere possibility of a creative proposal for manufacturing for an oddly shaped parcel is far too speculative to show a need or potential for future rail service on this segment. Mr. Morris acknowledges that the size of the lots would make them unlikely to generate rail traffic.¹⁸ Even if, as Mr. Morris contends, the zoning for the 2 south-end properties were not as restrictive as the City maintains, any future rail operations over the Kingsbury segment could be inefficient and require safety mitigation because the line is located in the middle of a public street that is being developed for retail use. The value of such service to future shippers would be questionable because of the expense and delay that would be connected with these problems.

Public interest in termination. The City has made a persuasive showing that abandoning these line segments would serve the public interest.¹⁹ The removal or paving-over of the Kingsbury Street track would save it approximately \$1.3 million in the planned reconstruction of Kingsbury Street. While there is no imminent project for reconstruction of the part of Lakewood Avenue having track in the middle of it, the City would realize proportionate savings from future reconstruction of that street as well. The permanent removal or paving-over of the trackage on the Kingsbury and Lakewood Avenue segments also would substantially improve safety, including that of bicyclists using the bicycle equipment company located on the Kingsbury segment.

Mr. Morris agrees that public interest considerations favor abandonment of service over the Lakewood segment, at least as to the portion of that segment that is north of Fullerton Avenue.²⁰ While at times he appears to confuse Diversey Parkway with Fullerton Avenue, he questions the need to abandon the portion of the Lakewood segment where the tracks run over a private right-of-way and not in the street. Mr. Morris also maintains that the City has not made a public interest case for abandonment of the Kingsbury segment. Mr. Morris argues that the additional cost to the City of maintaining Kingsbury Street with the rail tracks present is not conclusive and does not outweigh what Mr. Morris believes to be the public's interest in continued rail service over that segment. Mr. Morris also argues that safety issues arising out of the presence of the track are not relevant to this proceeding.

¹⁸ Morris Comments 6 n.11.

¹⁹ V.S. Alonzo.

²⁰ Concerning this portion, Mr. Morris observes that the tracks run through the parking lot of a club and that, if the track were to be put back into service at that location, about 30 parked cars would be forced out onto the streets where they would add to parking congestion.

We disagree with Mr. Morris' arguments regarding the public interest. The added street maintenance cost imposed on a city by the continuation of the potential for future rail service is a factor to consider in evaluating whether continued rail service is in the public interest. As noted by Mr. Morris, this type of cost is only one factor that must be weighed against other considerations that might favor the continuation of rail service. Here, however, the street maintenance cost attributable to the track is not outweighed by other considerations; there is no present traffic, and there is only a very remote likelihood of future traffic. Although railroad safety is, as observed by Mr. Morris, primarily under the jurisdiction of the Federal Railroad Administration, safety issues arising out of the presence of railroad track are also a relevant public interest consideration in STB proceedings.²¹ Thus, even if CTR had been willing to mount the considerable effort that would be required to attract future traffic to the Kingsbury segment, the City would still have a strong public interest in avoiding the safety and environmental problems that could arise from reviving rail operations in the middle of a busy commercial/residential street.

Rural and community development. Because the segments are located in an urban area and are not needed for current or future rail service, we also find that their abandonment will not harm rural or community interests, much less have a "serious, adverse impact on rural and community development." See 49 U.S.C. § 10903(d).

Environmental matters. The Board is required to consider the environmental and energy impacts of the proposed abandonment. The City has submitted a combined environmental and historic report with its application, and notified the appropriate federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed abandonment. See 49 C.F.R. § 1105.11. The Board's Section of Environmental Analysis (SEA) has examined the environmental report, verified its data, and analyzed the probable effects of the proposed action on the quality of the human environment. SEA served an Environmental Assessment (EA) on March 5, 2010. Public comments on the EA were due by April 5, 2010, but none were filed.

In the EA, SEA states that the National Geodetic Survey (NGS) has advised that it has identified a geodetic station marker that may be affected by the proposed abandonment. SEA therefore recommends that we impose a condition requiring that the City consult with NGS and notify NGS at least 90 days prior to beginning any activities that would disturb or destroy any geodetic station markers.

We will impose the condition recommended by SEA. Based on SEA's recommendations, we conclude that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

Labor protection. In approving this application, we must ensure that affected rail employees will be adequately protected. 49 U.S.C. § 10903(b)(2). Therefore, we will impose

²¹ See 49 U.S.C. § 10101(8).

the conditions set forth in Oregon Short Line Railroad – Abandonment Goshen Branch Between Firth and Ammon, in Bingham and Bonneville Counties, Idaho, 360 I.C.C. 91 (1979).

OFA, public use, and trail use. As noted, we already have exempted this adverse abandonment from the OFA provisions of 49 U.S.C. § 10904 and from the public use condition provisions of 49 U.S.C. § 10905. We have deferred ruling on the City's request for waiver of the trail use provisions of 49 C.F.R. § 1152.29 until we rule on the adverse abandonment application. Because trail use requests were due by March 18, 2010, and none were filed, the City's request for a waiver is now moot. Accordingly, we will not entertain OFA, public use, or trail use requests in this proceeding.

Expedited consideration. CTR and the Deputy Commissioner have requested that we expeditiously consider and grant the application. They also request that we make our decision effective on the service date of our decision rather than the typical 30 days from the date of service. They have failed, however, to justify eliminating our typical 30-day notice period.

It is ordered:

1. The City's adverse abandonment application is granted, subject to the employee protective conditions in Oregon Short Line Railroad – Abandonment Goshen Branch Between Firth and Ammon, in Bingham and Bonneville Counties, Idaho, 360 I.C.C. 91 (1979), and subject to the condition that the City shall consult with NGS prior to beginning any activity that will disturb or destroy any geodetic station markers. If NGS identifies geodetic station markers that may be affected by the proposed abandonment, the City shall notify NGS at least 90 days prior to beginning activities that will disturb or destroy any geodetic station markers in order to plan for the possible relocation of the geodetic station markers by NGS.

2. The requests by CTR and the Deputy Commissioner for an expedited effective date are denied.

3. The City's request for a trail use waiver is denied as moot.

4. This decision will be effective on July 16, 2010.

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