

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.**

STB Docket No. AB-1071

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**STEWARTSTOWN RAILROAD COMPANY
- ADVERSE ABANDONMENT -
IN YORK COUNTY, PA**

**REPLY IN OPPOSITION TO STEWARTSTOWN
RAILROAD COMPANY'S PETITION TO REOPEN**

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The Estate of George M. Hart (the “Estate”) hereby responds to Stewartstown Railroad Company’s (“SRC”) petition to reopen the Board’s decision in above-referenced proceeding granting the Estate’s abandonment application. For the reasons set forth below, SRC’s petition to reopen lacks merit, and must be denied.

PRELIMINARY MATTER – BIFURCATED ESTATE RESPONSE

SRC’s petition to reopen is included in a filing entitled as a “Petition to Re-Open and Stay the Board’s Decision of November 14” (the “SRC Petition”).¹ In light of the procedural deadlines for replies to stay requests in abandonment proceedings (49 C.F.R. § 1152.25(e)(2)(i)), the Estate replied in opposition to the stay component of the SRC petition on December 5, indicating in that reply filing that the Estate would respond at a later date to SRC’s reopening request. Consistent with the

¹ The Board did not serve its decision in this proceeding granting the Estate’s abandonment application until November 16, and that date – not November 14 – is the relevant date for the purposes of measuring the deadline for appeals and stay requests. As it is, the timing of the SRC Petition, filed on November 30, seems tacitly to acknowledge the procedural insignificance of the November 14 “decision” date. For purposes of this proceeding, and for purposes of complying with typical Board practice in referring to decisions as of their respective service dates, the Estate will refer to decision from which SRC seeks relief as the “November 16 Decision.”

previously-outlined course of action, the Estate hereby responds in opposition to the reopening request component of the SRC Petition.

ARGUMENT

The Board will not entertain appeals to its abandonment cases, but it will accept a timely-filed petition to reopen an abandonment decision. See 49 C.F.R. § 1152.25(e)(2). The Board will not reopen an abandonment decision unless the petitioning party has met its burden to prove that the subject Board action involves material error, new evidence, or substantially changed circumstances. See 49 C.F.R. § 1152.25(e)(4). Although evidently not identical, the standards for reopening an abandonment decision under section 1152.25(e) are analogous to, although presumably more rigorous than, those applicable to petitions for reconsideration under the Board's appellate procedures at 49 C.F.R. § 1115.3(b).² Accordingly, it follows that the same principles leading to a denial of relief under the analogous "reconsideration" standards must be of guidance in dealing with requests to reopen an abandonment decision.

Here, SRC seeks reopening on the basis that – (1) the Board's November 16 Decision contains material error; and (2) new circumstances have arisen warranting a fresh look at the case's merits. In support of its request, SRC argues for the first time at this inappropriate juncture that the Board lacks the statutory authority to act on the Estate's abandonment application, although SRC's argument is

² Petitions for reconsideration under section 1115.3(b) and petitions for reopening under section 1152.25(e)(4) appear to boil down to the same fundamental showings – material error, new evidence, or substantially-changed circumstances. Although the reconsideration and reopening standards seem to be roughly the same on their faces, they are, evidently not quite identical in application. Thus, "the standards for granting either reconsideration or reopening are similar." SF&L Railway, Inc. – Acquisition and Operation Exemption – Toledo, Peoria and Western Railway Corporation Between La Harpe and Peoria, IL, et al., STB Docket No. FD 33995, et al., slip op. at 2 (STB served Jan. 31, 2003) (citing Schneider Transport, Inc., et al. – Petition for Exemption, Docket No. 40784 (ICC served Mar. 3, 1995). While clearly governed by similar standards, an appeal (*i.e.*, a petition for reconsideration) is not available in an abandonment, but an abandonment decision may be reopened upon appropriate showing. Logically, however, whatever would suffice as material error or changed circumstances under a request for reconsideration would also pass muster under the reopening standard and *vice-versa*.

incorrect. SRC also claims, incorrectly, that the Board has committed material error in applying the facts of this case to the law, and in concluding that granting the Estate's abandonment application was warranted. And finally, although SRC also contends that "changed circumstances" have arisen, the changed circumstance here – essentially SRC's decision to make a substantial offer of settlement after years spent avoiding such constructive gestures – is of its own making, and did not arise from external factors. As such, SRC's request for reopening must be denied.

1. SRC's argument regarding the scope of the Board's statutory authority is untimely and, in any event, is also incorrect and unavailing

SRC begins its meritless reopening request arguing that the Board lacks the authority to act on the Estate's "adverse" abandonment application. This is a threshold issue that SRC could have raised but did not raise much earlier in this proceeding. SRC does not explain why it has chosen to present the issue only after the Board ruled against the railroad. SRC cannot be permitted at this juncture to introduce such fundamental questions of law, particularly where there is absolutely no excuse for SRC's failure to have done so either at the time that the Estate sought exemptions and waivers from certain abandonment application requirements or, at the latest, in its response to the Estate's application. In the petition for reconsideration context, the Board has stated that "new arguments that could have been presented earlier cannot be raised" at this point in the proceeding.³

And even if the Board were to accept SRC's argument at this time, the agency has, through its handling of several adverse abandonment proceedings – including the recently-decided Norfolk Southern Railway Company – Adverse Abandonment in St. Joseph County, IN, Docket No. AB-290

³ Simplified Standards for Rail Rate Cases, STB Docket No. EP 646 (Sub-No. 1), slip op. at 13 (STB served March 19, 2008); and see CSX Corporation, et al. – Control and Operating Leases/Agreements – Conrail, Inc., et al., 3 S.T.B. 764, 783 (1998) (denying petition for reconsideration on the basis that the party seeking reconsideration impermissibly sought to introduce "newly raised arguments that could have and should have been raised earlier").

(Sub-No. 286) (STB served Apr. 17, 2012) (“South Bend-2”)⁴ – made clear its position that it does indeed have the authority to grant “adverse” abandonments on the basis of third-party applications. Moreover, if the Board doubted its authority to act on the Estate’s abandonment application, it could have, in the presence of the relatively fresh City of South Bend decision, expressed such concern on its own initiative, just as it could have done (but did not do) in issuing South Bend-2. The Board, mindful of the dicta in City of South Bend case, forged ahead with the subject abandonment proceeding, just as it did in South Bend-2.

2. The Board did not err in granting the Estate’s Application – SRC’s arguments to the contrary merely re-hash cases and arguments already presented and considered and question the Board’s judgment in balancing the competing interests as it has

SRC complains, in essence, that it is being held to a more difficult standard than has confronted abandonment opponents in other adverse abandonment proceedings. That this is not so, and SRC’s argument derives from its self-serving and utterly inaccurate characterization of itself as a victim the Estate and its residual beneficiary, Bucks County Historical Society. SRC’s argument that the Board has committed material error boils down to a re-visitation of agency precedent, all of which was presented and carefully considered earlier, at the appropriate phases of this proceeding.

All of SRC’s new argument in Section II-A of the SRC Petition is nothing more than a re-arguing of the merits of the case, and SRC doesn’t do anything here but offer a slightly modified spin on agency precedent that the parties presented and relied upon for their respective positions before the record closed last year. But, in the end, SRC’s arguments in Section II-A of the SRC petition have nothing to do with legal error *per se*. Rather, in acknowledging that the adverse abandonment process requires the Board to engage in a careful balancing of the interest for and against abandonment, SRC

⁴ In South Bend-2 (issued after the D.C. Circuit Court of Appeals’ decision in City of South Bend, Indiana v. Surface Transportation Board, 566 F.3d 1166 (2009) (“City of South Bend”), (in which the D.C. Circuit narrowly upheld the Board’s decision to deny an adverse abandonment decision)), the Board, in response to a petition filed by the abandonment proponents, reopened the proceeding and granted the applicants’ previously-denied adverse abandonment application.

argues that the Board didn't reach the right conclusions because it allegedly "undervalued" SRC's desire to preserve the subject rail line, and, accordingly, barred SRC from evading its creditors any farther. In short, SRC does not argue that the Board applied the incorrect standard, or that it failed to account for critical precedent. Rather, SRC doesn't like the way that the Board interpreted the applicable standard here, and it doesn't like the decision. That – along with SRC's inappropriate attempt to re-argue its case at this time – is no basis for reopening.

SRC's does not really argue that the Board committed material legal error at all. Rather, SRC contends that the Board has committed an error of judgment, and complains because the Board has embraced policy considerations that are not to SRC's liking or to its advantage. Section II-B of the SRC Petition is an excellent example of this line of argument. There, SRC contends that the Board erred in finding that granting the Estate's abandonment application would promote a legitimate, identifiable public interest – "ensuring railroad creditworthiness and freeing the Estate to use all legal remedies available to it to hold [SRC] accountable for its financial obligations."⁵ But SRC does not offer legal precedent that conflicts with the Board's policy findings, and, in fact, SRC admits that the subject abandonment would promote the public interest.⁶ SRC's frustrated bluster aside – SRC figured the Board would condone its debt-obligation ducking tactics, but the Board wisely put an end to SRC's games – the November 16 Decision is on solid footing legally, factually, and as a matter of agency policy.

SRC may be contending that the November 16 Decision does not reflect careful consideration of the record or application of the applicable law. But the Board has taken additional time – over a year from the close of the record – to reach a decision on the merits. (And during all of that time,

⁵ November 16 Decision, slip op. at 12.

⁶ "SRC recognizes that the STB has a legitimate need to serve the public interest in railroad creditworthiness. SRC recognizes that legitimate public interest in fulfilling debt obligations and the efficient probate of estates." SRC Petition at unnumbered page 5.

incidentally, SRC did nothing to repay its debt obligations to the Estate, aside from advising the Estate's counsel on October 4, 2012 that SRC was considering selling off two unused locomotives to reduce by a modest percentage SRC's total debt obligation.)⁷ The November 16 Decision is careful and thorough, and the separate expressions of two of the Board's three members reflects the degree to which this case engendered thought and scrutiny. SRC doesn't like the balancing of interests set forth in the November 16 Decision, but the decision does not suffer from material error.

3. The Only "Changed Circumstance" Following The November 16 Decision Is SRC's Newfound Willingness To Own Up To Its Debt Obligations – This Is A Promising Outgrowth Of The Board's Decision, Not A Basis For A Stay Or Reopening

In response to the Board's November 16 Decision, SRC has now for the first time expressed a willingness and the ability to pay off most, if not all, of its debt obligations owed to the Estate. SRC first publicly announced its offer of "not less than \$275,000" in settlement of its debt obligations in the SRC Petition filed on November 30, two weeks after the November 16 Decision. That was the first that time that the Estate became aware of the proposal. But SRC did not formally convey this settlement proposal until December 7, 2012 (when counsel for the Estate received a scanned copy of a letter dated December 6, 2012), seven days after the SRC Petition was filed.

SRC's reaction to the November 16 Decision reflects a change in its tactics, not a change in circumstances, and SRC certainly should not be rewarded by reopening the abandonment proceeding. As explained in other proceedings, the Board looks to external circumstances or the changed conduct of the non-moving party to find the existence of changed circumstances.⁸ The Board does not and must not sanction reopening this proceeding on the basis of the reopening-seeking party's change of

⁷ On October 24, 2012, the Estate responded that it did not object to such a transaction. There has been no further communication from SRC concerning the proposed locomotives sale.

⁸ See, e.g., Gauley River Railroad LLC – Abandonment and Discontinuance of Service – In Webster and Nicholas Counties, WV, et al., STB Docket No. AB-559 (Sub-No. 1X), 4 S.T.B. 920 (2000) (the Board – (1) reopened its prior decision denying abandonment where the sole shipper objecting to the abandonment stopped making line subsidy payments, thereby affecting the central economics of the case; and, in turn, (2) granting the railroad's abandonment application).

heart.⁹ That is the only changed circumstance at play here – SRC’s professed change of attitude, resulting in a change of the railroad’s tactics. Now confronted with the ramification of its dilatory misconduct, SRC cannot now be heard on reopening because it has decided in the face of Board action that it will try to be a responsible debtor.¹⁰

SRC’s reaction to the November 16 Decision is not a substantially changed circumstance that warrants revisiting of the merits of this case. If anything, SRC’s post-November 16 Decision actions prove that the Board was right to rule as it did, for without that decision it is a virtual certainty that SRC would have been content to do nothing, and never would have extended a sizeable cash offer to the Estate to open a possible avenue under which the Estate promptly can recover amounts due to it. Reopening the proceeding, on the other hand, would enable SRC to revert back to debt-evasion mode, but if the Board stands firm, this would motivate SRC to pursue debt settlement in good faith.

CONCLUSION

SRC owes a considerable amount to the Estate, but, for four years, it has made no meaningful effort to repay its debt. This was the situation because SRC could invoke federal preemption to bar state law collection remedies otherwise available to the Estate, and it would have remained the situation but for the November 16 Decision. With that decision, however, things have changed. Faced with the imminent removal of the jurisdictional shield protecting SRC from foreclosure, “not

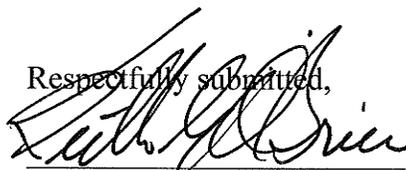
⁹ See Santa Fe Southern Pacific Corporation – Control – Southern Pacific Transportation Company, 3 I.C.C. 2d 926, 933 (1987), 1987 ICC LEXIS 198 at *17 (“the circumstances which have already changed are, in essence, merely changes of position rather than external occurrences. [T]he changed circumstances test would not be satisfied simply by an expression of [the moving party’s] new willingness to accept conditions, yet this shift in attitude from resistance to acquiescence is the primary circumstance that has changed. We [will not allow a party to try its case] twice: first by taking a hard-line preliminary approach toward the issues . . . , then falling back on a more conciliatory approach if the initial approach is unsuccessful”).

¹⁰ Cf. Delaware and Hudson Railway Company – Lease and Trackage Rights Exemption – Springfield Terminal Railway Company, Finance Docket No. 30965 (Sub-Nos. 1 and 2), et al. (STB decided June 20, 1991), 1991 ICC LEXIS 156 at 11 (“It simply is not ‘changed circumstances’ when [a party] is confronted with the consequences of its past litigative choices”).

less than” \$275,000 is evidently now available and at SRC’s disposal. SRC would like agency dispensation to effectively return to the *status quo ante*, where it can evade its debt obligations, but, to get there, it needs the Board to sanction SRC’s bad faith by overturning the November 16 Decision. Now, in light of SRC’s post-Decision conduct, the November 16 Decision was exactly what the doctor ordered, even though it has been an expensive remedy for the Estate to obtain.

The Board has as recently as April of this year and then again with the November 16 decision, tacitly reaffirmed its authority to act on noncarrier (“adverse”) abandonment applications. Moreover, the Board has committed no material error, whether that would be by failing either to apply the correct legal standards or to consider the relevant facts on record. Rather, the November 16 Decision faithfully applies the correct standard and reaches a well-reasoned conclusion upon applying the relevant facts on record to that standard. Finally, SRC’s cooked-up “changed circumstances” are nothing more than a reflection of SRC’s professed change of heart and change of tactics in dealing with its debt obligations. For these reasons, there is no basis for reopening this proceeding or for revisiting the November 16 Decision. Accordingly, the SRC Petition – both the stay and reopening request components – must be denied.

Respectfully submitted,



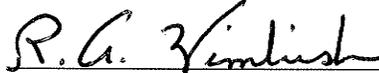
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Dated: December 11, 2012

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing reply to be served upon all parties of record by first class mail (postage prepaid) or by more expeditious means of delivery.



Robert A. Wimbish

Dated: December 11, 2012