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BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET No AB-854(X)

ALLEGHENY & EASTERN RAILROAD, INC - - EXEMPTION OF ABANDONMENT - -
ELK AND CAMERON COUNTIES, PENNSYLVANIA

OPPOSITION OF ROBERT TROHA, ON BEHALF OF HIMSELF
AND MEMBERS OF THE CLASS OF LANDOWNERS CERTIFIED IN THE UNITED
STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA,
TO ANY ADDITIONAL EXTENSION OF TIME
TO NEGOTIATE NITU AGREEMENT

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District Court

Dated June 10, 2008

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I. Introduction

The proceeding involves Allegheny & Eastern Railroad's (the "Railroad") petition for exemption from abandonment, the issuance of a Notice of Interim Trail Use Order and subsequent motions for an extension of time to extend the NITU negotiating period

Petitioner, Robert Troha, owns land adjacent to the railroad line at issue in this administrative proceeding. Petitioner is also a representative plaintiff in a class action against the United States seeking just compensation for a taking in an action pending in United States District Court for the Western District of Pennsylvania

Since first issuing a NITU on October 14, 2003, the Board has granted extensions of almost five years for the parties to reach a trail use agreement. Granting additional extensions of time will prejudice Petitioner's class action takings case against the United States. Thus, the Board should deny the motion.

II. Background

On September 11, 2003, A&E filed with the Surface Transportation Board a notice under 49 C F R Subpart F – Exemption Abandonments, seeking authorization to abandon approximately 18.9 miles of its rail line in Elk and Cameron Counties, Pennsylvania. The STB docket number assigned to this matter was AB-854X

On October 14, 2003, Cameron and Elk Counties, Pennsylvania, filed requests for issuance of a Notice of Interim Trail Use (“NITU”) for the rail line under the National Trails System Act, 16 U S C § 1247(d) (“Trails Act”) and further requesting imposition of a public use condition under 49 U S C. § 10906.

On October 30, 2003, the STB served a decision and NITU for the 18.9-mile rail line segment. In this decision, the STB reopened the exemption proceedings and modified the notice of exemption served on October 30, 2003, by allowing the Railroad and the Counties 180 days to negotiate a railbanking and interim trail use agreement, and by allowing other parties that same period of time to negotiate an acquisition of the line for public use. The NITU provided that if an agreement for interim trail use/rail banking is reached during the 180-day period, interim trail use may be implemented, and if no such agreement is reached during that time, A&E may fully abandon the line.

On June 20, 2005, Robert Troha, filed suit against the United States in United States District Court for Western District of Pennsylvania, on behalf of himself and other similarly situated owners of land adjacent to the railroad line at issue in this administrative proceeding.¹ The class action suit alleged that the STB’s issuance of the NITU deprived Mr. Troha and Class

¹ *Troha v United States*, 05-191E (W.D. Pa.)

members of their rights to possession, control and enjoyment of their land following the cessation of railroad operations and constitutes a taking of the landowners' property for public use without just compensation, for which the Fifth Amendment to the United States Constitution requires that just compensation be paid. 28 U.S.C. § 1346(a)(2) The Court certified the case as a class action on February 20, 2006.

On December 14, 2006, Elk and Cameron Counties filed a notice with the STB stating they had agreed to the substitution of the West Creek Recreational Trail Association ("WCRTA") for the Counties as the trail sponsor

The negotiating period set forth in the NITU served on October 30, 2003, was subsequently extended at the request of the parties by STB decisions served on April 12, 2004, July 22, 2004, October 25, 2004, April 22, 2005, July 22, 2005, October 21, 2005, April 21, 2006, October 13, 2006, April 12, 2007, January 8, 2008, and March 7, 2008. In its March 7, 2008 decision, the Board granted an extension, to June 6, 2008, and stated that, "[g]iven the time that has elapsed since abandonment was authorized, however, the negotiation parties are again urged to conclude their negotiations so that further extensions will not be necessary."

In proceedings before the United States District Court, the Court dismissed the parties' cross-motions for summary judgment because there has been no final agreement reached between the Railroad and the trail sponsor. The Court has deferred any ruling on the merits of the takings claim until final agreement between the Railroad and the WCRTA.

Petitioner moved to intervene before the Board in a motion brought on March 6, 2008. The Board granted Petitioner's motion to intervene, but denied Petitioner's opposition to any additional extensions of time to negotiate the NITU period.

On June 9, 2008, the WCRTA moved for an additional extension of time to negotiate a NITU agreement

III. Argument

In *Birt v Surface Transportation Board*, 90 F 3d 580, 589 (D.C. Cir 1996), the court of appeals held that the Board could grant extensions of time to negotiate a trail use agreement “when presented with evidence of good-faith negotiations between the railroad and potential trail sponsor.” However, the court stated that “extensions *ad infinitum* might frustrate [the purpose of the Act] by allowing the railroad to stop service without either relinquishing its rights to the easement or putting the right-of-way to productive use.” *Id*

In this case, the railroad has sought and received extensions *ad infinitum* for five years. As a result, the railroad has frustrated the purposes of the Trails Act by stopping service on the line without either relinquishing its rights to the easement or allowing the right-of-way to be put to a productive use

Nor has the WCRTA satisfied its burden of demonstrating progress in good faith negotiations between the railroad and the putative trail sponsor. For example, there is no verification included with WCRTA’s motion detailing when the parties have negotiated, what specific progress has been made, and what terms have been negotiated. In the absence of any evidence of progress in good faith negotiations, the sole conclusion is that the parties have reached an impasse in their negotiations. Indeed, if a agreement cannot be reached after five years of negotiations, Petitioner submits that there is little chance that an agreement will be reached at all.

Despite the characterization of the Board’s role under the Trails Act as “ministerial,” the

Board's discretion to extend the NITU negotiation period is not without limits. Much like the amendment of pleadings before the federal district courts, the Board should take into consideration of whether there has been "undue delay, bad faith on the part of the movant, or prejudice to the nonmovant as a result of the delay" See *Long v Wilson*, 393 F.3d 390, 400 (3d Cir 2004). In determining what constitutes 'prejudice,' the Board should consider whether the continued extension of time would significantly delay the resolution of the dispute or prevent the plaintiff from bringing a timely action in another jurisdiction. See *Block v First Blood Assocs*, 988 F.2d 344, 350 (2d Cir. 1993); *Tokao Marine & Fire Ins Co v Employers Ins of Wausau*, 786 F.2d 101, 103 (2d Cir. 1986), *Straus v Douglas Aircraft Co*, 404 F.2d 1152, 1157 (2d Cir 1968)

In this case, the continued extension of time to allow the parties to negotiate a NITU agreement is extremely prejudicial to Petitioner's pending cause of action in the United States District Court. Petitioner represents a class of landowners who have brought suit against the United States under the "Little Tucker Act," 28 U.S.C. § 1346(a)(2). Petitioner claims that through the application of the Trails Act, Petitioner and the Class were deprived of their rights to possession, control, and enjoyment of their land following the cessation of railroad operations. Petitioner has alleged the application of the Trails Act constituted a "taking" of his property for public use without just compensation, in violation of the Fifth Amendment to the Constitution of the United States.

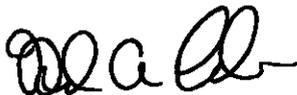
The final disposition of the administrative action pending before the Board is necessary in order for the District Court to determine the merits of Petitioner's takings claim. In a hearing on the parties cross-motions for summary judgment in March 2007, Judge Sean McLaughlin

expressed great frustration that, in almost four years, no final trial use agreement had been reached and that the lack of finality in the proceedings before this Board prevented the District Court from ruling on the cross-motions for summary judgment. Now, another year had gone by without any trial use agreement.

The grant of an additional extension will continue to prejudice Petitioner's interest, by continuing the intolerable delay in prosecuting his, and the Class's, takings claim in District Court.

The Board should deny the motion for extension of time to reach a NITU agreement.

Respectfully submitted,



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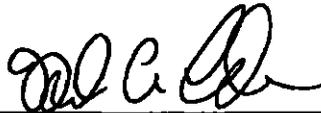
Attorneys for Robert Troha and the Class Certified
by the United States District Court

CERTIFICATE OF SERVICE

This is to certify that on this the 10th day of June, 2008, I have served true and accurate copies of the foregoing Opposition any Extension of Time to Negotiate the NITU Agreement upon all parties of record, by first class mail, postage prepaid, as follows:

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