

STB DOCKET NO. AB-493 (SUB-NO. 7X)¹

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

Decided October 28, 1999

The Board denies the Iowa Trails Council, Inc.'s petition to reopen and revoke Track Tech, Inc.'s acquisition and operation exemption and subsequent exemption. The Board also denies the Iowa Railway Finance Authority's supporting petition.

BY THE BOARD:

A notice served September 12, 1997, provided public notice that Track Tech, Inc. (TTI), a noncarrier, had been exempted under 49 U.S.C. 10502 and 49 CFR 1150.31 from the prior approval requirements of 49 U.S.C. 10902 to acquire from The Burlington Northern and Santa Fe Railway Company (BNSF) and to operate approximately 19.70 miles of rail line (the Line) in Iowa between milepost 1.45 near Creston and the end of the line, at milepost 21.15, near Greenfield.² Less than a year later, in a decision and notice of interim trail use or abandonment (NITU) served July 2, 1998, TTI was exempted under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon the Line, subject to public use, trail use, environmental, and employee protective conditions. On May 3, 1999, Iowa Trails Council, Inc. (ITC), the entity that had requested the public use and trail use conditions, filed a petition to revoke the

¹ This decision embraces STB Finance Docket No. 33434, *Track Tech, Inc. — Acquisition and Operation — The Burlington Northern and Santa Fe Railway Company*. These proceedings have not been formally consolidated; they are being handled together for administrative convenience.

² TTI acquired the track and track materials, the facilities, and the common carrier obligation; BNSF retained ownership of the underlying real estate.

exemptions arguing that TTI never intended to operate the Line, and, as a consequence, that TTI's actions constituted a misuse of the Board's processes.³

Green Valley Chemical Corporation (Green Valley), one of the three shippers on the Line, filed a comment, and Iowa Railway Finance Authority (IRFA) filed a motion for leave to intervene and a petition of joinder in support of ITC's revocation request. TTI and an earlier intervener, Farmers Group,⁴ filed replies to ITC's petition and to IRFA's motion and petition of joinder. IRFA will be granted leave to intervene. It has established an interest in the outcome of the proceeding, and its intervention will neither disrupt the procedural schedule nor broaden the issues in dispute. The petitions to reopen and revoke lack merit and will be denied.

BACKGROUND

In the verified notice of exemption to acquire and operate, at page 3, TTI described the Line as "out of service and * * * embargoed by BNSF on or about February 26, 1997, due to unsafe track conditions." Less than 7 months after the exemption was served, on March 17, 1998, TTI filed a petition for exemption to abandon.⁵ Following service of the NITU on July 2, 1998, Green Valley filed a successful offer of financial assistance (OFA) under 49 U.S.C. 10904 to acquire the 4-mile segment between milepost 1.45 and milepost 5.45. The abandonment exemption subsequently was dismissed with respect to this segment in a decision served September 21, 1998.⁶

The 180-day public use and trail use negotiating periods imposed in the NITU continued to apply to the remainder of the Line between milepost 5.45 and

³ ITC acknowledges that the Line is inactive and a logical candidate for abandonment and salvage and states that it would not object if the Board, acting on its own initiative, granted an abandonment exemption to BNSF provided that reasonable time was afforded for filing new trail use requests under 16 U.S.C. 1247(d) [National Trails System Act (Trails Act)].

⁴ The Farmers Group includes Mr. Leo Cheers, Mrs. Darlene Cheers, and 32 other members of a landowner's organization, all of whom state that they own property along the Line's right-of-way. In a decision served April 28, 1999, Farmers Group was granted leave to intervene in opposition to ITC's requests to extend further the NITU negotiating period.

⁵ TTI essentially reiterated that the Line had been out of service since the BNSF embargo and claimed that it could not be operated profitably based on the sporadic, minimal traffic that previously moved and based on the cost of rehabilitating the Line. TTI noted that the Line is composed of light-weight, 66-lb. rail laid in 1908 and that tie and ballast conditions are "fair to poor."

⁶ In its comment on ITC's revocation request, Green Valley claimed that it would be severely prejudiced and that the integrity of the entire OFA process would be called into question if Board action effectively nullified the sale it had consummated with TTI and BNSF.

milepost 21.15 until they expired on December 29, 1998. On January 8, 1999, ITC filed a request to extend the NITU negotiating period for the remaining portion of the Line for an additional 180 days. On February 2, 1999, ITC filed a letter from BNSF agreeing to a 90-day extension. After TTI advised that it also agreed to a 90-day extension, the Board on February 19, 1999, served a decision extending the negotiating period to March 29, 1999.

Then, in a letter dated March 19, 1999, TTI informed the Board that it was no longer willing to negotiate for interim trail use for the portion of the Line not acquired by Green Valley. TTI stated that it had consummated, and exercised, the abandonment authority granted to it and had fully abandoned that portion of the Line on March 12, 1999. According to TTI, all negotiations for interim trail use ceased on or before March 12, 1999. Therefore, TTI requested that the Board terminate the NITU negotiating period effective March 12, 1999, the date of the stated consummation.

ITC nevertheless filed for a 14-day extension of the negotiating period on March 29, 1999. TTI responded by letter filed on March 31, 1999, stating that, notwithstanding its previous letter, it had consulted with BNSF and ITC and now agreed to the requested 14-day extension. On April 12, 1999, ITC requested a further extension to May 1, 1999. TTI filed an affirmative response on April 13, 1999.

On April 14, 1999, Farmers Group filed for leave to intervene and, relying on TTI's March 19, 1999, letter, argued that the Board lacks jurisdiction to further extend the NITU negotiating period. According to Farmers Group, TTI filed formal notice that it had consummated the 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.

In the April 28, 1999, decision that granted the Farmers Group leave to intervene, *see n. 4, supra*, the Board's Director of the Office of Proceedings (Director) concluded that TTI's formal, unambiguous notice to the Board that it was no longer willing to negotiate for interim trail use and that it had exercised the abandonment authority at issue here was conclusive on the point of consummation. The Director noted that, while there was some question as to whether TTI should have consummated the abandonment of the portion of the Line not acquired by Green Valley before the outstanding trail condition was removed, the courts have held that clear statements by a carrier that the carrier intends to consummate the abandonment govern. *E.g., Fritsch v. ICC*, 59 F.3d 248 (D.C. Cir. 1997). Citing *Becker v. STB*, 132 F.3d 60, 62-63 (D.C. Cir. 1997), the Director explained that 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. Rather, the line is no longer part of the interstate rail system, and the Board has no jurisdiction to impose, or extend, a trail use negotiating period. See, *RLTD Railway Corp. v. STB*, 166 F.3d 808, 814 (6th Cir. 1999), citing *Becker*. Accordingly, ITC's requests to extend the NITU negotiating period were denied. ITC filed its petition to reopen and revoke following the issuance of the April 28, 1999, decision.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10502(d), an exemption may be revoked, in whole or in part, if the Board finds that: (1) it contains false and/or misleading information, see, e.g., *Save the Rock Island Committee, Inc. v. St. Louis Southwestern Railway Co.*, Docket No. AB-39 (Sub-No. 18X) (ICC served April 1, 1994); (2) regulation is necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. 10101, see, e.g., *Indiana Hi-Rail Corporation — Lease and Operation Exemption — Norfolk and Western Railway Company Line Between Rochester and Argos, IN, and Exemption from 49 U.S.C. 10761, 10762, and 11141*, Finance Docket No. 32162, et al. (STB served January 30, 1998) (*Hi-Rail*); or (3) revocation is necessary to ensure the integrity of the Board's processes, see, e.g., *Minnesota Comm. Ry., Inc. — Trackage Exempt. — BNRR. Co.*, 8 I.C.C.2d 31 (1991) (*Minnesota*).

When, as here, an exemption has become effective, a revocation request is treated as a petition to reopen and revoke and, under 49 CFR 1115.3(b), the petitioner must specify whether revocation is supported by material error, new evidence, or substantially changed circumstances. The petitioner has the burden of proof and must articulate reasonable, specific concerns to satisfy the revocation criteria. See, *Wisconsin Central Ltd. — Exemption Acquisition and Operation — Certain Lines of Soo Line Railroad Company*, Finance Docket No. 31102 (ICC served July 28, 1988); *Minnesota*, 8 I.C.C.2d at 35; and *I&M Rail Link LLC — Acquisition and Operation Exemption — Certain Lines of Soo Line Railroad Company d/b/a Canadian Pacific Railway*, STB Finance Docket No. 33326, et al. (STB served April 2, 1997), *aff'd sub nom. City of Ottumwa v. STB*, 153 F.3d 879 (8th Cir. 1998).

ITC does not challenge the Director's decision denying the requests to extend the NITU negotiation period filed by ITC on March 29, 1999, and April 12, 1999, because the segment at issue was no longer part of the national rail transportation system. Instead, relying on *Land Conservancy — Acq. & Oper. — Burlington Northern*, 2 S.T.B. 673 (1997), and *aff'd*, May 13, 1998

(*Land Conservancy*),⁷ ITC argues that the exemptions by which TTI was authorized to acquire and abandon the Line should be revoked because TTI is a subsidiary of, or is controlled by, Tie Yard of Omaha (Tie Yard), a railroad salvager, and only acquired the Line for salvage purposes. ITC claims that TTI never intended to provide rail service, that neither TTI nor Tie Yard had any motive power or equipment suitable for serving the Line,⁸ and that filing a notice for an acquisition and operation exemption, under the circumstances, constituted a misuse of Board processes.

ITC's reliance on *Land Conservancy* is misplaced. There, the Land Conservancy of Seattle and King County (LCSKC) petitioned for an exemption to abandon a line LCSKC had acquired under a notice of exemption less than 6 weeks before, and at the same time, requested an exemption from the OFA provisions, and a request for a NITU, to be made immediately effective. In those circumstances, the Board determined that the acquisition exemption should be revoked based on record evidence establishing that LCSKC had planned to convert the line into a trail as soon as possible and had never intended to operate it. As the Board noted [*Land Conservancy*, 2 S.T.B. at 677]:

[t]he policy underlying the governing acquisition exemption procedures is to support the continued operation of rail lines in lieu of abandoning them. There is no set period of time during which a line must be operated before abandonment authority can be sought. However, when an acquiring noncarrier initiates abandonment proceedings within days after consummating the acquisition of the line, and there are no extenuating circumstances, our processes are being abused.

Here, ITC has failed to present credible evidence to demonstrate that TTI's decisions to acquire and abandon constituted a misuse of Board processes. The evidence of record establishes that TTI was ready, willing, and able to provide rail service on the Line; that TTI had access to locomotive power units and, through Fillmore Western Railway Company (Fillmore), an affiliate, access to engineers certified by the Federal Railroad Administration; and that TTI also had arranged for Fillmore to provide rail service. TTI Reply at 2 and the verified statements of Mr. T. Peterson, TTI's Vice President, and Mr. Bannister. The record establishes that TTI filed for an abandonment exemption only after it had

⁷ Petitions for review pending in *The Land Conservancy of Seattle et al. v. STB*, Nos. 98-70776 and 98-71348 (9th Cir. filed July 10, 1998).

⁸ In support, ITC submitted verified statements from Mr. Thomas Neenan, its Executive Director, ITC Petition to revoke, Exhibit A; and Mr. Charles Montange, its counsel, ITC Petition to revoke, Exhibit B. Mr. Montange claimed that in the course of a conversation with Mr. T. Scott Bannister, TTI's counsel, the latter admitted that TTI "did not intend and never intended to operate the * * * Line." This allegation was denied in TTI's Reply, Verified statement of Mr. Bannister.

determined that neither the shippers⁹ nor the Iowa Department of Transportation were interested in a restoration of service, and Green Valley ultimately filed a successful OFA to acquire the 4-mile segment between milepost 1.45 and milepost 5.45 for continued rail service.

The evidence suggests on the other hand that ITC has attempted to manipulate the Board's processes to its own advantage. Although the acquisition and operation exemption was filed on August 22, 1997, and the abandonment and discontinuance exemption was filed on March 17, 1998, ITC challenged neither until May 3, 1999, notwithstanding its active participation in the proceeding before the Board and the fact that TTI's relationship to a salvager was public information. The fact that TTI's exemptions were not challenged by ITC or IRFA until after the issuance of the Director's April 28, 1999, decision indicates that ITC and IRFA would not have challenged the exemptions if TTI had not notified the Board on March 19, 1999, 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.

IRFA suggests that its failure to acquire the right-of-way for interim trail use/rail banking or other public use was attributable to the structure of the acquisition transaction whereby BNSF retained the underlying right-of-way and sold the track and operating authority to TTI. Specifically, IRFA claims that the parties were unsure as to who held the operating authority. According to IRFA, TTI denied holding the operating authority and pointed to BNSF, and BNSF subsequently denied retaining the operating authority and pointed back to TTI.

IRFA has not shown that revocation or reopening is warranted. The evidence establishes that IRFA did not express any interest in the Line until its September 4, 1998, letter to TTI. *See*, IRFA Joinder in petition to revoke *et al.*, Exhibit 2. Then, in a letter dated September 23, 1998, BNSF informed IRFA that it had retained ownership of the real estate interest underlying the Line and offered to convey all of its right, title, and interest (excluding the 4-mile segment transferred to Green Valley under the OFA and the remaining track, track

⁹ Between June 11, 1997, the alleged date of the purchase agreement, and September 12, 1997, the service date of the notice of exemption to acquire and operate, TTI contacted the three shippers with facilities on the Line. Farmer's Cooperative Company, the largest shipper with facilities at Greenfield and Orient, IA, indicated that it had acquired a mainline loading facility on the Iowa Interstate Railroad approximately 13 miles to the north and was no longer interested in moving grain from Greenfield. Rolling Hills Farm Service received a handful of fertilizer shipments in 1996 and expressed no interest in further rail service. Green Valley expressed no interest in TTI's rail service but indicated that it had been negotiating with BNSF and remained interested in acquiring the 4-mile segment that subsequently became the subject of its successful OFA.

materials and facilities, and operating easement) outright or under an exclusive, transferable 5-year purchase option for a certain sum. See, RFA Joinder in petition to revoke, *et al.*, Exhibit 1. Subsequently, in a letter dated October 28, 1998, BNSF clarified that the abandonment had not been, and could not be, consummated because public use and trail conditions were outstanding. See, 49 CFR 1152.29(e)(2). BNSF also reiterated that TTI was the owner of the operating authority; that BNSF was the owner of only the underlying real estate and that its offer extended only to that interest; and that BNSF, as the owner of the real estate interest, was a necessary party to any transfer of the right-of-way. IRFA Joinder in petition to revoke, *et al.*, Exhibit 3. IRFA received these letters well before December 29, 1998, the expiration date of the public use and original trail use negotiating periods, and March 19, 1999, the filing date of TTI's abandonment consummation letter. These letters, and an additional letter from IRFA,¹⁰ establish that IRFA was adequately informed of the nature of the ownership of the Line's assets.

Finally, we are reluctant to grant petitions to revoke where, as here, a line segment has been purchased pursuant to a Board authorized OFA, and petitions to revoke are not filed until long after consummation of the sale. See, *Consolidated Rail Corporation — Abandonment Exemption — in Erie County, NY*, Docket No. AB-167 (Sub-No. 1164X), pending review in *Buffalo Crushed Stone, Inc. v. STB*, 194 F.3d 125 (D.C. Cir. 1999).

It is ordered:

1. IRFA is granted leave to intervene.
2. ITC's petition to reopen and revoke TTI's acquisition and operation exemption and subsequent abandonment exemption, and IRFA's supporting petition, are denied.
3. This decision is effective on November 1, 1999.

By the Board, Chairman Morgan, Vice Chairman Clyburn and Commissioner Burkes.

¹⁰ Responding to a BNSF status request, IRFA wrote that no interested persons had sought the purchase of the Line and, as a result, "the thirty day period for IRFA to act on the BNSF offer, as provided in the Iowa code, has expired." Farmers Group Opposition to IRFA's motion to intervene and joinder to petition to revoke, *et al.*, Exhibit A, letter dated December 11, 1998.