

STB DOCKET NO. AB-559 (SUB-NO. 1X)¹

GAULEY RIVER RAILROAD, LLC
— ABANDONMENT AND DISCONTINUANCE OF SERVICE —
IN WEBSTER AND NICHOLAS COUNTIES, WV

Decided June 20, 2000

The Board reopens a decision denying a rail carrier's petition to abandon a line because the carrier was receiving a subsidy and grants the petition because the subsidy had been discontinued.

BY THE BOARD:

In this decision, we are granting a petition to reopen these proceedings filed by Gauley River Railroad Company (Gauley River) and CSX Transportation, Inc. (CSXT). On reopening, we are also granting petitioners' request for an exemption from the prior approval requirements of 49 U.S.C. 10903, permitting them to abandon and discontinue service over three rail line segments (collectively, the Lines), totaling 30.7 miles, in Webster and Nicholas Counties, WV.

BACKGROUND

On February 26, 1999, Gauley River and CSXT jointly filed a petition in which Gauley River sought an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 for Gauley River to abandon: (1) a 10-mile line of railroad extending between milepost BUE-119 near Cowen, WV, and milepost BUE-129 at Allingdale, WV (Line A); and (2) an 8.3-mile line of railroad extending between milepost BUE-12.4 at Muddlety Falls, WV, and milepost BUE-20.7 at Muddlety, WV (including the McMillon Creek Branch and Delmont Branch) (Line C). Both Gauley River and CSXT sought an exemption to discontinue service over a 12.4-mile line of railroad between

¹ A single decision is being issued in the two proceedings for administrative convenience only. This decision embraces STB Docket No. AB-55 (Sub-No. 572X), *CSX Transportation, Inc. — Discontinuance of Service — Webster and Nicholas Counties, WV*.

milepost BUE-0.0 at Allingdale, WV, and milepost BUE-12.4 at Muddlety Falls, WV (Line B).²

The proposed abandonment and discontinuance was opposed by Gauley Eagle Holdings, Inc. (GEH), Nicholas County Commission, Webster County Prosecuting Attorney's office, Region 4 Planning and Development Council and 4-C Economic Development Authority. The West Virginia State Rail Authority (WVSRA), Pardee & Curtin Resources Company (Pardee), Pace Carbon Fuels, L.L.C. (Pace Carbon), and Tioga Lumber Company (Tioga) jointly filed their opposition and request for investigation and hearing (Joint Opposition). In addition, United States Senator Robert C. Byrd, United States Representative Bob Wise, the West Virginia Development Office, and Brotherhood of Locomotive Engineers Division 751 filed letter-comments in opposition. The Webster County Commission (WCC) and the WVSRA filed requests that we issue a notice of interim trail use (NITU) and that we impose a public use condition. The United Transportation Union (UTU) had requested imposition of labor protective conditions.

In a decision served June 16, 1999, we denied the exemption petitions because we were unable to conclude that the proposed abandonment and discontinuance met the exemption standards of section 10502. We recognized that no traffic had moved on the Lines since 1994 and that no shipper had made a firm commitment to tender traffic in the future. But we found that Gauley River received regular monthly payments of \$12,000 from Pace Carbon to retain the Lines and that Gauley River had failed to demonstrate that the costs attributable to the Lines exceeded these revenues it received. We also found that additional information was needed for us to determine that locomotive costs could properly be attributed to the Lines and that the record was unclear about the amount of rehabilitation and maintenance expenses that would be needed for rail service to be provided. The petitions were denied without prejudice to Gauley River and CSXT refiling appropriate abandonment applications or petitions for exemption and curing the defects of their original petitions.

² Gauley River purchased Lines A and C from CSXT in 1998. *See, Gauley River Railroad, LLC—Purchase and Operation Exemption — CSX Transportation, Inc.*, STB Finance Docket No. 33579 (STB served July 14, 1998). Gauley River subleased Line B from CSXT, which in turn leases the line from the Strouds Creek and Muddlety Railroad (SC&M). *See, CSX Transportation, Inc. — Renewal of Lease Exemption — Strouds Creek and Muddlety Railroad Company*, Finance Docket No. 31373 (ICC served December 21, 1988).

On November 2, 1999, Gauley River and CSXT filed jointly a petition to reopen pursuant to 49 CFR 1152.25(e)(4).³ Petitioners assert that, after the June 16 decision was issued, several developments have occurred that warrant the reopening of the proceeding. Michael Ellis, Gauley River's manager, testifies that the \$12,000 monthly payments by Pace Carbon to Gauley River ended in July 1999. According to Mr. Ellis, Gauley River received payments totaling \$84,000 from Pace Carbon from January 1999 through July 1999, but has received no payments from Pace Carbon after July 20, 1999.

Mr. Ellis states further that, on or about August 12, 1999, he was informed by the president of Pace Carbon that it would make no further payments. Mr. Ellis states further that he had been advised by Pace Carbon that it did not object to reopening the proceeding and having the Board authorize abandonment and discontinuance of the Lines, provided that Gauley River would not salvage track until after June 1, 2000. Mr. Ellis indicates that Gauley River agreed that, if abandonment was authorized, the petitioner would not consummate abandonment until after June 1, 2000.

Mr. Ellis adds that, in July 1999, he discussed the status of Line B with a representative of Pardee, which, he believes, owns SC&M.⁴ Mr. Ellis states that he discussed "alternatives SC&M may have with respect to its ownership and possible disposition" of Line B.

Petitioners assert that the record indicates that no traffic has moved on the Lines since 1994, and no shipper has tendered or guaranteed to tender traffic. Petitioners state further that Gauley River has lost at least \$12,000 from continuing to own the Lines. These losses represent the difference between the \$96,000 in interest expenses and the \$84,000 in payments received from Pace Carbon. Petitioners state that, even without the locomotive costs and rehabilitation and maintenance costs that were questioned in the June 16 decision, it is continuing to incur ownership costs for interest and property taxes, which are not being offset by attributable revenues.⁵

³ Under these rules, petitioners must show that the proceeding sought to be reopened involves material error, new evidence, or substantially changed circumstances.

⁴ There is uncertainty about which company owns SC&M. On the basis of a statement in the joint opposition, the June 16 decision indicates that SC&M is owned by Tioga. The petition to reopen, however, indicates that SC&M is owned by Pardee. As previously noted, Pardee and Tioga appeared jointly in the earlier phase of this proceeding. They also appear to have common management. See, verified statement of George D. Curtin in opposition to the petition for exemption, April 7, 1999.

⁵ Gauley River also questions whether the payments received from Pace Carbon should have been considered as revenue attributable to the Line. Gauley River asserts that the payments should

(continued...)

Pardee and Pace Carbon (protestants) were the only opposing parties responding to the petition to reopen; their reply was filed on November 22, 1999. Protestants confirm that they no longer object to the Gauley River and CSXT's proposed abandonment and discontinuance of service over the Lines with the proviso that certain statements be clarified. In a verified statement, Pace Carbon's president, James R. Treptow, states that he and Mr. Ellis agreed that Gauley River would not take any action to make Gauley River's system inoperable prior to June 1, 2000. Mr. Treptow further indicates that he and Mr. Ellis agreed that, prior to June 1, 2000, Gauley River and CSXT would negotiate in good faith with Pace Carbon to see whether an acceptable rate could be agreed upon for the coal-based synthetic fuel produced at its plant to be shipped by rail. The synthetic fuel is currently shipped by truck, but, according to Mr. Treptow, the product could be shipped by rail if rail rates were not too high.

Pardee would prefer the line to stay in place to ship coal from its property to GEH. However, Pardee submits that, if no viable operations are agreed to prior to June 1, 2000, then it would not oppose abandonment. Pardee asserts that, in consideration for this commitment, Gauley River has agreed to cooperate with Pardee to remove the rails at Pardee's facility in an equitable and orderly manner should Gauley River remove its rail.

DISCUSSION AND CONCLUSIONS

Under 49 CFR 1152.25(e)(4), a petition to reopen an abandonment proceeding must show material error, new evidence, or substantially changed circumstances. The petitioners have submitted new evidence showing that circumstances have substantially changed since our prior decision. Gauley River is no longer receiving subsidy payments from Pace Carbon. More significantly, none of the parties who opposed the petitions for exemption in the earlier phase of this proceeding has opposed reopening the proceeding. These changed circumstances warrant reopening this proceeding. With the demonstrated new evidence and changed circumstances, we will reconsider the petition for exemption and will not require petitioners to submit a new application or petition for exemption.

⁵(...continued)

have been treated as a voluntary subsidy. We agree with Gauley River that the payments from Pace Carbon were a voluntary subsidy and not revenue from traffic. However, the payments are still considered revenue attributable to the Lines.

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EXEMPTION CRITERIA

Under 49 U.S.C. 10903, a rail line may not be abandoned or service discontinued without our prior approval. Under 49 U.S.C. 10502, however, we are to exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative time and expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. Moreover, an exemption will foster sound economic conditions and encourage efficient management by allowing Gauley River and CSXT to avoid operating and maintaining an uneconomic rail line and to use their assets more productively elsewhere [49 U.S.C. 10101(5) and (9)]. Exemption will relieve Gauley River of the costs it is incurring from owning the Lines, although the exact amount of those costs is not shown on the record. Also the Lines are not generating revenues to offset costs incurred by Gauley River since the subsidy payments stopped. Other aspects of the rail transportation policy are not affected adversely.

Regulation is not necessary to protect shippers from the abuse of market power. The evidence in the record shows that the Lines have not been operated since 1994 and that there is no potential for traffic on the Lines. In addition, there is no opposition to reopening the proceeding. Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

In the petition to reopen, the petitioners indicate that, if the abandonment is approved, Gauley River will defer salvaging Lines A and C until June 1, 2000. Verified Statement of Michael Ellis at 2. The abandonment authority we grant is permissive. Should the parties agree to continue the Lines in service, the parties may request that this proceeding be dismissed. We require only that Gauley River notify the Board if it exercises the authority granted and fully abandons the Lines. Also, the decision sets a 1-year time limit for Gauley River to consummate abandonment.

LABOR PROTECTION

Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. However, we do not normally impose employee protective conditions when a carrier abandons its entire line unless the evidence shows the existence of: (1) a corporate affiliate that will continue substantially similar rail operations; or (2) a corporate parent that will realize substantial financial benefits over and above relief from the burden of deficit operations by its subsidiary railroad. See, *Wellsville, Addison & Galeton R. Corp. — Abandonment*, 354 I.C.C. 744 (1978); *Northampton and Bath R. Co. — Abandonment*, 354 I.C.C. 784 (1978) (*Northampton*). Gauley River proposes to abandon its entire line of railroad. Gauley River does not appear to have a corporate affiliate or parent that could benefit from the proposed abandonment, and no one has attempted to show that the situation under *Northampton* exists for imposing labor protection in this proceeding. Accordingly, we will not impose labor protective conditions in STB Docket No. AB-559 (Sub-No. 1X). In STB Docket No. AB-55 (Sub-No. 572X), however, we will impose the standard labor protective conditions of *Oregon Short Line R. Co. — Abandonment — Goshen*, 360 I.C.C. 91 (1979), on CSXT's exemption for discontinuance of service.

ENVIRONMENTAL ISSUES

Gauley River had submitted an environmental report with its petition for exemption and had 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 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment. SEA served an environmental assessment (EA) on April 29, 1999. In the EA, SEA indicated that (1) the West Virginia Department of Culture and History (SHPO) had not completed its review of the proposed abandonment and (2) the West Virginia Division of Environmental Protection may require certain permits before salvage operations can commence, and recommended mitigation. SEA has subsequently advised us that the SHPO has now indicated that there are no historic properties on the Lines. No comments to the EA were filed. In response to the EA, we will require Gauley River to consult with the West Virginia Division of Environmental Protection-Office of Water Resources, prior to commencing salvage operations to determine

what practices should be followed during salvage to ensure against contamination of waterways. Accordingly, we conclude that the proposed abandonment and discontinuance, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

TRAIL USE

As previously noted, requests for issuance of a notice of interim trail use had been submitted by WCC and WVSRA for Lines A, B, and C. WCC and WVSRA have each submitted a statement of willingness to assume financial responsibility for the right-of-way, and have acknowledged that use of the right-of-way is subject to possible future reconstruction and reactivation for rail service as required by 49 CFR 1152.29. However, in their joint reply filed May 7, 1999, petitioners stated that, because of opposition of adjoining land owners, Gauley River was "reluctant to enter into trail use negotiations with any party." The National Trails System Act, 16 U.S.C. 1247(d), establishes a voluntary program for rail carriers and applies only if the abandoning railroad agrees to negotiate a trail use/rail banking agreement. *See, Rail Abandonments — Use of Rights-of-Way as Trails*, 2 I.C.C.2d 591, 605 (1986). Because Gauley River has not agreed to negotiate a trail use/rail banking agreement, we will not impose an interim trail use condition here.⁶

PUBLIC USE

SEA has indicated in the EA that the right-of-way may be suitable for other public use under 49 U.S.C. 10905. As noted above, WCC and WVSRA have also requested that a 180-day public use condition be imposed, precluding Gauley River from disposing of the rail corridor, other than the tracks, ties and signal equipment, except for public use on reasonable terms and barring Gauley River from removing or destroying potential trail-related structures such as bridges, trestles, and culverts.

WCC and WVSRA each state that the right-of-way is suitable for recreational trail purposes. WVSRA states that the right-of-way should be preserved for highway use because of extensive mineral deposits in the area that

⁶ Even had Gauley River agreed to negotiate a trail use/rail banking agreement, it cannot negotiate an agreement for Line B, because neither it nor CSXT owns that segment.

may be developed in the future.⁷ Both parties indicate that the 180-day time period is needed to complete negotiations with Gauley River. However, a public use condition cannot be imposed for Line B, which is owned by SC&M, because that carrier has not sought authority to abandon that segment.⁸

WCC and WVSRA have met the public use criteria prescribed at 49 CFR 1152.28(a)(2) by specifying: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) justification for the period of time requested. Accordingly, a 180-day public use condition will be imposed for Lines A and C, commencing from the effective date of this decision. A public use condition is not imposed for the benefit of any one potential purchaser. Rather it provides an opportunity for any interested person to acquire the right-of-way that has been found suitable for public purposes. Therefore, with respect to the public use condition, Gauley River is not required to deal exclusively with WCC or WVSRA, but may engage in negotiations with other interested persons.

The parties should note that operation of the public use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in *Trails*, 2 I.C.C.2d at 608, legitimate offers of financial assistance (OFA) to acquire rail lines for continued rail service or to subsidize rail operations take priority over other public uses. Accordingly, if an OFA is timely filed under 49 CFR 1152.27(c)(1), the effective date of this decision and notice will be postponed beyond the effective date indicated here. See, 49 CFR 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. See, 49 CFR 1152.27(f). Finally, if the line is sold under the OFA procedures, the petition for exemption, as it relates to the

⁷ WVSRA has also requested a public use condition to preserve the right-of-way for future rail use. We reject this request. A public use condition cannot be imposed to preserve a right-of-way for future rail use. The appropriate procedure to preserve a right-of-way for continued rail use is through financial assistance procedures in 49 U.S.C. 10904. *Wisconsin Central Ltd. — Abandonment Exemption — In Douglas, Washburn, and Barron Counties, WI*, Docket No. AB-303 (Sub-No. 12X) (ICC served April 20, 1993).

⁸ Following discontinuance of service by Gauley River and CSXT over Line B, SC&M, as lessor, has a residual common carrier obligation to provide rail service over that line. See, *Bush Terminal R. Co. Entire Line Abandonment*. 342 I.C.C. 34, 50(1971). If Gauley River abandons Lines A and C, Line B would be left as an island segment that would not be connected to other rail lines. Nevertheless, the circumstances here do not warrant delaying the proposed abandonment of Lines A and C until SC&M obtains the necessary abandonment authority for Line B. SC&M's owner (either Tioga or Pardee) is aware of its options. Requests for public use conditions over Line B can be submitted when SC&M seeks abandonment authority.

abandonment only, will be dismissed and public use precluded. Alternatively, if a sale under the OFA procedures does not occur, the public use processes may proceed.

It is ordered:

1. The joint petition to reopen STB Docket No. AB-559 (Sub-No. 1X) and STB Docket No. AB-55 (Sub-No. 572X) is granted.

2. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903 the abandonment by Gauley River of Lines A and C and the discontinuance of service by Gauley River and CSXT over Line B, subject to the imposition on CSXT of the employee protective conditions of *Oregon Short Line R. Co. — Abandonment — Goshen*, 360 I.C.C. 91 (1979) in AB-55 (Sub-No. 572X), and the conditions that, for Lines A and C, Gauley River (a) leave intact all of the right-of-way underlying the track, including bridges, trestles, culverts, and tunnels (but not track and materials), for a period of 180 days from the effective date of this decision, to enable any State or local government agency or any other interested person to negotiate the acquisition of the line for public use; and (b) consult with the West Virginia Division of Environmental Protection-Office of Water Resources, prior to commencing salvage operations to determine what practices should be followed during salvage to ensure against contamination of waterways.

3. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by July 3, 2000, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by a \$1,000 filing fee. *See*, 49 CFR 1002.2(f)(25).

4. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: "Office of Proceedings, AB-OFA."

5. Provided no OFA has been received, this exemption will be effective on July 23, 2000. Petitions to stay must be filed by July 3, 2000. Petitions to reopen must be filed by July 13, 2000.

6. Pursuant to the provisions of 49 CFR 1152.29(e)(2), Gauley River shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned Lines A and C. If consummation has not been effected by Gauley River's filing of a notice of consummation by June 23, 2001, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If any legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation

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must be filed not later than 60 days after satisfaction, expiration or removal of the legal or regulatory barrier.

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

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