DOCKET NO. AB-389 (Sub-No. 1X)

GEORGIA GREAT SOUTHERN DIVISION, SOUTH CAROLINA CENTRAL RAILROAD CO., INC.—ABANDONMENT AND DISCONTINUANCE EXEMPTION—BETWEEN ALBANY AND DAWSON, IN TERRELL, LEE, AND DOUGHERTY COUNTIES, GA

Decided May 9, 2003

The Board (1) grants petition to vacate a notice of interim trail use so that rail service may be restored on the line, and (2) rejects the trail sponsors' argument that the Board should require compensation to the trail sponsors as a prerequisite to the reactivation of rail.

BY THE BOARD:

On March 5, 2003, Georgia Southwestern Railroad, Inc. (GSWR), successor in interest to the Georgia Great Southern Division, South Carolina Central Railroad Co., Inc. (GGS), filed a petition to vacate a notice of interim trail use (NITU) pursuant to 49 CFR 1152.29(c)(3), on a 13.62-mile rail line between Albany and Sasser, GA (the line). GSWR seeks to reinstate active rail service on the line in accordance with section 8(d) of the National Trails System Act, codified at 16 U.S.C. 1247(d) (Trails Act). South Georgia Rails to Trails, Inc. (SGRT), the current interim trail use sponsor, and Rails to Trails Conservancy (RTC), the original interim trail use sponsor (together, trail sponsors or RTC/SGRT) filed replies in opposition to the petition. In addition, various entities and state and local interests submitted comments and letters. We will grant GSWR's petition and vacate the NITU so that rail service may be restored.

BACKGROUND

In a decision and NITU served on August 16, 1996, we found that GGS should be exempted from the prior approval requirements of 49 U.S.C. 10903-04 to abandon its 13.62-mile line of railroad between milepost 86.5 at Albany and milepost 72.88 at Sasser and to discontinue service over its 5.38-mile line of railroad between milepost 72.88 at Sasser and milepost 67.5 at Dawson, in

Terrell, Lee, and Dougherty Counties, GA. We issued a NITU that provided a 180-day period for GGS and the Chehaw Park Authority (Chehaw) to negotiate an interim trail use/rail banking agreement that would avoid abandonment of the 13.62-mile line segment between Albany and Sasser. Subsequently, in a decision served on October 25, 1996, RTC was substituted for Chehaw as the negotiating party. The initial negotiating period was subsequently extended, by decisions served on February 28 and August 11, 1997. In October 1997, the parties advised us that they had reached an interim trail use agreement.

In the meantime, GGS's parent, RailTex, Inc. (RailTex), had transferred the line, and various other rail lines, from a rail subsidiary that it controlled, South Carolina Central Railroad Co., Inc. (SCCR),[1] to GSWR, a noncarrier RailTex subsidiary.[2] *See RailTex, Inc.–Corporate Family Transaction Exemption–Georgia and Alabama Lines, South Carolina Central Railroad Co., Inc. and Georgia Southwestern Railroad, Inc.*, Finance Docket No. 32682 (ICC served April 20, 1995). Accordingly, it was GSWR that entered into the interim trail use/rail banking agreement with RTC.

Subsequently, SCCR acquired all of GSWR's rail lines and leased those rail lines back to GSWR. *See Georgia Southwestern Railroad, Inc.–Sale and Lease Exemption Within a Corporate Family Transaction–South Carolina Central Railroad, Inc.*, STB Finance Docket No. 34144 (STB served January 18, 2002). According to GSWR, to ensure that it held the exclusive right to reactivate rail service on this line, it acquired from SCCR any and all rights SCCR might have had in this line at that time.

GSWR currently interchanges all traffic moving to and from the Norfolk Southern Railway Company (NS) at Albany, GA. The interchange at Albany now requires GSWR to use its trackage rights over NS lines located either between Americus, GA, and Albany, or between Smithville, GA, and Albany, depending on the routing of the traffic. GSWR claims that the use of these trackage rights is operationally and financially detrimental, as GSWR is subject to the control of NS for dispatching, which, GSWR claims, often causes delays and impairs GSWR's operating efficiency.

To address these problems, the current owners of GSWR have had numerous discussions with the State of Georgia Department of Transportation (GDOT) during the past 2 years concerning the reactivation of rail service on the

[1] These lines were managed by GGS as a division of SCCR.

[2] RailTex and its subsidiaries were subsequently acquired by RailAmerica, Inc. (RailAmerica), pursuant to our authorization in *RailAmerica, Inc.–Control Exemption–RailTex, Inc.*, 4 S.T.B. 479 (2000). In March 2002, RailAmerica sold all of the stock of GSWR to its current owners.

Albany to Sasser line. GDOT has a program of acquiring the assets of light density rail lines to preserve rail service on the lines,[3] and it has tentatively agreed to financially assist GSWR in rehabilitation of the line.

In the spring of 2002, GSWR contacted RTC to discuss the reactivation of active rail service on the line. According to GSWR, an RTC official informed GSWR that RTC had transferred its rights in the line to SGRT, and suggested that GSWR contact SGRT.

In addition to requesting that we vacate the NITU, GSWR asks us to decide the following issues: (1) whether an interim trail sponsor can transfer its interest in a rail banked line to another entity without Board approval and the acquiescence of the railroad; (2) whether GSWR may reactivate rail service on the line; and (3) whether the interim trail sponsor is entitled to compensation as a precondition to the reactivation of rail service.

PRELIMINARY MATTER

On April 4, 2003, Pioneer Railcorp, and the railroads it owns,[4] and Arkansas-Oklahoma Railroad Company (together, Pioneer) jointly filed a motion for leave to intervene and participate. Also on April 4, 2003, the Association of American Railroads (AAR) filed a petition for leave to intervene and filed comments on the same day. GSWR and RTC/SGRT filed replies to Pioneer's and AAR's motions to intervene.[5]

Under 49 CFR 1112.4, intervention may be granted if (1) it would not unduly disrupt or prolong the evidentiary schedule, and (2) it would not unduly broaden the issues raised in the proceeding. Both Pioneer and AAR have set

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[3] *See, e.g.*, *Georgia Department of Transportation–Acquisition Exemption–Central of Georgia Railroad Company*, Finance Docket No. 32667 (ICC served March 7, 1995); *State of Georgia, Department of Transportation–Acquisition Exemption–Line of Central of Georgia Railroad Company*, STB Finance Docket No. 33690 (STB served January 6, 1999); *State of Georgia, Department of Transportation–Acquisition Exemption–Georgia Southwestern Railroad, Inc.*, STB Finance Docket No. 33876 (STB served May 25, 2000).

[4] The railroads are: Alabama Railroad Co.; Alabama & Florida Railway Co., Inc.; Decatur Junction Railway Co.; Elkhart & Western Railway Co.; Fort Smith Railroad Co.; The Garden City Western Railway, Inc.; Gettysburg & Northern Railroad Co.; Indiana Southwestern Railway Co.; Kendallville Terminal Railway Co.; Keokuk Junction Railway Co.; Keokuk Union Depot Company; Michigan Southern Railroad Co.; Mississippi Central Railroad Co.; Pioneer Industrial Railway Co.; Shawnee Terminal Railway Co.; Vandalia Railroad Co.; and West Michigan Railroad Co.

[5] On May 6, 2003, RTC/SGRT filed a motion to strike GSWR's reply; however, in the interest of a complete record, we will consider all pleadings submitted in this case and deny RTC/SGRT's motion.

forth, in their respective filings, their interest in this proceeding, their positions on the relief sought, and their requests for relief in accordance with 49 CFR 1112.4(b). Intervention will not unduly delay the proceeding or broaden the issues. Thus, we will grant Pioneer's and AAR's requests to intervene, and we have considered their filings in reaching our decision in this matter.

DISCUSSION AND CONCLUSIONS

I. *Modification of the NITU.*

Under our regulations implementing the Trails Act, for one interim trail sponsor to be substituted for another, the existing and future interim trail users must file jointly a copy of the extant NITU or Certificate of Interim Trail Use (CITU), and the new interim trail sponsor must file a Statement of Willingness to Assume Financial Responsibility containing the information specified in 49 CFR 1152.29(a) (which includes an acknowledgment that the interim trail use is "subject to possible reconstruction and restoration for rail service"). 49 CFR 1152.29(f)(1). Additionally, the parties must indicate the date on which substitution of the trail sponsor is to occur. 49 CFR 1152.29(f)(2). Upon receipt of this information, absent objection, we issue an appropriate replacement NITU to the new trail sponsor. *Id.*

The trail sponsors failed to follow the requirements of 49 CFR 1152.29(f) in this case, until May 6, 2003, when we received a joint motion to substitute SGRT as the trail sponsor. We admonish parties to comply with 49 CFR 1152.29(f) promptly in future cases. Here, however, our action vacating the existing NITU renders moot the compliance issue in this case, as neither RTC nor SGRT will have any remaining rights and responsibilities under the Trails Act. Nevertheless, for convenience in resolving the remaining issues, we will refer to RTC/SGRT jointly as trail sponsors here.

II. *Rail Banking and the Restoration of Rail Service Under the Trails Act.*

The Trails Act "is the culmination of congressional efforts to preserve shrinking rail trackage by converting unused rights-of-way to recreational trails." *Preseault v. ICC*, 494 U.S. 1, 5 (1990). Under the Trails Act, we must "preserve established railroad rights-of-way for future reactivation of rail service" by prohibiting abandonment where a trail sponsor offers to assume managerial, tax, and legal liability for the right-of-way for use in the interim as a trail. *See* 16 U.S.C. 1247(d); *Citizens Against Rails to Trails v. STB*, 267 F.3d 1144, 1149-50

(D.C. Cir. 2001) (*CART*). The statute expressly provides that only "if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for [any] purposes * * * as an abandonment * * * *" 16 U.S.C. 1247(d). Instead, the right-of-way is "rail banked," which means that the railroad is relieved of the current obligation to provide service over the line but that the railroad (or any other approved rail service provider) may reassert control to restore service on the line in the future. *See Birt v. STB*, 90 F.3d 580, 583 (D.C. Cir. 1996); *Iowa Power–Const. Exempt–Council Bluffs, IA*, 8 I.C.C.2d 858, 866-67 (1990) (*Iowa Power*); 49 CFR 1152.29. In short, an interim trail use arrangement is subject to being cut off at any time by the reinstitution of rail service. If and when the railroad wishes to restore rail service on all or part of the property, it has the right to do so, and the trail user must step aside. 16 U.S.C. 1247(d); 49 CFR 1152.29(d)(2)-(3).

As discussed above, in this case GSWR is the successor in interest to the rail carrier that originally sought to abandon this rail line. That carrier, SCCR, no longer has any interest in the line. Because GSWR now wishes to reactivate rail service, we have all the information we need to vacate the outstanding NITU, pursuant to 49 CFR 1152.29(d)(2), so that rail service can be restored. No authority under 49 U.S.C. 10901 is required to reactivate rail service where, as here, the carrier who would have been the abandoning railroad had there not been rail banking and interim trail use, or its successor, is the one who decides to restore active rail service. *See Iowa Power*. Because it could have performed the operations without seeking any additional regulatory approval prior to the interim trail use, the resumption of service by the same carrier or its successor does not trigger the licensing requirement of section 10901, or require that its successor in interest seek concurrences from any other carrier.

III. *Compensation To Interim Trail User*.

Trail sponsors cannot avoid the statutory predicate that an interim trail use arrangement is subject to being cut off at any time for restored rail service, *see*, 16 U.S.C. 1247(d), but they argue that RTC/SGRT can demand compensation as a prerequisite to the reactivation of rail service here. Specifically, RTC/SGRT contend that, because they now own the land on which the line is located, we cannot require the transfer of the line to GSWR unless GSWR pays RTC/SGRT to reacquire the line. Trail sponsors also argue that, because RTC/SGRT paid GGS for the line (in a "bargain" sale, for which GGS took a charitable tax

deduction), the line may not legally be reconveyed to GSWR for less than its full market value.

GSWR and AAR, on the other hand, maintain that neither the Trails Act nor our implementing regulations require railroads to compensate interim trail sponsors as a precondition to the reactivation of service on rail banked lines. Unless a railroad and an interim trail sponsor enter into an agreement that provides for compensation to the interim trail sponsor in the event of restoration of rail service on a rail banked line, GSWR and AAR contend, the interim trail sponsor may not resist the reactivation of rail service on grounds that it is entitled to compensation.

Our analysis of this issue is based on the Board's ministerial role under the Trails Act. *See CART*; *Goos v. ICC*, 911 F.2d 1283 (8th Cir. 1990). Our only responsibility is to confirm that the trail sponsor agrees to assume full liability for the property during the interim trail use and to keep the property available for reactivation of rail service. 16 U.S.C. 1247(d); 49 CFR 1152.29(a)(3).

Under the Trails Act, we do not decide whether interim trail use is desirable for a particular line. We cannot impose an interim trail use arrangement upon an unwilling railroad or a reluctant trail sponsor; such arrangements must be voluntary. *National Wildlife Fed'n v. ICC*, 850 F.2d 694, 699-702 (D.C. Cir. 1988) (*National Wildlife*); *Washington State Dept. Of Game v. ICC*, 829 F.2d 877, 881-82 (9th Cir. 1987). Moreover, we play no part in the parties' negotiations. Nor do we analyze, approve, set the terms of—or even require that parties submit to us—their trail use agreements. *National Wildlife*, 850 F.2d at 700; *Rail Abandonments–Use of Rights-of-Way As Trails*, 2 I.C.C.2d 591, 608 (1986). Rather, the terms of these agreements are a private contractual matter that is beyond the purview of our limited Trails Act authority. *Iowa Southern R. Co.–Exemption–Abandonment*, 5 I.C.C.2d 496, 503 (1989).

Furthermore, we are not authorized to regulate activities over the actual trail, and we have no involvement in the type, level, or condition of the trail that is used for a particular right-of-way. *See Central Kansas Railway, Limited Liability Company–Aband. Exemption–In Marion and McPherson Counties, KS*, STB Docket No. AB-406 (Sub-No. 6X) (STB served May 8, 2001); *Idaho Northern et al.–Abandoment & Discon. Exemption*, 3 S.T.B. 50 (1998). We have authority to revoke a trail condition only if it is shown that the statutory requirements (i.e., the rail banking, liability, and trail management obligations) are not being met. *Id.*; 49 CFR 1152.29(a)(3). The trail sponsors' position in this case is plainly inconsistent with our limited role and lack of discretion under the Trails Act.

In fact, the Trails Act does not speak to compensation, either by a railroad to an interim trail sponsor for reactivation of rail service, or by an interim trail sponsor to a railroad to use the property on an interim basis as a trail. Nor does the statute provide any mechanism for us to set compensation in either instance. Instead, it leaves compensation issues (like all other issues in Trails Act cases, except for the statutory requirements regarding rail banking and liability) to the voluntary agreement of the parties. Had Congress intended to require compensation or give us authority to set compensation in Trails Act matters, it presumably would have included appropriate statutory language in 16 U.S.C. 1247(d). *Cf.* 49 U.S.C. 10904, 10907 (providing for us to set compensation, if the parties cannot agree on terms, for the sale of a rail line under the financial assistance and feeder line development programs, respectively). The lack of such language in 16 U.S.C. 1247(d) indicates that Congress intended to leave compensation matters to the parties to trail use agreements. *See, e.g., Rail Abandonments–Supplemental Trails Act Procedures*, 4 I.C.C.2d 152, 156 (1987).

Thus, contrary to the trail sponsors' claims, it would be inappropriate for us to determine whether they might be entitled to any recompense in this situation, as we do not oversee, review, approve, or interpret the terms of the parties' trail use agreements. Such issues are for a court to address. But a satisfactory resolution of such compensation issues cannot be a precondition to restoration of rail service, as the statute gives the railroad the right to restore rail service at any time.

In sum, even if a trail sponsor "buys" a right-of-way under the Trails Act,[6] interim trail use is always subject to rail banking. Under the statute, the trail sponsor can acquire only the right to use the rail corridor on an interim basis for trail use, and trail use may continue only until the carrier (or another approved rail service provider) restores rail service on all or part of the line.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened.
2. The motions for leave to intervene are granted.
3. The RTC/SGRT motion to strike is denied.

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[6] Under the Trails Act, rail carriers can transfer lines to interim trail sponsors by means of donation, lease, sale or otherwise. 16 U.S.C. 1247(d).

4. The notice of interim trail use is vacated.
5. This decision is effective 30 days from the service date.

By the Board, Chairman Nober and Commissioner Morgan.