

SERVICE DATE – JULY 11, 2024

SURFACE TRANSPORTATION BOARD

DECISION AND CERTIFICATE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 1331

SNOHOMISH COUNTY—ADVERSE ABANDONMENT—
GNP RLY, INC., IN SNOHOMISH COUNTY, WASH.

Digest:¹ The Board is granting, subject to interim trail use/railbanking, environmental, and labor protective conditions, the application by Snohomish County for adverse abandonment of a rail line in that county.

Decided: July 10, 2024

On October 17, 2023, Snohomish County (the County) filed an application under 49 U.S.C. § 10903, requesting that the Board authorize the third-party (“adverse”) abandonment of an approximately 11.9-mile segment of a freight rail easement owned by GNP RLY, Inc. (GNP), and located between milepost 26.38 and milepost 38.25, in Snohomish County, Wash. (the Line or the Snohomish Segment of the Easement). GNP does not oppose the application. Notice of the application was served and published in the Federal Register on November 6, 2023 (88 Fed. Reg. 76,266). As discussed below, the Board will grant the County’s application.

BACKGROUND

According to the County, in a series of transactions recorded on December 21, 2009, under the Board’s line of precedent in Maine, Department of Transportation—Acquisition & Operation Exemption—Maine Central Railroad, 8 I.C.C.2d 835 (1991), BNSF Railway Company (BNSF) sold the physical assets of a rail line between milepost 23.8 in Woodinville, Wash., and milepost 38.25 in Snohomish, Wash., to the Port of Seattle (the Port); GNP acquired a permanent freight rail easement for the entirety of that rail line (the Easement); and GNP entered into an operations and maintenance agreement with the Port. (See Pet. 4 & nn.6-8; Appl. 4 nn.2-3); see also Port of Seattle—Acquis. Exemption—Certain Assets of BNSF Ry., FD 35128 (STB served Oct. 27, 2008). The County states that the Easement is subject to a covenant (Covenant), binding on all successors, requiring the holder of the Easement, upon cessation of rail service, either to seek voluntary abandonment authority and, upon request, to cooperate in railbanking the rail line pursuant to the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d), or to cooperate in an adverse abandonment proceeding and, upon request, railbanking of the rail line. (Pet. 4-5; Appl. 8.) In 2016, the County purchased the physical

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

assets of the Snohomish Segment from the Port. (Pet. 5-6; Appl. 4 n.2); see also Snohomish Cnty., Wash.—Pet. for Declaratory Ord., FD 35830 (STB served Mar. 5, 2015).²

History of the Easement from 2012 to 2023. In 2012, Eastside Community Rail, LLC (ECR), sought and received authority, via the Board’s expedited notice-of-exemption process, to acquire the Easement from GNP in a bankruptcy proceeding. See Eastside Cmty. Rail, LLC—Acquis. & Operation Exemption—GNP RLY, Inc., FD 35692, slip op. at 2 (STB served Nov. 23, 2012). In 2013, Ballard Terminal Railroad Co., L.L.C. (Ballard) sought and received authority, also via the Board’s notice-of-exemption process, to operate over the Easement pursuant to a lease with ECR. See Ballard Terminal R.R.—Lease Exemption—Line of Eastside Cmty. Rail, LLC, FD 35730, slip op. at 2 (STB served Apr. 18, 2013). In 2018, the County filed a petition to revoke the exemptions as void ab initio, claiming the notices contained materially false or misleading information, which the Board denied. See generally Eastside Cmty. Rail, LLC—Acquis. & Operation Exemption—GNP RLY, Inc., FD 35692 et al. (STB served Dec. 13, 2018). The Board’s decision was vacated by the U.S. Court of Appeals for the District of Columbia Circuit. See Snohomish Cnty. v. STB, 954 F.3d 290 (D.C. Cir. 2020). On remand, the Board found that ECR’s 2012 verified notice of exemption was materially misleading because it did not disclose prior transfers, or attempted transfers, of the Easement by a principal of both GNP and ECR (Douglas Engle), which were executed without seeking the required Board authority. Eastside Cmty. Rail, LLC—Acquis. & Operation Exemption—GNP RLY, Inc., FD 35692 et al., slip op. at 4-5 (STB served Dec. 20, 2020). As a result, the Board vacated both ECR’s and Ballard’s exemptions as void ab initio. Id. at 7.

Thereafter, because it appeared that ECR and Engle had not yet taken any actions to return the Easement to GNP, the Board specifically ordered ECR and Engle to do so within a time certain. Eastside Cmty. Rail, LLC—Acquis. & Operation Exemption—GNP RLY, Inc., FD 35692 et al., slip op. at 5 (STB served Sept. 29, 2021). In response to a petition seeking reconsideration of that decision, the Board noted that two quiet title actions were pending in Washington state courts, each involving one of the Easement segments, and ruled that it would not decide the petition³ until after the state court proceedings had been completed. 2022 Decision, FD 35692 et al., slip op. at 3-4.

In the next decision in these dockets, the Board indicated that the Washington state courts had ruled that neither ECR nor Engle has any legal interest in either the Woodinville Segment of the Easement or the Snohomish Segment of the Easement and denied ECR and Engle’s pending petition to reopen. Eastside Cmty. Rail, LLC—Acquis. & Operation Exemption—GNP RLY, Inc. (2023 Decision), FD 35692 et al., slip op. at 7 (STB served Apr. 24, 2023). In the same

² The City of Woodinville (Woodinville) purchased the physical assets of the segment of the rail line between milepost 23.8 and milepost 26.38 in Woodinville, Wash. (the Woodinville Segment). See City of Woodinville, Wash.—Pet. for Declaratory Ord., FD 35905 (STB served Oct. 7, 2015).

³ As the petition seeking reconsideration was filed more than 20 days after the order it challenged, the Board treated it as a petition to reopen. See Eastside Cmty. Rail, LLC—Acquis. & Operation Exemption—GNP RLY, Inc. (2022 Decision), FD 35692 et al., slip op. at 2 n.4 (STB served Mar. 8, 2022) (citing 49 C.F.R. §§ 1115.3(e), 1115.4).

decision, the Board removed from abeyance a notice of exemption in Docket No. AB 1316X, in which GNP sought authority to abandon the Woodinville Segment of the Easement, so that GNP and Woodinville could pursue interim trail use/railbanking. Id. at 8-9.⁴

The Application. In a filing on March 31, 2023, corrected on April 3, 2023, the County sought exemptions from certain statutory provisions and waivers of certain regulatory requirements in anticipation of its filing an adverse abandonment application for the Snohomish Segment of the Easement, so that segment could also be railbanked. (Pet. 12.) By decision served May 23, 2023, the Board partially granted the County's petition for exemptions and waivers. See Snohomish Cnty.—Adverse Aban.—GNP RLY, Inc., in Snohomish Cnty., Wash. (Exemptions & Waivers Decision), AB 1331 (STB served May 23, 2023).

According to the application, shortly after the County acquired the Line, ECR wrote the County Council to indicate that a major customer, Spectrum Glass, was leaving the Line and implied that obtaining substitute traffic would require rehabilitating the Line to Class 2 status. (Appl. 22.) According to the County, rail use on the Line ceased entirely in 2019 when a rail bridge was damaged in a traffic accident.⁵ (Id.) The County states that, although rail service on the Line subsequently resumed for a time, rail service ceased completely no later than August 1, 2020, when ECR, presumably acting through its lessee, Ballard, embargoed the Line because of track conditions. (Id. at 20 n.24, 22-23.) The County further states that, shortly thereafter, Ballard withdrew all its rail equipment. (Id. at 23.)

The County asserts that the Line is not viable. (Id. at 24.) To evaluate the Line's continued freight viability, the County retained R.L. Banks & Associates, Inc. (RLBA). (Id. at 24-25.) The County states that RLBA detected no shipper interest in using the Line, (id. at 25 & n.35; see also id., Attach. 8 at 5), and found the condition of the Line to be substandard, (Appl. 25 & n.36; see also id., Attach. 9 at 3). RLBA determined that the Line would require substantial rehabilitation to be returned to service and determined that a rehabilitated Line would not be financially viable, even under a scenario where traffic was restored to historically high volumes and the Line also earned revenues from car storage. (Appl. 25 & nn.37-38; see also id., Attach. 8 at 9-10.)

The County states that the Puget Sound Regional Council, which represented local jurisdictions, including the County, recommended including the Covenant in the deed from

⁴ Notice of the exemption authorizing the abandonment of the Woodinville Segment of the Easement was published in the Federal Register on April 28, 2023 (88 Fed. Reg. 26,375). By decision served May 26, 2023, the proceeding was reopened, a salvage-related condition was imposed, and a notice of interim trail use or abandonment was issued, which authorized Woodinville and GNP to negotiate for interim trail use/railbanking of the Woodinville Segment of the Easement. GNP RLY, Inc.—Aban. Exemption—in King Cnty., Wash., AB 1316X, slip op. at 1-2 (STB served May 26, 2023). On June 8, 2023, Woodinville and GNP jointly notified the Board that they reached an interim trail use/railbanking agreement covering the Woodinville Segment of the Easement.

⁵ Elsewhere in the application, the County states that the Line has not been used for rail purposes since at least March 15, 2020. (Appl. 20 & n.24.)

BNSF to the Port, which created the Easement, as part of a plan to preserve BNSF's Woodinville Subdivision, a 31-mile corridor which includes the Line, for future interim trail use through the Trails Act. (Id. at 29, 31.) The County notes that railbanking the Line is a key piece of a developing regional trail corridor and park, all consistent with possible future rail use, including transit use. (Id. at 29.)

The County states that, in the absence of rail service on the Line, the Snohomish County Superior Court determined that the Covenant was applicable, (id. at 23; see also id., Attach. 3, Ex. C), and notes that the Board mentioned the Covenant in authorizing GNP's abandonment of the Woodinville Segment of the Easement, (Appl. 23); see also 2023 Decision, FD 35692 et al., slip op. at 8. According to the County, GNP supports the County's application. (Appl. 2; see also id., Attach. 2.)

With its application, the County filed a request for issuance of a certificate of interim trail use or abandonment (CITU) pursuant to the Trails Act. (Appl., Attach. 11.) The County states that GNP consents to negotiate for interim trail use/railbanking of the Line with the County. (Appl. 3; see also id., Attach. 12.) According to the County, it has entered into a settlement agreement with GNP, which provides for the Line to be transferred to the County for interim trail use/railbanking, contingent upon the Board's issuance of a CITU in this proceeding. (Appl. 3; see also id., Attach. 3, Ex. B.)

In the Exemptions & Waivers Decision, the Board directed the County to address in its application why the Line is eligible for interim trail use/railbanking under the Trails Act in this adverse abandonment proceeding. Exemptions & Waivers Decision, AB 1331, slip op. at 8. In response, the County argues in its application that, because GNP has agreed to negotiate with the County for interim trail use/railbanking of the Line, this case is similar to other adverse abandonment cases where the Board issued CITUs, citing various Board precedent. (Appl. 13.)

In addition, the County argues that authorizing the abandonment of the Line would not isolate the adjoining Woodinville Segment of the Easement from the interstate rail network, for similar reasons to those the Board cited in the 2023 Decision in finding that authorizing the abandonment of the Woodinville Segment of the Easement would not isolate an adjoining railbanked line south of that segment. (See Appl. 6-7 (citing 2023 Decision, FD 35692 et al., slip op. at 8).) The County asserts that the proposed railbanking of the Line would simply add to an existing trail on the Woodinville Segment, that the County and GNP entered into a settlement agreement that commits them to joint efforts to railbank the Line, and that the Covenant requires GNP to cooperate in railbanking the Line. (See Appl. 7-8.)

On December 1, 2023, Woodinville, which owns the adjoining and recently railbanked Woodinville Segment, filed a letter in support of the County's application. The County filed a comment on December 18, 2023, noting the Woodinville letter of support, and requesting the Board issue a decision by February 4, 2024.

On June 1, 2024, the County filed a letter stating, among other things, that an adjoining landowner has removed trees from the rail corridor without authorization, threatening the physical integrity of the corridor. (County Letter 2-3, June 1, 2024.) The County therefore

reiterates its request that the Board grant the adverse abandonment and issue the CITU. (Id. at 3.)

DISCUSSION AND CONCLUSIONS

As explained below, the Board finds that granting adverse abandonment here, subject to certain conditions, is consistent with § 10903. Accordingly, the Board will grant the County's unopposed application for adverse abandonment.

PC&N Analysis. Under 49 U.S.C. § 10903(d), the standard that applies to any application for authority to abandon a line of railroad is whether the present or future public convenience and necessity (PC&N) require or permit the proposed abandonment.⁶ As part of the standard, the Board must also consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development. 49 U.S.C. § 10903(d). In applying this standard in a third-party, or adverse, abandonment context, the Board considers the “competing benefits and burdens” of abandonment on “all interested parties.” Yakima Interurban Lines Assoc.—Adverse Aban.—in Yakima Cnty., Wash., AB 600, slip op. at 4 (STB served Nov. 19, 2004). The Board has denied adverse abandonments explaining, for example, that the Board “typically preserves and promotes continued rail service where a carrier has expressed a desire to continue operations and has taken reasonable steps to acquire traffic.” Hartwell First United Methodist Church—Adverse Aban. & Discontinuance—Great Walton R.R. in Hart Cnty., Ga., AB 1242, slip op. at 3 (STB served Jan. 31, 2018); see also N.Y. Cross Harbor R.R. v. STB, 374 F.3d 1177, 1187 (D.C. Cir. 2004)). On the other hand, the Board has granted requests for adverse abandonment in situations such as where the carrier “do[es] not oppose the requested abandonment” and where “there are no remaining shippers who desire service.” Minn. Com. Ry.—Adverse Discontinuance—in Ramsey Cnty., Minn., AB 882 et al., slip op. at 4 (STB served July 16, 2008); see also City of Chi., Ill.—Adverse Aban.—Chi. Terminal R.R. in Chi., Ill., AB 1036, slip op. at 4 (STB served June 16, 2010).

Here, the carrier (GNP) supports the County's application for adverse abandonment, (see Appl. 2; see also id., Attach. 2), and has entered into a settlement agreement with the County to work jointly toward railbanking the Line, (see Appl. 3; see also id., Attach. 3, Ex. B). In addition, the County states that rail service ceased no later than August 1, 2020, when the Line was embargoed. (See Appl. 22-23.) And, according to the report from RLBA, the Line is non-viable and no potential shipper has expressed interest in using the Line. (See id. at 25 & nn.37-38; see also id., Attach. 8 at 5, 9-10.) For the foregoing reasons, the record demonstrates that there is no present or future need for common carrier rail service on the Line, and that the present and future PC&N support the requested adverse abandonment.

Environmental and Historic Review. The Board is also required to consider the environmental impacts of the proposed abandonment to meet its obligations under the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370m-11. The County submitted a combined

⁶ As discussed below, the environmental impacts of the proposed abandonment must also be considered, and, pursuant to 49 U.S.C. § 10903(b)(2), the interests of affected rail employees must be adequately protected.

environmental and historic report with its application and notified the appropriate federal, state, and local agencies of the opportunity to submit information concerning the environmental impacts of the proposed abandonment. See 49 C.F.R. § 1105.11. The Board's Office of Environmental Analysis (OEA) examined the environmental and historic report, verified its data, and analyzed the probable environmental effects of the proposed action. OEA issued for public review and comment a Draft Environmental Assessment (EA) on December 1, 2023.

In the Draft EA, OEA recommended that four conditions be placed on any decision granting abandonment authority. First, OEA recommended a condition that, in the event any unanticipated archaeological sites, human remains, funerary items, or associated artifacts are discovered during abandonment-related salvage activities, the County shall immediately cease all work and notify OEA, interested federally recognized tribes, and the Washington Department of Archeology & Historic Preservation (SHPO) pursuant to 36 C.F.R. § 800.13(b), and OEA will then consult with the SHPO, interested federally recognized tribes, the County, and other consulting parties, if any, to determine whether appropriate mitigation measures are necessary. Second, OEA recommended a condition requiring the County to consult with the Washington State Department of Transportation (WSDOT), Multimodal Planning Division, regarding WSDOT's requirements regarding any abandonment-related activities that would impact State Route 522. Third, pursuant to the Coastal Zone Management Act (CZMA), 16 U.S.C. §§ 1451-1467, OEA recommended a condition requiring the County to consult with the Washington Coastal Zone Management Program and obtain state coastal management consistency certification, if necessary, and prohibiting the County from consummating abandonment or initiating salvage activities until it reports the results of those consultations in writing to OEA and the Board has removed the condition. Finally, OEA recommended a condition requiring GNP to cooperate as necessary to facilitate the successful and timely completion of the above conditions.

OEA issued a Final EA on January 19, 2024, indicating that one comment was received from the County.⁷ OEA continues to recommend that the four conditions previously set forth in the Draft EA be imposed.

The Board adopts the analysis and recommendations in the Final EA. Based on OEA's recommendations, the Board concludes that the proposed adverse abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

Labor Protection. In approving this application, the Board must ensure that the interests of affected railroad employees will be adequately protected. 49 U.S.C. § 10903(b)(2). The Board has found that the conditions imposed in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho,

⁷ The County commented that the Draft EA referred to an incorrect deadline for filing a CITU request. In the Final EA, OEA modified the Draft EA to include the correct deadline for filing a CITU request, which is 45 days from the filing date of the application. (Final EA 2 (citing 49 C.F.R. § 1152.26(a)).)

360 I.C.C. 91 (1979), satisfy the statutory requirements and will impose those employee protective conditions here.⁸

Interim Trail Use. The County submitted a request for the issuance of a CITU for the Line and included GNP's reply agreeing to negotiate for interim trail use/railbanking with the County.

The Board's role under the Trails Act is limited and largely ministerial. Citizens Against Rails-to-Trails v. STB, 267 F.3d 1144, 1151-52 (D.C. Cir. 2001); Goos v. ICC, 911 F.2d 1283, 1295 (8th Cir. 1990). Here, the County has satisfied the requirements for interim trail use/railbanking by providing a statement of willingness to assume financial responsibility for the Line and acknowledging that the use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service. Moreover, GNP has stated that it agrees to interim trail use negotiations. Because the County's request complies with the requirements of 49 C.F.R. § 1152.29 and GNP is willing to negotiate for interim trail use/railbanking, the Board finds that interim trail use/railbanking is appropriate in this adverse abandonment proceeding, and a CITU will be issued. See, e.g., Stewartstown R.R.—Adverse Aban.—in York Cnty., Pa., AB 1071, slip op. at 18 (STB served Nov. 16, 2012), vacated, (STB served Nov. 14, 2013); Chelsea Prop. Owners—Aban.—Portion of the Consol. Rail Corp.'s W. 30th St. Secondary Track in N.Y.C., N.Y., AB 167 (Sub-No. 1094A) et al., slip op. at 8 (STB served June 13, 2005). The parties may negotiate an interim trail use agreement for the Line during the one-year period prescribed below. If an interim trail use agreement is reached, the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(c)(2), (h). If no agreement is reached within one year, the Line may be fully abandoned, subject to the other conditions described below. 49 C.F.R. § 1152.29(c). Use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service.

Finally, the Board finds that authorizing the abandonment of the Line will not result in the Woodinville Segment of the Easement being isolated from the interstate rail network. Here, the adjoining Woodinville Segment of the Easement is already railbanked, meaning the County and GNP's plan to railbank the Line would add to an existing trail. See 2023 Decision, FD 35692 et al., slip op. at 8. In addition, the Board is satisfied that the Covenant and the settlement agreement between the County and GNP to jointly pursue interim trail/use railbanking

⁸ In the Exemptions & Waivers Decision, the Board denied the County's request for waiver of the requirement to include text related to the mandatory imposition of labor protective conditions in the notices the County was required to serve pursuant to 49 C.F.R. §§ 1152.21 and 1152.22(i), finding that the agency's policy of not imposing labor protective conditions in entire-system abandonment did not apply because the Line did not constitute GNP's entire system. See Exemptions & Waivers Decision, AB 1331, slip op. at 5. The County argues again in the application that this proceeding involves the abandonment of GNP's entire remaining system, but states that it will not oppose the imposition of the Oregon Short Line Railroad conditions here because it does not perceive them to impose any burden, as there are no rail employees. (Appl. 14-15.)

of the Line sufficiently constrain GNP's ability to terminate Trails Act negotiations and consummate the abandonment of the Line. See id.

It is ordered:

1. The County's adverse abandonment application is granted, subject to the employee protective conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979), and subject to the following conditions:⁹

(a) In the event any unanticipated archaeological sites, human remains, funerary items, or associated artifacts are discovered during abandonment-related salvage activities, the County shall immediately cease all work and notify OEA, interested federally recognized tribes, and the SHPO pursuant to 36 C.F.R. § 800.13(b), and OEA will then consult with the SHPO, interested federally recognized tribes, the County, and other consulting parties, if any, to determine whether appropriate mitigation measures are necessary.

(b) The County shall consult with the WSDOT regarding WSDOT's requirements regarding any abandonment-related activities that would impact State Route 522.

(c) Pursuant to the CZMA and the Board's environmental regulations at 49 C.F.R. § 1105.9, the County shall consult with the Washington Coastal Zone Management Program and obtain state coastal management consistency certification, if necessary. The County may not file its consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties) until it reports the results of those consultations in writing to OEA and the Board has removed the condition.

(d) GNP shall cooperate as necessary to facilitate the successful and timely completion of the above conditions.

2. The County's request for a CITU, under 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29, for the Line is granted, which will permit the parties to negotiate for interim trail use/railbanking of the Line, for a period of one year from the service date of this decision and certificate, until July 11, 2025.

3. If an interim trail use/railbanking agreement is reached, it must require the trail sponsor to assume, for the term of the agreement, full responsibility for: (i) managing the right-of-way; (ii) any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability); and (iii) the payment of any and all taxes that may be levied or assessed against the right-of-way.

⁹ If an interim trail use agreement under 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29 were to be reached for the Line (or a portion thereof), compliance with these conditions would not be required with respect to any portion of the Line covered by the interim trail use agreement for the duration of the agreement.

4. Interim trail use/railbanking is subject to possible future reconstruction and reactivation of the right-of-way for rail service and to the trail sponsor's continuing to meet its responsibilities for the right-of-way described in ordering paragraph 3 above.

5. If an interim trail use/railbanking agreement is reached (and thus, interim trail use/railbanking is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. See 49 C.F.R. § 1152.29(c)(2), (h).

6. If interim trail use/railbanking is implemented, and subsequently the trail sponsor intends to terminate trail use on all or any portion of the right-of-way covered by the interim trail use/railbanking agreement, it must send the Board a copy of this decision and certificate and request that it be vacated on a specified date.

7. If an agreement for interim trail use/railbanking is reached by July 11, 2025, interim trail/railbanking use may be implemented. If no agreement is reached by that time, the abandonment authority granted in this decision and certificate shall be fully effective, provided the conditions imposed above are met. See 49 C.F.R. § 1152.29(c)(1).

8. This decision and certificate is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Primus, and Schultz. Board Member Fuchs concurred with a separate expression.

BOARD MEMBER FUCHS, concurring:

In City of South Bend v. STB, 566 F.3d 1166 (D.C. Cir. 2009), then-Judge Kavanaugh, joined by then-Chief Judge Sentelle, observed that the agency “has exercised adverse abandonment authority since 1981” but that “[i]t appears...the statute as amended by the ICC Termination Act of 1995¹ may allow only a railroad that owns the tracks—not a third party—to seek abandonment of a rail line.” Id. at 1171-72 (Kavanaugh, J., concurring). Last month, in a different proceeding, a commenter argued that ICCTA precludes adverse abandonments.² In this proceeding, however, the Board's authority to grant adverse abandonments has not been challenged or briefed, and the rail carrier supports the application. While I am open to reconsidering whether the Board has adverse abandonment authority, I decline to do so in this docket and instead vote consistent with agency precedent.

However, examining the precedent, I note the potential for erroneous or excessive use of adverse abandonment authority. The agency has been overturned for granting an adverse abandonment without properly considering carrier and shipper interests and the current and potential rail service on a line. See N.Y. Cross Harbor R.R. v. STB, 374 F.3d 1177 (D.C. Cir.

¹ ICCTA.

² See Pacific Legal Foundation Comments 3-7, June 17, 2024, Great Redwood Trail Agency—Adverse Aban.—Mendocino Ry. in Mendocino Cnty., Cal., AB 1305 (Sub-No. 1).

2004). In Cross Harbor, the Court noted that the Board neglected to mention its “statutory duty to preserve and promote continued rail service”³ and that the agency failed to address precedent denying adverse abandonment where there was the potential for continued or future rail service on the line (among other reasons). Id. at 1182-87 (citing, *inter alia*, Salt Lake City Corp.—Adverse Aban.—in Salt Lake City, Utah, AB 33 (Sub-No. 183) (STB served Mar. 8, 2002); Chelsea Prop. Owners—Aban.—Portion of the Consol. Rail Corp.’s W. 30th St. Secondary Track in New York, N.Y., 8 I.C.C.2d 773 (1992), *aff’d sub nom.* Consol. Rail Corp. v. ICC, 29 F.3d 706 (D.C. Cir. 1994); Wisconsin Dept. of Transp.—Aban. Exemption, FD 31303 (ICC served Dec. 5, 1988) (discussing national interests in “development and continuation of a sound rail transportation system” and citing section 10101a(4) of Rail Transportation Policy (RTP))). In contrast with the more aggressive use of the authority in Cross Harbor, the Board and its predecessor—in the years before and immediately following ICCTA—had, in effect, affirmed the importance of protecting both current⁴ and future⁵ rail service. In this vein, following Cross Harbor, the agency was upheld in denying an adverse application where there was “potential for renewed service” dependent on multiple contingencies. South Bend, 566 F.3d at 1170-71. If the Board has adverse abandonment authority, it must not ignore the RTP and its broader statutory duties facilitating rail service and interstate commerce.

The statutory arguments and use concerns noted above suggest that the Board should comprehensively examine its approach to adverse abandonments. The agency should start by reevaluating the textual changes made by ICCTA and deciding whether they preclude adverse abandonments. In addition to the statutory arguments raised in a different docket, I see many possible tensions, such as whether adverse abandonment authority (1) compromises other statutory requirements (e.g., Offer of Financial Assistance provisions, information and disclosure requirements, and the National Environmental Policy Act and related environmental laws);⁶

³ W. Stock Show Ass’n—Aban. Exemption—in Denver, Colo., 1 S.T.B. 113 (1996).

⁴ In 2002, the Board stated: “Neither the Board, nor the [ICC] before it, has *ever* granted an adverse abandonment when the carrier was operating over the line.” Salt Lake City Corp., AB 33 (Sub-No. 183), slip op. at 7 (emphasis added) (denying adverse abandonment application where the carrier was operating over the line, among other reasons).

⁵ “Generally, the [ICC] denies an adverse abandonment application if there is *potential for future* operation on the [subject] line and the carrier has taken *reasonable steps to attract traffic*.” Consol. Rail Corp., 29 F.3d at 711 (emphasis added) (citation omitted).

⁶ See Snohomish Cnty.—Adverse Aban.—GNP RLY, Inc., in Snohomish Cnty., Wash., AB 1331 (STB served May 23, 2023) (waiving certain requirements in adverse abandonment proceeding); Final Environmental Assessment, Mar. 7, 2018, Alloy Property Co., LLC—Adverse Aban.—Chicago Terminal R.R. in Chicago, Ill., AB 1258, slip op. at 1 (stating that adverse abandonments present “unique” issues because the applicant must rely on the railroad “to document historic sites and structures on the line,” and the relationship between the applicant and railroad may “affect[] the success of documenting the potentially historic resources on the rail line”).

(2) implies that a carrier must do more than the common carrier obligation requires;⁷ and (3) undermines ICCTA’s expansive preemption provision.⁸ The Board should resolve any such tensions and clearly articulate its basis and reasoning. If the Board concludes it has adverse abandonment authority, it should also evaluate any disparate treatment of reliance interests across licensing proceedings⁹ and any inconsistency in its application of the public convenience and necessity standard, particularly where it may not appropriately value interests in continued or future rail service. If the Board finds no adverse abandonment authority, it should consider the extent to which other mechanisms—for example, reconsideration authority, enforcement actions, or contracts between parties—could address some of the problems currently presented in adverse abandonment cases.¹⁰ The Board should conduct these analyses, as applicable, in an appropriate docket and—to the maximum extent practicable—seek broader public comment.

⁷ Compare, e.g., Chelsea Prop. Owners, 8 I.C.C.2d at 778 (explaining the requirement that carriers take “reasonable steps to attract traffic” to defeat an adverse abandonment application), with 49 U.S.C. § 11101(a) (common carrier requirement for carriers to provide “transportation or service on reasonable request”).

⁸ “It is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations.” BNSF Ry. Co. v. California Dep’t of Tax & Fee Admin., 904 F.3d 755, 760 (9th Cir. 2018) (emphasis omitted) (quoting City of Auburn v. United States, 154 F.3d 1025, 1030 (9th Cir. 1998)).

⁹ Compare Ind. Hi-Rail Corp.—Lease & Operation Exemption—Norfolk & W. Ry. Co. Line between Rochester & Argos, Ind. and—Exemption from 49 U.S.C. 10761, 10762, & 11144, FD 32162, slip op. at 5 (STB served Jan. 30, 1998), with Paulsboro Refining Co., LLC—Adverse Aban.—in Gloucester Cnty., N.J., AB 1095 (Sub-No. 1) (STB served Dec. 2, 2014) (later vacated following settlement).

¹⁰ The Board might also address any implications for adverse discontinuance proceedings, particularly trackage rights cases.