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June 24, 2003

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The Honorable Vernon Williams
Surface Transportation Board
1925 K Street NW
Suite 715
Washington, DC 20423-001

208176

Re: 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 Terrel, Lee And Dougherty Counties, GA
Petition To Vacate A Notice Of Interim Trail Use Or Abandonment
Pursuant To 49 C.F.R. 1152.29(c)(3)

Dear Secretary Williams:

Attached for filing please find the original and ten (10) copies of the Reply
To Joint Petition For Partial Reconsideration and/or Clarification in the above-
referenced proceeding.

Please time and date stamp the extra copy of the Reply and return it with
our messenger.

If you have any questions, please call me.

Sincerely,

Karl Morell

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

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 TERREL, LEE AND DOUGHERTY COUNTIES, GA

REPLY TO JOINT PETITION FOR PARTIAL RECONSIDERATION
AND/OR CLARIFICATION



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RAILROAD, INC.

Dated: June 24, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD



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 TERREL, LEE AND DOUGHERTY COUNTIES, GA

REPLY TO JOINT PETITION FOR PARTIAL RECONSIDERATION
AND/OR CLARIFICATION

Georgia Southwestern Railroad, Inc. ("GSR"), the successor in interest to the Georgia Great Southern Division, South Carolina Central Railroad, Co., Inc., hereby responds to the Joint Petition of Rails-to-Trails Conservancy and South Georgia Rails to Trails for Partial Reconsideration and/or Clarification of Order Served May 16, 2003 (the "Petition").

Pursuant 49 CFR 1115.3, a petition for reconsideration must state in detail the respects in which the proceeding involves material error, new evidence, or changed circumstances. Rails-to-Trails Conservancy and South Georgia Rails to Trails ("Petitioners") have failed to allege, much less demonstrate, material error or changed circumstances and they proffer no new evidence. Consequently, the Petition, to the extent it seeks reconsideration, should be denied. *See SSW Ry. Co. – Aban. – In Smith and Cherokee Counties, TX*, 9 I.C.C.2d 429 (1992).

Petitioners alternatively seek clarification of the following sentence set forth at page 7 of the May 16th decision in this proceeding:

“Under the statute, the trails 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.”

GSWR opposes the clarification sought by Petitioners essentially on two grounds: First, the requested clarification is unnecessary because the Surface Transportation Board (“Board”) and its predecessor, the Interstate Commerce Commission (“Commission”), have already addressed and clearly identified the interests that may be transferred and those that must be retained in a transaction conducted under section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d) (“Trails Act”). Petitioners do not seek clarity, but a fundamental change in nearly two decades of Commission and Board rulings. Second, contrary to Petitioners’ suggestion, GSWR did not transfer all of its right, title and ownership interest in the rail line to Rails-to-Trails Conservancy (“RTC”). Therefore, Petitioners are seeking an abstract advisory opinion from the Board that bears no relation to the facts of this proceeding.

Petitioners correctly point out that the Commission stated that the Trails Act “does not prohibit alienation of rights-of-way that are proposed for interim trail use.” *Rail Abandonments – Use of Rights-of-Way as Trails*, 2 I.C.C.2d 591, 599 (1986) (“*Rail Abandonments*”). In so doing, however, the Commission expressly noted the temporal limitations of any such alienation under the Trails Act. To ensure that trail use would be limited in duration and terminate upon any future restoration of rail service, the Commission required all transfer agreements, whether they involved the sale, donation or lease of the corridor, to disclose that the corridor remains subject to the Commission’s – now Board’s – jurisdiction for future restoration of rail service. In so doing, the Commission specifically warned trail developers, particularly developers who

wished to purchase the railroad's interest in the right-of-way, not to utilize the Trails Act if they did not want to risk losing the corridor to restored rail service.¹ *Id.*

In *Rail Abandonment – Trails Act – Policy Statement*, 5 I.C.C.2d 370, 375 n. 6 (1989) (“*Policy Statement*”), the Commission reiterated the temporal nature of any sale of rail property under the Trails Act:

“[B]ecause of the rail banking condition in the statute, we retain jurisdiction over the property and any disposal of the property is subject to the possibility that rail service may be resumed on the corridor.”

Subsequently, in *N&W – Aban. St. Marys & Minister in Auglaize County, OH*, 9 I.C.C.2d 1015 (1993), the Commission explained in detail the nature of the interests that may be transferred under the Trails Act and those that must be retained by the abandoning railroad. The Commission noted that interim trail use may be established by “donation, transfer, lease, [or] sale” of the right-of-way. *Id.* at 1017 n. 4, citing 16 U.S.C. 1247(d). Regardless of the nature of the transfer – sale or lease of the corridor – the trail sponsor can receive no more of an interest in the corridor than the “interim” ownership or use of the corridor because of the statutory

¹ Whenever the corridor is rail banked under the Trails Act, the trail developer risks the loss of its investment in the right-of-way if rail service is reactivated. As the Commission explained in *Rail Abandonments*:

“[r]ights-of-way developed as trails under section 1247(d) technically do not lose their status as lines of a railroad subject to Commission jurisdiction, because by law they are rail banked and are not treated as abandoned property for purposes of any law. If a railroad intends to permit interim trail use, it will not ‘abandon’ the line, and the property will remain under the Commission’s jurisdiction so that the Commission can, if requested, exercise its regulatory authority to reauthorize rail operation in the future.” *Id.*

“requirement that the corridor remain available for the resumption of rail service.” *Id.* citing *Iowa Power – Const. Exempt. – Council Bluffs, IA*, 8 I.C.C.2d 858, 865-866 (1993).

In addressing the interests that the abandoning railroad must retain in any transaction under the Trails Act, the Commission explained:

“By consenting to the issuance of a CITU/NITU, a carrier agrees to forgo consummating the authorized or exempted abandonment. As a consequence, its common carrier obligation does not terminate. Instead, the abandoning carrier retains a residual common carrier obligation and transfers the right-of-way to the trail user, subject to the stipulation that the rail corridor remain available for the reinstitution of rail service. A carrier’s decision to agree to a CITU/NITU is totally voluntary and, as far as the Commission is concerned, may be withdrawn at any time the abandoning carrier wishes to reinstitute rail operations over the right-of-way.”

Id. at 1018. The Commission elaborated on the abandoning railroad’s retained rights:

“The right to reinstitute rail service is a common carrier interest that did not exist prior to the Trails Act. Notwithstanding any understanding or agreement between the abandoning carrier and the trail user, this right does not transfer to the trail user without our explicit approval. This is because the right embraces the unextinguished, residual common carrier obligation, and only we may authorize its transfer or exempt it from regulation.”

Id. at 1018-1019 (footnotes omitted and emphasis added).

Most recently, in the May 16th decision, the Board again summarized the temporal nature of the interests that may be transferred under the Trails Act:

“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.

* * * * *

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.”

May 16th decision, slip op. at 4 and 7.

From *Rail Abandonments* to the May 16th decision, the Commission and now the Board have clearly, consistently and correctly interpreted the Trails Act as not permitting a railroad to transfer all of its interests in a rail line to the trail sponsor in any transaction conducted under the Trails Act. These findings are legally sound and fully consistent with the express terms of the Trails Act and the underlying legislative intent. The Trails Act expressly limits the trail sponsor’s interests or property rights in the corridor to an “interim use” of the corridor for recreational purposes provided that “such interim use is subject to restoration or reconstruction for railroad purposes.” 16 U.S.C. 1247(d). The legislative history also clearly demonstrates that Congress intended “to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors and to encourage energy efficient transportation use.” H.R. Rep. No. 98-28, p. 8 (1983); S. Rep. No. 98-1, p. 9 (1983).

Petitioners offer no legal or factual support for the interpretation they seek other than the preposterous assertion that the vast majority of parties entering into agreements under the Trails Act were under the misimpression that the railroad was alienating all of its interests in the corridor.² Petitioners also fail to explain how an abandoning railroad could seek, or the Board

² Petitioners’ reference to Federal income tax credits is a matter between the railroad and the Internal Revenue Service and should not be of any concern to the Board. It is interesting to note, however, the disingenuousness of Petitioners’ position in this regard. Petitioners seek to be compensated for the reactivation of rail service in this proceeding not because they paid for the corridor or have a significant investment in a trail, but on the assertion that GSWR’s predecessor

could order, the restoration of rail service on a corridor where all of the railroad's former property interests had been transferred to the trail sponsor. Under Petitioners' interpretation of the Trails Act, the railroad, without any retained interests, would be left with whatever eminent domain rights it may have under state law, and the Board, without condemnation power, would be powerless to act.

Petitioners' true motives are exposed in their assertion that, if the Trails Act actually permits the reactivation of rail service, as the Board stated in the May 16th decision, "[s]uch a construction would jeopardize the continued utility of [the Trails Act] as a means to preserve corridors for future rail reactivation." Joint Petition at 3. Petitioners apparently are of the view that the Trails Act goal of preserving rail corridors can best be achieved if rail service is not reactivated on the rail-banked corridors. In a perverse sense, Petitioners are, of course, correct in that the fewer corridors that are reactivated the more will remain banked as trails. GSWR, however, does not believe Congress intended such a result.

sought tax credits for donating the line to RTC. Undaunted by any sense of shame, Petitioners ask not that any credits be returned to the Federal government but forwarded to them.

Petitioners' contention that a railroad must alienate all of its interests in a rail corridor in order to protect itself from liability for taxes, torts and management is utterly nonpersuasive. As Petitioners well know, the Trails Act expressly requires the trail sponsor to assume the financial responsibility for all such matters. *See Railroad Abandonments* at 598.

Petitioners' assertion that full alienation of a railroad's property rights in a rail-banked corridor is essential for Federal funding of the Trails Act program is misleading at best. In the early 1990's, the rail banking program was the third largest use of Transportation Enhancement Activities ("TEA") funds under the Surface Transportation Program. As of June 1995, over \$200 million from the Highway Trust Fund had been obligated for 545 rails-to-trails projects under the TEA program. It has been estimated that by 2003, when TEA-21 expires about \$750 million in state and federal funds will have gone to the rails-to-trails program. These funds were obligated not for the purpose of converting rail lines to trails, but for the preservation of the corridors for future reactivation of rail service. If anything, the interpretation Petitioners seek here would likely jeopardize any continued funding of this program.

Petitioners' ostensible premise in seeking the clarification is that GSWR conveyed or purported to convey all of its interest in the line at issue ("Line") to RTC. As explained in GSWR's Petition to Vacate, the Line was rail banked pursuant to the execution of Deeds between GSWR and RTC.³ Petitioners claim that pursuant to those Deeds "GSWR has transferred all its right, title, and ownership interest in the line to RTC." Joint Petition at 3-4. GSWR, however, did not, and could not lawfully, convey all of its rights and interests in the Line to RTC. Petitioners conveniently ignore the portions of the Deeds that deal with the requirements of the Trails Act and the Board's Trail Use conditions. The Deeds expressly state that the Line was "subject to publication of a [NITU]" and that RTC had requested the use of the Line "for Interim Trail Usage, under the National Trails Systems Act" and that GSWR "has agreed to a conveyance for such purposes". The Deeds, a copy of which is attached to the Petition to Vacate as Exhibit No. 5, go on to provide that:

"This Deed is made pursuant to Section 8(d) of the National Trails Systems Act, 16 U.S.C. section 1247(d), and subject to the Trail Use Conditions imposed by the U.S. Surface Transportation Board in STB Docket No. AB-389 (Sub-No. 1X). *** It is agreed and understood that any conservation/recreation use by Grantee shall not impair any future restoration of rail service pursuant to the National Trails System Act."

Since the Deed expressly states that the conveyance was made pursuant to the Trails Act, GSWR could not have conveyed to RTC any rights greater than those authorizing interim recreational

³ The only other written agreement between GSWR and RTC was a Bargain Sale Option Agreement dated March 14, 1997, which simply gave RTC the option to acquire the Line. That Agreement, a copy of which is attached as Exhibit C to the Reply of South Georgia Rails to Trails, Inc., provides in pertinent part: "This Agreement and any subsequent conveyance or agreement shall be interpreted to conform to Section 8(d) of the [Trails Act]...."

use of the line.⁴ Consequently, RTC received nothing more than interim use of the Line which, pursuant to the mandate of the Trails Act, terminates upon the restoration of rail service.

Moreover, GSWR did not transfer its right to terminate interim trail use and reinstitute rail service on the Line to RTC or any other entity. As was noted in *N&W*, only the Board could have authorized the transfer of GSWR's residual common carrier rights and obligations. See also, STB Docket No. 34063, *Dallas Area Rapid Transit – Acquisition Exemption – Lines of Union Pacific Railroad Company* (not printed), served July 20, 2001 (the transfer of the right to restart freight service on a rail-banked line requires Board approval). As the Board is undoubtedly aware, no such approval was ever sought by RTC or granted by the Board.⁵

Finally, Petitioners contend that, if RTC's interest in the Line is voided as a result of the Board's May 16th decision, the Board's order would constitute a taking without due process of law. RTC knowingly took possession of the Line pursuant to a NITU duly issued by the Board and Deeds that expressly state the corridor was conveyed pursuant to the Trails Act for "Interim

⁴ If GSWR had transferred the Line to RTC pursuant to a standard quit claim deed that did not contain the operable Trails Act clauses, the transfer would have been void or voidable by the Board because of its failure to comply with the Trail Use Condition contained in the Board's decision. See e.g., STB Docket No. AB-406 (Sub-No. 6X), *Central Kansas Railway, Limited Liability Company – Abandonment Exemption – In Marion and McPherson Counties, KS* (not printed), served May 8, 2001.

⁵ To the extent that Petitioners are seeking an abstract ruling that an abandoning railroad may, under the Trails Act, alienate all of its interests in the line, the requested ruling has the potential of eviscerating the fundamental objective of the Trails Act – the preservation of rail corridors for future reactivation of rail service – and of rendering the Trails Act a nullity. GSWR fully agrees that an abandoning railroad could rail bank a line with an entity, such as RTC, and transfer its retained rights to reactivate rail service to another entity with express Board approval. GSWR questions, however, whether it would be sound public policy for the Board to authorize the transfer of both sets of rights – the right to interim trail use and the right to terminate interim trail use – to the same entity. With the possible exception of certain governmental entities, an entity whose mission is to establish trails would have little incentive to reactivate rail service.

Trail Usage.”⁶ Consequently, RTC’s interests in the Line were limited by the Trails Act, the NITU and the Deeds in two major respects: usage and duration. First, RTC could not dispose of the corridor without Board approval or in any manner inconsistent with future restoration of rail service. Nor could RTC make any improvements on the corridor that jeopardized the restoration of rail service. See Docket No. AB-406 (Sub-No. 6X), *Central Kansas Railway Limited Liability Co. – Abandonment Exemption – In Marion and McPherson Counties, KS* (not printed), served December 8, 1999, slip op. at 6 (“Indeed, our chief concern, once a trail condition has been imposed, is whether the statutory rail banking condition has been compromised, precluding a railroad’s ability to reassert control over the right-of-way at some future time to revive rail service.”); and Docket No. AB-433 (Sub-No. 2X), *Idaho N. & Pac. R.R. – Abandonment & Discontinuance Exemption – In Washington and Adams Counties, ID* (not printed), served April 1, 1998. Second, RTC’s use of the corridor was “interim” and lasted only until GSWR sought to restore rail service on the corridor. The termination of RTC’s “interim use” rights of the Line upon the vacating of the NITU is not a compensatory event. RTC has fully received the benefit of its bargain: the interim use of the Line for recreational purposes.⁷

⁶ The NITU issued in this proceeding specifically states that “[i]nterim trail use/rail banking is subject to the future restoration of rail service....” The Trails Act similarly states that a trail sponsor may purchase only the interim use of the line and that such interim use must be subject to reactivation of rail service. The Deeds provide that the corridor is being conveyed solely for “Interim Trail Usage, under the [Trails Act].”

⁷ A conveyance by quit claim deed of a rail corridor to a trail sponsor under the Trails Act is analogous to many of the land grants the railroads received from the Federal government in the 19th Century. Those grants were neither easements nor fee simple absolute transfers, but limited fee. The railroad possessed a property right in the right-of-way equivalent to a fee interest as long as the right-of-way was used for railroad purposes. Upon cessation of rail service, the right-of-way reverted and the railroad’s property interests expired. See *e.g.*, *Rio Grande Ry. V. Stringham*, 239 U.S. 44 (1915). Under the Trails Act, a trail sponsor that acquires a right-of-way

In any event, the Board is not the proper forum to adjudicate “takings” claims. *Policy Statement* at 374. If RTC has the temerity, it should pursue its “takings” claim where it rightfully belongs, at the United States Court of Federal Claims.

It is painfully obvious that Petitioners will go to any lengths to thwart GSWR’s attempt to reactivate the Line unless their ransom demands are met.⁸ Confronted with the Board’s ruling in the May 16th decision that the Trails Act does not provide for any compensation to the trail sponsor upon reactivation and recognizing that the Deeds give Petitioners no contractual rights to seek compensation from GSWR, Petitioners come before the Board with a new theory intended to resuscitate their ransom demands. Petitioners are asking the Board to convert their interim property rights into permanent rights that would survive reactivation of rail service. Petitioners presumably intend to take any such ruling from the Board and seek compensation from GSWR in local courts or from the Federal Government in the Federal Court of Claims.

Petitioners’ request, however, necessarily involves perverting the meaning of the terms “interim use” in the Trails Act, “interim trail use” in the Board’s NITU, and “Interim Trail Usage” in the Deeds.⁹ RTC received its property rights in the Line on October 14, 1997, when

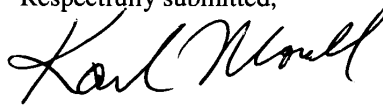
by deed acquires a similar interest. The trail sponsor possesses a limited fee interest as long as the railroad does not seek to reactivate rail service on the corridor. Upon the reactivation of rail service, however, the trail sponsor’s interest in the corridor reverts back to the railroad.

⁸ The irony of the demands seems to be lost on Petitioners. RTC received the corridor for free in 1997 and to date no action has been taken to develop a trail on the corridor. Indeed, large sections of the Line are impassable because of weeds and a few sections have barriers erected across the right-of-way. Consequently, Petitioners have no equitable, much less legal grounds for seeking compensation.

⁹ See Ex Parte No. 274 (Sub-No. 13), *Rail Abandonments – Use Of Rights-of-Way As Trails* (not printed), served February 20, 1985, slip op. at 1. (“The use of the property as a trail is considered an interim use in that the right-of-way always is available for future rail use.”) See

the Deeds were executed and its property rights in the Line lasted until June 15, 2003, when the NITU was vacated so that GSWR could reinstitute rail service on the Line. As the definition of the word "interim"¹⁰ suggests, RTC's rights lasted from one event to another. The event terminating RTC's property rights has occurred and, in the words of the Board, it is time for RTC to "step aside." May 16th decision, slip op. at 4.

Respectfully submitted,



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Dated: June 24, 2003

also *Grantwood Village v. Missouri Pacific R.R. Co.*, 95 F.3d 654, 659 (8th Cir. 1996)(Quitclaim deed drafted to comply with Trails Act reserves a reversionary interest in the line in the railroad).

¹⁰ "An interval of time between one event, process, or period and another." The American Heritage Dictionary, New College Edition 1976.

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2003, I have caused the foregoing Reply of Georgia Southwestern Railroad, Inc., to be served, by first class mail, postage prepaid, on the following:

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