

SERVICE DATE – JUNE 28, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 290 (Sub-No. 404X)

NORFOLK SOUTHERN RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN
THE CITY OF GREENSBORO, N.C.

Digest:¹ The Board clarifies its regulatory authority over a railbanked line in North Carolina and explains the Board’s procedures for determining whether a portion of a right-of-way can be removed from such a line. The Board provides the railroad an additional 30 days to respond to a petition from the City of Greensboro.

Decided: June 28, 2023

BACKGROUND

Norfolk Southern Railway Company (NSR) filed a verified notice of exemption under 49 C.F.R. part 1152 subpart F—Exempt Abandonments to abandon an approximately 3.1-mile rail line in the City of Greensboro, N.C., extending between milepost CF-65.6 and milepost CF-68.7 (the Line). Notice of the exemption was served and published in the Federal Register on September 13, 2019 (84 Fed. Reg. 48,383). The exemption was scheduled to become effective on October 13, 2019.

On October 11, 2019, at the request of NSR and the City of Greensboro (Greensboro), the Board issued a notice of interim trail use or abandonment (NITU), authorizing Greensboro, as the proposed trail sponsor, to negotiate with NSR for interim trail use/rail banking of the Line’s right-of-way under the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d), and 49 C.F.R. § 1152.29.² On November 8, 2019, NSR and Greensboro jointly notified the Board that they had reached a trail-use agreement. The following day, NSR conveyed the right-of-way to Greensboro by non-warranty deed subject to rail reactivation and various property encroachments. (Greensboro Pet. 4, Dec. 7, 2022.)

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).

² The abandonment also was made subject to two salvage-related conditions.

According to Greensboro, the claimed width of the right-of-way is 100 feet from the center line, but the actual width varies throughout the corridor due to certain encroachments.³ Further, Greensboro notes that when it obtained the corridor from NSR, various documented encroachments already existed, some as close as 30 feet from the center line. (Greensboro Pet. 4, Dec. 7, 2022.)

On December 7, 2022, Greensboro filed a petition seeking clarification that the right-of-way subject to the NITU may be narrowed along a 264-foot section of the Line to permit encroachment by Kotis Properties (Kotis) for development of a grocery store.

To support its assertion that the narrowed right-of-way, which would continue to be subject to the NITU, would be sufficient to permit the future reestablishment of rail service, Greensboro relies on an Engineering Analysis Report of James R. Blaze. (*Id.* at 5 n.3, Ex. 3.) Greensboro states that the proposed encroachment would extend 56 feet into the right-of-way, leaving the right-of-way 144 feet wide over that 264-foot section of the Line: 44 feet from the center line on the side of the encroachment and 100 feet from the center line on the other. (*Id.* at 5 n.3.) Nevertheless, Greensboro notes that, for purposes of its petition and Blaze’s engineering analysis, the remaining corridor should be assumed to be only 50 feet wide in total at that location “out of an abundance of caution due to the older property rights involved here” and “to ensure the accuracy” of the engineering report “in the event of unforeseen circumstances.” (*Id.*) According to Greensboro, Blaze performed an evaluation of the right-of-way and conducted an independent analysis in keeping with the rail design standards of the Manual for Railway Engineering of the American Railway Engineering and Maintenance-of-Way Association and NSR’s own track engineering standards. (*Id.* at 5.) Blaze concludes that, even assuming a remaining corridor width of only 50 feet at the Kotis development site, “rail service could be reestablished for a rail facility meeting commonly used design criteria without the use of exotic or unusual construction techniques.” (*Id.* at 13.)

On December 27, 2022, NSR filed a response challenging Greensboro’s petition, claiming that the only means to remove the railroad’s residual common carrier obligation from the parcel at issue is through an “adverse abandonment” proceeding under 49 U.S.C. § 10903. (NSR Reply 2, Dec. 27, 2022.) Greensboro filed a rebuttal on January 9, 2023, and simultaneously requested that the Board accept its rebuttal into the record. NSR filed a response on January 30, 2023, and asks that the Board accept its response into the record.⁴

³ The U.S. Department of Justice has questioned the width of the right-of-way in a separate proceeding before the United States Court of Federal Claims. *See* U.S. Post-Trial Br. at 4-5, *Kotis Assocs. v. United States*, No. 20-932 (Fed. Cl. Feb. 28, 2023) (arguing that “[t]he Court should conclude . . . that the easement is not 200 feet”).

⁴ Although a reply to a reply is not permitted under 49 C.F.R. § 1104.13(c), the Board will accept the January 9 and January 30 replies in the interest of a complete record. *See City of Alexandria, Va.—Pet. for Declaratory Ord.*, FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing a reply to a reply “[i]n the interest of compiling a full record”).

DISCUSSION AND CONCLUSIONS

In cases where a trail sponsor proposes to narrow the width of a right-of-way subject to a NITU, the Board has found it unnecessary to vacate a NITU and issue a replacement NITU under 49 C.F.R. § 1152.29(d)(2) if the trail sponsor has demonstrated with adequate specificity that the remaining width of the right-of-way would be sufficient to support the reactivation of rail service. In such cases, the Board will instead issue a decision clarifying the width of the right-of-way and explaining that the portion of the right-of-way that the trail sponsor has demonstrated is not needed to reactivate rail service is no longer part of the NITU. See Mo. Pac. R.R.—Aban. Exemption—in Red River & Bowie Cntys., Tex. (Missouri Pacific), AB 3 (Sub-No. 137X), slip op. at 4 (STB served July 29, 2021) (and decisions cited therein).

Here, Greensboro asserts that if the encroachment area is conveyed to Kotis, the remaining right-of-way—even if assumed to be only 50 feet wide in total at the Kotis site—is sufficient to support the reactivation of rail service on the Line. Greensboro provides an engineering report from Blaze that rail service could be reestablished within the remaining assumed 50-foot-wide right-of-way. (Greensboro Pet., Ex. 3, Attach. 1, Dec. 7, 2022.)

NSR presently takes no position on whether the proposed encroachment would still leave a sufficient right-of-way to allow for the restoration of rail service. (NSR Reply 4 n.3, Jan. 30, 2023.) Instead, NSR claims that Greensboro is seeking to remove a railroad’s residual common carrier obligation on a portion of a railbanked right-of-way over the railroad’s objection, and in such cases, the proper procedure is to seek “adverse abandonment” authority from the Board. (NSR Reply 1, Dec. 27, 2022.) In an adverse abandonment proceeding, the Board rules on a third-party application to abandon a rail line and determines whether there is a present or future public need for rail service over the line and whether that need is outweighed by other interests. See Alloy Prop. Co.—Adverse Aban.—Chi. Terminal R.R., AB 1258, slip op. at 2 (STB served Apr. 30, 2018) (internal citations omitted). NSR asserts that this process would provide all parties with a full opportunity to comment on whether the portion of the right-of-way that Greensboro seeks to remove from the railbanked corridor is permitted under 49 U.S.C. § 10903(d). (NSR Reply 1, Dec. 27, 2022.)

According to NSR, although the process set out in Missouri Pacific is “adequate” for the situation where the holder of the railbanked real property and the holder of the common carrier obligation consent, it is “wholly inadequate in an adverse situation.” (NSR Reply 6, Dec. 27, 2022.) Allowing Greensboro to follow Missouri Pacific, according to NSR, would mean that NSR, as the residual common carrier holder, would have only 20 days to receive the petition, analyze the expert’s statement that removal would not interfere with the future reactivation of rail service, conduct an analysis of its future common carrier needs, develop its own expert opinion, and file its evidence. (NSR Reply 6-7, Dec. 27, 2022.)

In its January 30, 2023 reply, NSR expands its challenge to Missouri Pacific, claiming that it is flawed and should not be followed in future cases. (NSR Reply 6, Jan. 30, 2023.) It asks the Board to adopt a different approach for the future whereby the original NITU is vacated, and a replacement NITU is issued that excludes a specific parcel. (*Id.*) NSR claims that this approach is superior, as it avoids the need for the trail user to hire an expert to confirm that rail

operations could occur in the future. (*Id.*) NSR also claims that the approach avoids the Board spending resources to review and confirm the evidentiary presentations and is consistent with the Board’s role in the administration of the Trails Act, which is to be ministerial in nature. (NSR Reply 6-7, Jan. 30, 2023.)

The Board will not abandon the Missouri Pacific approach. The process of vacating a NITU was developed to apply to situations where the length of a railbanked line would be shortened—i.e., where the abandonment of the line would be partly consummated—not where the right-of-way would be narrowed but remain adequate for potential future rail service. See Idaho N. & Pac. R.R.—Aban. & Discontinuance Exemption—in Wash. & Adams Cntys., Idaho, AB 433 (Sub-No. 2X), slip op. at 2 (STB served Dec. 27, 2012). Moreover, even if the Board were to formally adopt the procedure of vacating and reissuing a NITU in these situations, as NSR suggests, the Board would still need to determine whether narrowing the railbanked right-of-way would leave sufficient width to allow for the possibility of rail service reactivation. Thus, it is unclear how such a process would be more efficient.

The Board also does not agree that Greensboro must seek adverse abandonment authority to narrow the right-of-way. First, the entire width of the right-of-way is already authorized for abandonment, as the Board’s decision granting the NITU also authorized abandonment, so the concept of requiring an adverse abandonment application is repetitive and legally unnecessary. Second, as explained in Idaho Northern & Pacific Railroad—Abandonment & Discontinuance Exemption—in Washington & Adams Counties, Idaho, 3 S.T.B. 50, 59 (1998), “[the Board’s] chief concern, once a trail condition has been imposed, is that the statutory rail banking condition not be compromised, and that nothing occur that would preclude a railroad’s right to reassert control over the right-of-way at some future time to revive active service.” See also Jie Ao—Pet. for Declaratory Ord., FD 35539 (STB served June 6, 2012) (holding that ownership claims to a portion of railbanked property were preempted under 49 U.S.C. § 10501(b) for potentially precluding reactivation of service on the line). Therefore, the Board is primarily concerned with protecting NSR’s right to reactivate service and is generally only concerned about the width of the railbanked right-of-way for that purpose.⁵ Missouri Pacific and the cases cited therein all recognize these agency concerns and that rights-of-way are sometimes more extensive than necessary to reactivate service.⁶ Indeed if Greensboro removes only portions of the right-of-way that are unnecessary for rail service reactivation, it cannot be reasonably concluded that NSR’s common carrier obligation has been removed from the Line, as NSR argues in its reply. Rail lines and rights-of-way for rail lines are not synonymous. Rail lines under the Board’s jurisdiction often occupy only small widths of much larger rights-of-way that are obtained by rail carriers under state property law. Indeed, here, it has been asserted that NSR or its predecessor on this Line secured a right-of-way that may be up to 200 feet wide, (Greensboro Pet. 4, Dec. 7, 2022); yet the majority of that width has not been used for the construction and operation of the

⁵ Indeed, Greensboro asserts that no entity seems to have sought this agency’s involvement before other encroachments were placed on this right-of-way. (Greensboro Pet. 4, Dec. 7, 2022.)

⁶ See also State of Me., Dep’t of Transp.—Acquis. & Operation Exemption—Me. Cent. R.R., 8 I.C.C.2d 835, 836-37 (1991) (finding agency authority is unnecessary to convey physical assets so long as the common carrier obligation attached to them is also not conveyed).

Line. Moreover, the Board understands that rail carriers often sell, lease, or transfer parts of their rights-of-way under state law for other purposes, such as utility lines, and they are not required to seek Board authority to do so. See, e.g., Pet. of Union Pac. R.R. for Declaratory Ord., FD 35960, slip op. at 2 (STB served Sept. 30, 2016) (explaining how a railroad agreed to allow pipelines to be constructed in its rights-of-way for decades). NSR's position, taken to its logical conclusion, would require rail carriers to seek Board authority to abandon portions of their rights-of-way any time they wish to sell, lease, or otherwise transfer excess rights-of-way for purposes other than common carrier rail service. The Board is not aware of any case in which it required a rail carrier to seek such authority where that sale, lease, or transfer did not interfere with the provision of common carrier rail service. See Sacramento Reg'l Transit Dist.—Pet. for Declaratory Ord. Regarding Carrier Status, FD 33796, slip op. at 2 (STB served July 5, 2000) (explaining that transfer of excess right-of-way for non-jurisdictional activities does not require Board approval where there would be no interference with common carrier rail service).

Further, the Board has found that state law property and contract disputes are better handled by the appropriate courts and that such matters are possibly subject to preemption if they unreasonably interfere with interstate commerce. See Pet. of Union Pac. R.R. for Declaratory Ord., FD 35960, slip op. at 7 (noting that preemption under 49 U.S.C. § 10501(b) typically does not apply to voluntary agreements between a railroad and a third party). Here, the parties acknowledge that they presently dispute the terms and conditions of the sale agreement for the Line; they also recognize that such a dispute would properly be addressed by an appropriate court, as that dispute does not appear on the current record to interfere with NSR's ability to reactivate the Line in the future if it so chooses.⁷

However, while NSR's procedural arguments here are rejected, the Board will give NSR an opportunity to demonstrate with specificity that the narrowing of the right-of-way here through the removal of the Kotis parcel would unreasonably interfere with the potential reactivation of rail service, and Greensboro will have an opportunity to file a reply. Although NSR has suggested possible future uses for the parcel, such as locating side track or a communication tower (NSR Reply 7, Dec. 27, 2022), it has not demonstrated that it would need this specific parcel for any such activities should it wish to reactivate service. It has also not refuted Greensboro's contention that a 50-foot-wide right-of-way would suffice for restoring rail

⁷ The record indicates that the parties entered into a sale agreement providing NSR the right to repurchase the Line if it decides to reactivate rail service. (Greensboro Pet. 8 n.7, Dec. 7, 2022; NSR Reply 3, Dec. 27, 2022.) The parties dispute whether the sale to Kotis would breach that contract. (Greensboro Pet. 8 n.7, Dec. 7, 2022; NSR Reply 3 n.2, Jan. 30, 2023.) Greensboro claims it would not, as the agreement does not restrict Greensboro's ability to convey portions of the right-of-way as long as NSR is able to reactivate rail service. (Greensboro Pet. 8 n.7, Dec. 7, 2022.) On the other hand, NSR claims that it retained the contractual right to reacquire the entire right-of-way and that Greensboro's transferring a portion of it to Kotis would violate the contract. (NSR Reply 3 n.2, Jan. 30, 2023.) The parties agree, however, that the question of whether there is a breach of the agreement is a matter of state contract law that should be decided by an appropriate court rather than the Board. (Greensboro Pet. 8, Dec. 7, 2022; NSR Reply 3-4, Dec. 27, 2022.)

service on the parcel. See Mo. Pac.; Union Pac. R.R.—Aban.—in Harris, Fort Bend, Austin, Wharton & Colo. Cntys., Tex., AB 33 (Sub-No. 156) (STB served Dec. 1, 2006).

It is ordered:

1. Greensboro's January 9, 2023 reply and NSR's January 30, 2023 response are accepted into the record.
2. NSR's response, if any, is due by July 28, 2023. Greensboro's reply, if any, is due by August 17, 2023.
3. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.