

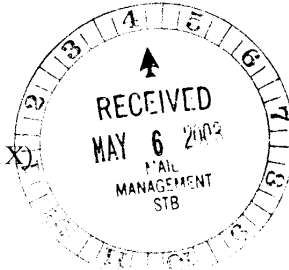
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Part of
Public Record

Before the Surface Transportation Board

Georgia Great Southern Division --)
Abandonment and Discontinuance) AB 389 (Sub-no. 1X)
Exemption -- between Albany and Dawson, GA)



Motion to Strike

South Georgia Rails to Trails (SGRT) and Rails to Trails Conservancy (RTC) hereby move to strike the "Reply to Petition and Motion for Leave to Intervene" filed by Georgia Southwestern Railroad, Inc. (GSR) in this proceeding.¹

Summary

Under 49 C.F.R. § 1104.13(c), replies to replies are not permitted. GSR's "Reply to Petition and Motion for Leave to Intervene" amounts to a substantive reply to replies filed in this proceeding by Association of American Railroads (AAR), RTC and SGRT to GSR's original petition to revoke a NITU.

Argument

GSR filed a petition to revoke a NITU in the above-captioned proceeding ostensibly for rail reactivation. However, GSR requested this Board to revoke the NITU and to clarify that under 16 U.S.C. § 1247(d), the trail manager/railbanker would be divested of any property interests in the corridor at issue without compensation, even though the parties to the railbanking agreement intended the trail manager/railbanker to own all the rights of the former railroad owner in the property, even though former railroad owner claimed a federal tax deduction of \$1.83 million for an alleged complete severance of its rights (donation), and even though the contract accordingly nowhere provided for

¹ Under this Board's rules, SGRT and RTC have twenty (20) days to move or otherwise to respond to GSR's paper dated April 24. 49 C.F.R. § 1104.13(a). This motion to strike is accordingly timely.

a return of those rights for free, much less for free at the arbitrary demand of the new owner of the railroad. RTC and SGRT timely opposed any such construction. RTC and SGRT explained that any such construction would nullify the voluntarily-negotiated railbanking contract involved and would otherwise jeopardize the integrity of the rail corridor. No trail manager could buy rail property for railbanking purposes, much less spend the money to manage it for trail purposes, if it could be arbitrarily divested of its asset without compensation, as demanded by GSR. Moreover, GSR's position would disrupt the tax position of numerous railroads which have made donations or partial donations of rail property for railbanking/interim trail purposes. Finally, if rail property can be transferred by this agency without compensation from railbankers to railroads, then it is hard to see why inactive rail property cannot similarly be transferred for free by railroads to railbankers who wish to preserve it, or from one railroad to another which wants to "activate" it.

Association of American Railroads (AAR) timely filed a "Petition for Leave to Intervene and to File Comments" in response to GSR. Not surprisingly, AAR's comments opposed the relief sought by GSR insofar as GSR sought to divest RTC and SGRT of property without compensation. In a nutshell, AAR urged -- as did SGRT and RTC -- that the voluntarily negotiated railbanking agreement be honored, and not involuntarily thrown out by this agency.

GSR now seeks to reply to AAR, or (more accurately) to RTC and SGRT under the guise of responding to AAR. Whether GSR is purporting to reply to AAR, or to RTC and SGRT does not matter. GSR cannot reply to a reply filed by AAR, any more than it can lawfully reply to the replies filed by RTC and SGRT. 49 C.F.R. § 1104.13(c). Under any construction, GSR's "Reply to Petition and Motion for Leave to Intervene" dated April 24, 2003, is a reply to replies, and must be stricken.

The only response that GSR legitimately could make to AAR's filing was to object to AAR's

petition to intervene, and to offer argument on that objection.² But GSR states up front that it does not oppose AAR's intervention.³ Since GSR does not oppose AAR's intervention, it has no right to say anything in reply to AAR's reply. 49 C.F.R. § 1104.13(c). In any event, counsel for SGRT (Montagne) has been informed by counsel for several AAR members that GSR drew AAR's attention to this proceeding, and GSR sought the intervention of AAR in this proceeding. AAR upon consideration determined that GSR was wrong and so advised this Board. GSR should not be permitted to set itself up to reply to SGRT and RTC by inviting AAR to intervene, and then using AAR as a foil or an excuse to file a reply to SGRT and RTC arguments indorsed by AAR. That would make a mockery of § 1104.13(c).

If this Board does not strike GSR's "Reply to Petition and Motion for Leave to Intervene," due process requires this Board to permit RTC and SGRT an additional twenty days to respond, counted from the date of this Board's action on this motion to strike. RTC and SGRT among other things wish an opportunity to demonstrate that the three alleged "alternatives" listed by GSR's attorney at page 11 in his unlawful reply to AAR, RTC and SGRT are wrongly stated and wrongly argued. RTC and SGRT wish an opportunity to show that GSR's latest advice to this Board would render railbanking developed under this Board and its predecessor a nullity, and to show that GSR's construction would impose substantial costs on all those railroads (including many members AAR) who have drawn federal tax benefits for donations or below-fair market value transfers and sales of rail corridor for railbanking purposes. To impose costs retroactively on the railroads in this fashion

² SGRT and RTC objected to the intervention of Pioneer Rail Corporation and offered argument on that objection in this proceeding.

³ See GSR's " Reply to Petition and Motion for Leave to Intervene" dated April 24, p. 1, first ¶, last sentence.

is to impose them on rail shippers. Not only will a very heavy price be paid by the rail industry for a very small one-time gain to GSR, but rail shippers will be disadvantaged. There are none on the line that GSR seeks to reactivate, but there are many on the systems of those railroads who will have their tax deductions revoked if GSR has its way. RTC and SGRT also seek the opportunity to explain how there is no rational basis for any portion of the shortline industry to think it would benefit from destruction of railbanking as now sought by GSR.

This Board should offer the interested public, including the many other railroads and trail managers whose interests may be destroyed or uprooted by the ruling in this case, an opportunity to comment before this Board seriously entertains the mammoth step sought by GSR. Presumably this broad shift in policy would require a declaratory proceeding with Federal Register notice, or a rulemaking, or process due would be denied.

Conclusion

GSR's "Reply to Petition and Motion for Leave to Intervene" dated April 24 should be stricken.

Respectfully submitted,

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Certificate of Service

I hereby certify service of a copy of the foregoing Reply by U.S. Mail, postage pre-paid first class upon the following counsel of record this 6th day of May, 2003:

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