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SERVICE DATE – OCTOBER 31, 2006

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-600 (Sub-No. 1X)

YAKIMA INTERURBAN LINES ASSOCIATION—ABANDONMENT
EXEMPTION—IN YAKIMA COUNTY, WA

Decided: October 27, 2006

This decision denies a motion filed by Kershaw Sunnyside Ranches, Inc. (Kershaw) to dismiss a notice of exemption.

BACKGROUND

Yakima Interurban Lines Association (YILA) filed a verified notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments to abandon a line of railroad known as the Naches Branch, from milepost 2.97 (Fruitvale, near Yakima) to milepost 14.26 (near Naches), a distance of approximately 11.29 miles in Yakima County, WA. YILA also sought exemption from the offer of financial assistance (OFA) procedures at 49 U.S.C. 10904. Additionally, a request on behalf of Yakima County (County) for issuance of a notice of interim trail use (NITU) was filed with the notice, pursuant to section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act). On January 19, 2006, notice of the exemption was served and published in the Federal Register (71 FR 3153-54).

The exemption did not become effective as scheduled on February 18, 2006, because, on February 6, 2006, Oregon Pacific & Eastern Railroad Company (OP&E) late-filed a notice of intent to file an OFA. By decision served on February 17, 2006, the Board accepted OP&E's notice and postponed the effective date of the exemption until 10 days after the due date for OP&E's OFA. Also, in that decision, YILA's request for exemption from the OFA requirements of 49 U.S.C. 10904 was denied, the County's request for issuance of a NITU was held in abeyance pending completion of the OFA process, and seven environmental conditions recommended by the Board's Section of Environmental Analysis were imposed on the proposed abandonment.

By letter filed on March 23, 2006, OP&E requested tolling of the time period for submission of its OFA, along with a protective order. By letter filed on March 27, 2006, however, OP&E sought permission to withdraw its notice of intent to file an OFA.

By decision and notice served on April 5, 2006, the proceeding was reopened, OP&E's request to withdraw its notice of intent to file an OFA was granted, the OFA

process was terminated, OP&E's tolling request and request for a protective order were dismissed as moot, and the prior abandonment authorization became effective on the April 5 service date, subject to the environmental conditions imposed in the February 17 decision. Additionally, a NITU was issued authorizing the County to negotiate an interim trail use/rail banking agreement with YILA for 180 days, until October 2, 2006, for the 11.29 miles of railroad.

On August 25, 2006, the County filed a motion, with YILA's consent, requesting an extension of the NITU negotiating period for an additional 180 days, until March 31, 2007. On September 5, 2006, Kershaw filed a memorandum in opposition to the motion to extend the negotiating period. Kershaw also moved to dismiss the notice of exemption, arguing that the Board lacked jurisdiction over the transaction. YILA and the County filed a response, opposing both requests.

In a decision served on September 21, 2006, the Board, by the Director of the Office of Proceedings, granted YILA's motion to extend the NITU negotiating period until March 31, 2007. That decision also indicated that the jurisdictional questions raised in Kershaw's September 5 filing would be addressed in a subsequent Board decision. This decision will address those questions.

DISCUSSION AND CONCLUSIONS

Kershaw argues that abandonment of the YILA line is not subject to the jurisdiction of the Board because YILA's status is that of a noncarrier. Kershaw bases its argument on a March 27, 1997 decision by the U.S. Railroad Retirement Board (RRB) that found YILA, d/b/a the Yakima Electric Railway Museum, to be an excursion railroad not subject to the Board's jurisdiction. Kershaw also argues that the Board lacks jurisdiction over this matter because YILA's rail line is no longer connected to the interstate rail system and, consequently, a de facto abandonment has occurred. In support of its arguments, Kershaw cites RLTD Railway Corp. v. Surface Transportation Board, 166 F.3d 808 (6th Cir. 1999) (RLTD), and Jost v. Surface Transportation Board, 194 F.3d 79 (D.C. Cir. 1999) (Jost).

YILA, in its response to Kershaw's motion to dismiss, argues that Kershaw is relying on false information and irrelevant points. YILA states that it acquired an active freight rail line from The Burlington Northern and Santa Fe Railway Company, now BNSF Railway Company (BNSF), in this proceeding, and that the line remains under the Board's jurisdiction until the freight common carrier obligation and any rail banking under 16 U.S.C. 1247(d) are terminated. YILA argues that the RRB's decision cited in Kershaw's pleading is irrelevant and not dispositive of Board jurisdiction because the subject line there and the operations thereover (excursion service from Yakima to Selah, WA) differ from those here (freight service from Fruitvale to Naches, WA). Finally, YILA claims that the line in question is not severed from the interstate rail network because the relevant connecting lead from YILA's line to the main line (milepost 0 to milepost 2.97) has never been abandoned by BNSF.

We find no merit to Kershaw's claim that YILA is not a carrier subject to the Board's jurisdiction. Kershaw's reliance on a 9-year-old decision by the RRB that focused on a different type of rail service over a different line is not relevant for purposes of this proceeding. YILA became a carrier subject to our jurisdiction when it acquired this line in 1999 by invoking the authority of this agency. The property remains within our jurisdiction because the issuance of the NITU by this agency means that this line shall not be treated for any purpose as abandoned. 16 U.S.C. 1247(d).

We also reject Kershaw's claim that the Board does not have jurisdiction over the rail line in question because the line has been de facto abandoned. Kershaw is incorrect. According to RLTD, 166 F.3d at 810, 812, a de facto abandonment occurs when a rail line is no longer "linked to and part of the interstate rail system." In the case at hand, the evidence shows that the YILA line is, in fact, still connected to the interstate rail system and that it has never been severed therefrom: specifically, YILA has established that BNSF never abandoned the lead connecting the line at issue to the BNSF main line, and in fact, leased that lead to Central Washington Railroad Company within the past 2 years.¹

In sum, Kershaw has failed to provide any basis for the relief it seeks. Accordingly, its motion to dismiss will be denied.

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

It is ordered:

1. Kershaw's motion to dismiss is denied.
2. This decision is effective on its service date.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A. Williams
Secretary

¹ See Central Washington Railroad Company-Lease and Operation Exemption-The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 34640 (STB served Jan. 21, 2005).