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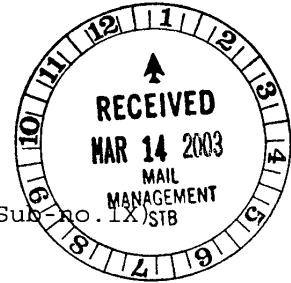
Before the Surface Transportation Board

Georgia Great Southern Division --)

Abandonment and Discontinuance)

Exemption -- between Albany and Dawson, GA)

AB 389 (Sub-No. 1X) STB



MOTION FOR EXTENSION OF TIME
IN WHICH TO FILE RESPONSIVE PLEADINGS

Rails to Trails Conservancy and South Georgia Rails to Trails, Inc. (hereinafter jointly referred to as RTC) hereby move for an extension of forty (40) days in time for purposes of preparing and filing pleadings responding to the Petition to Vacate a Notice of Interim Trail Use filed by counsel for Georgia Southwestern Railroad, Inc. (GSR) in the above-captioned proceeding.

Under this Board's Rules, RTC has a right to reply to the above pleading within 20 days. 49 C.F.R. § 1104.13(a). According to the STB website, the pleading to which this motion is directed was filed on March 5, 2003. Accordingly, RTC's responsive pleadings are due on March 25. Under the extension requested, RTC's responsive pleadings would be due on or before May 5, 2003 (40 days from March 25 is May 4, a Sunday, so the due date per 49 C.F.R. § 1104.7(a) would be May 5). Pursuant to § 1104.13(b), this extension request is timely.

Counsel for RTC has contacted counsel for GSR to determine if GSR consents to the requested extension. GSR's counsel advises that due to an accident in Mexico, GSR is unavailable earlier than Monday, March 17, for purposes of consenting to an extension. Unfortunately, March 17 is past the regulatory deadline for timely filing of extension requests. RTC

accordingly is filing this extension request with the understanding that GSR will subsequently advise STB of GSR's position.

Reasons to Grant Motion

The GSR pleading is purportedly to vacate a Notice of Interim Trail Use (NITU) previously entered in this proceeding pursuant to 16 U.S.C. § 1247(d) with respect to the portion of rail line in the above-captioned proceeding between Albany and Sasser. GSR represents that it wishes to reactivate rail service on the line. There is no shipper, nor any identified prospective rail shipper, on the railroad line at issue. Track and tie have long since been removed from the line.

Nonetheless, based on the information currently available, RTC does not oppose rail reactivation in this particular situation.¹ RTC, however, vigorously objects to granting the GSR petition at this time in the fashion GSR requests. RTC also vigorously objects to aspects of the relief requested in GSR's petition. We do not intend this Motion for Extension to be treated as our Reply. However, we will summarize portions of our position in order to indicate the nation-wide importance of the issues which are raised by the GSR petition. This should

¹ Again, "RTC" as employed here means both Rails to Trails Conservancy and the local trail group, South Georgia Rails to Trails. RTC will advise of the reasons for its support of a reactivation following proper procedures and with reasonable and just compensation when RTC files its Reply.

We also note that Rails to Trails Conservancy is the interim trail manager and is responsible for maintaining the line under a lease agreement with South Georgia Rails to Trails. South Georgia Rails to Trails owns the corridor.

serve to emphasize why adequate time to develop a record is necessary and prudent. We will focus on two key reasons why we must oppose the petition as filed by GSR, and the relief it specifically requests.²

First, GSR (under previous ownership³) deeded and contracted away all its property interest in the rail line. GSR currently owns no interest in the line at State law, having transferred away all of its property in the line. If the Surface Transportation Board (STB or Board) vacates the existing NITU in these circumstances, any railroad easements encompassed in the line may automatically extinguish under Georgia state law, because 16 U.S.C. § 1247(d) will no longer be applicable to them, they have been fully alienated by the railroad to a non-railroad, and track and ties have been removed. An effect of GSR's petition, if granted, is thus to trigger possible easement extinguishments, and certainly litigation risks of same. This is obviously counterproductive to what GSR purports to want (i.e., an intact rail corridor for rail reactivation). The risk is totally unnecessary, for relief should be structured to avoid it. For example, the railroad should not seek vacation of a NITU which may occur before it has received the deed to the

² The Petition raises other issues, and we by no means waive our right to respond to all issues in our Reply, as well as to supply further evidence and argument on the issues which are discussed in this Motion for Extension.

³ GSR represents that its current owner purchased GSR's shares after the rail line at issue in this proceeding had been railbanked.

property. In short, the process, or structure, of relief sought by the railroad is flawed and counterproductive.

Second, GSR demands, and seeks this Board to determine, that RTC/South Georgia Rails to Trails, which currently control all ownership interests in the property, must transfer the property to GSR for free. GSR takes this position notwithstanding the fact that GSR received substantial compensation for the all its interests in the line from RTC. Nothing in any contract or deed between RTC and GSR, or any other party in the chain of title, provides that RTC or its successors must surrender the property for free upon demand by GSR or any other railroad, or any non-railroad for that matter.

This Board and its predecessor have consistently taken the position that a "railbanking agreement" pursuant to 16 U.S.C. § 1247(d) is a voluntary transaction, in which the terms and conditions are worked out by the parties, so long as the line is kept intact and under the Board's jurisdiction for possible rail reactivation, and the railroad is not responsible for certain costs (management, taxes and tort liability). Railbanking agreements most often take the form of a transaction in which the railroad transfers its interests by quitclaim deed to the railbanking party for agreed upon compensation, or for a tax benefit, or for both. The agreement below followed this pattern.

According to statistics compiled by RTC, since the inception of railbanking pursuant to 16 U.S.C. § 1247(d) in

1983, ICC/STB has issued 398 railbanking orders. Pursuant to those orders, approximately 180 lines in thirty states have been preserved, encompassing some 3,983 miles of rail line. The bulk of this mileage is either developed, or under development. In at least one case, a freight rail line is operating on a railbanked trail in conjunction with a trail pursuant to a "modified PCN" (49 C.F.R. § 1152.21, et seq.). In many cases, substantial compensation is paid to a railroad by the party acquiring the line for railbanking. The National Park Service and Montgomery County (MD), for example, paid the railroad over \$11 million for what is now the beautiful Capital Crescent Trail in Bethesda (MD) and Georgetown (DC), a decade ago. Trail development on some of these railbanked properties can also be expensive. Seattle, for example, is currently investing around ten million dollars to develop a railbanked trail on the Lake Union waterfront at the north end of the downtown business district, in a project which requires reconfiguration of parking lots and relocation of utilities as part of the trail installation. Other railbanking entities (e.g., Roaring Fork Railroad Holding Authority, comprised of the cities and counties in the Aspen to Glenwood Springs corridor in Colorado) have paid substantial sums to acquire rail lines for passenger rail purposes. RFRHA's ultimate passenger rail system, once constructed, is currently estimated to be likely to cost in excess of at least \$40 million. No one could or would risk these investments in corridor preservation and either trail or

rail use if Notices or Certificates of Interim Trail Use could be "vacated" on demand by a freight railroad, and the property either lost to easement extinguishment in that event, or confiscated without any compensation for either the land or improvements in the absence of any contract provision providing for such confiscation. In other words, the procedure requested, as well as the relief sought, by GSR in its Petition, if adopted by this Board, would render 16 U.S.C. § 1247(d) effectively a nullity. GSR's proposed procedures and relief subvert the purpose of the statute to preserve corridors for future use nation-wide.

There is an obvious alternative consistent with preserving rail corridors for future use: the railroad should arrange for reacquisition of the property effective upon this Board's order vacating an applicable NITU or CITU, and part of that arrangement should include satisfaction of, or agreement concerning, compensation issues. To our knowledge, this has been followed in all other instances involving freight rail reactivation of railbanked lines.

Based upon the experience of counsel for RTC with 16 U.S.C. § 1247(d) (and RTC's counsel here have a combination about 30 years' worth of experience with the statute), there are two basic ways that parties to a railbanking transaction deal with rail reactivation compensation issues: (1) the parties provide in their voluntarily negotiated railbanking agreement specifically provide how compensation will be determined in the

event of rail reactivation, or (2) the parties merely provide for transfer of the property by quitclaim deed, leaving to future agreement or the processes of state eminent domain law the terms of compensation in the event rail reactivation is proposed.

GSR is apparently proposing to override the terms of voluntarily negotiated railbanking agreements whether or not they specifically speak to how compensation will be determined, and whether or not they leave that issue to agreement of the parties in the future. In either event, GSR is effectively suggesting that the intent of the parties be ignored, and the interests of one of the parties transferred for free to any entity which professes to wish to reactivate rail service. In either event, no railbanker could safely invest any money in the acquisition of a rail corridor. In either event, the procedures and relief sought by GSR conflict with, among other things, 16 U.S.C. § 1247(d) and its purposes.

The regime GSR is advocating has no equivalent in STB practice. Under 49 U.S.C. § 10904, when STB requires the transfer of rail property from one railroad to another for operation, the parties must agree on compensation, or the agency must and will set the terms and conditions of compensation at a level not less than the Constitutional minimum value. Under 49 U.S.C. § 10901, et seq., when the agency authorizes new rail construction, the agency does not authorize any railroad to confiscate private or public property for free. Instead, the

railroad must reach voluntary agreements, or use state law eminent domain powers, to assemble the corridor authorized by the agency. There is nothing in 16 U.S.C. § 1247(d) that provides for a different result upon the vacating of a NITU-- an action tantamount merely to an STB authorization for rail service.

The petition, if granted, would also lead to serious abuse of the railbanking statute. Trail opponents have already formed bogus railroads to attempt to acquire rail lines pursuant to the "offer of financial assistance" ("OFA") statute, 49 U.S.C. § 10904 (formerly found at § 10905). See, e.g., SLSER v. ICC, D.C.Cir. No. 94-1431, and Lake Union Terminal v. ICC, D.C. Cir. No. 94-1456, cert denied, 116 S.Ct. 799 (1996). Trail opponents could simply form alleged "freight railroads," or, following the model in this case, strive to acquire (at a discount) the stock of a defunct shortline, and then "reactivate" a railbanked line, seizing it from the interim trail manager for free. They could then allow the line to revert as advocated already for OFA process abuse at the NARPO website.

Furthermore, many railroads such as Union Pacific and Burlington Northern Santa Fe, as well as many shortlines, have donated (or more frequently sold at some discount) rail property for interim trail use and railbanking in return for a tax deduction for a charitable contribution. Railroads that took such tax deductions would presumably be subject to audit and penalties from the IRS if GSR's view were adopted, since under

GSR's view, the railroad is not really donating any property at all. Indeed, under GSR's view, sales and donation appear to be effectively void.

In short, the relief requested by GSR is counterproductive (may result in corridor extinguishment), is beyond this Board's authority (no statute authorizes this Board to require surrender of a railbanker's assets for free), raises serious risks of abuse, and is contrary to the interests of railroads which have taken tax deductions in the context of rail trail transactions. Equally important, the issues raised are of nation-wide import, affecting thousands of miles of corridor in at least 30 states. Because of the importance of the issues, RTC wishes to have adequate time to prepare its response fully to apprise this Board of the relevant issues and law. Conversely, RTC is unaware of any urgency for resolution of the pending petition; there are no shippers on the line; and any reactivation appears to be entirely contingent upon Georgia DOT picking up the full cost in any event.

As an additional reason for an extension, RTC currently anticipates making several modest discovery requests, perhaps including noticing a couple third party depositions concerning facts relevant to the issues. Taking this discovery will necessarily require an extension of time, in order to prepare the requests, obtain responses, and incorporate that information into our Reply.

Finally, RTC notes that it has already offered to have the

property appraised pursuant to a mutually agreeable process, but this offer necessarily is predicated upon GSR agreeing in principle to the payment of compensation.⁴ Although GSR has declined to discuss any process under which reasonable compensation can be agreed upon for RTC's property interest, it is possible the parties might be able to reach such an agreement. For this reason, and perhaps for others, RTC reserves the right to seek further extensions of time in order to accommodate negotiations, should GSR (or GDOT, see note 4) elect to negotiate rather than pursue this unprecedented effort to confiscate railbanked property in a counterproductive fashion that may result in the whole corridor disappearing if even remotely countenanced by this agency.

Again, this Motion should not be treated as our Reply, and any failure to comment on facts or arguments presented by GSR in its Petition should not be construed as an admission.

Conclusion

For the reasons stated, this Board should grant an extension of time to Reply to RTC, through and including May 5, 2003.

⁴ Based on responses by Georgia Department of Transportation (GDOT) to RTC informational requests, RTC understands that GSR lacks any financial resources for reactivation, including resources necessary to reactivate this line, except as supplied to GSR by GDOT. RTC has advised GDOT that RTC is also willing to deal directly with GDOT. GDOT has so far failed to respond to RTC. RTC understands that GSR may not own any rail lines in Georgia but instead simply operates some lines owned by the State.

Respectfully submitted,


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Certificate of Service

I hereby certify service by U.S. Mail, postage pre-paid first class, this 14th day of March, 2003, upon Karl Morell, counsel for GSR, at his address of record (Ball Janik, 1455 F St., N.W., Suite 225, Washington, D.C. 20005) and by fax on 14 March 2003 to 202-783-6947.

