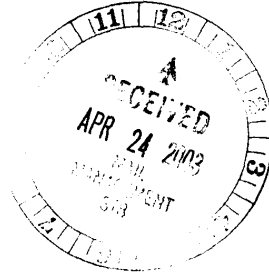


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April 24, 2003

BY HAND DELIVERY

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

207 686

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 please find for filing the original and ten (10) copies of the Reply
To Petition And Motion For Leave To Intervene 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

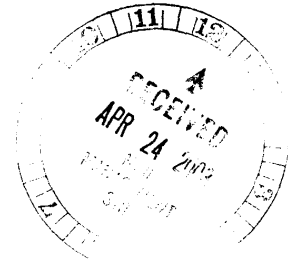
Enclosures

207686

ORIGINAL

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 PETITION AND MOTION FOR LEAVE TO INTERVENE

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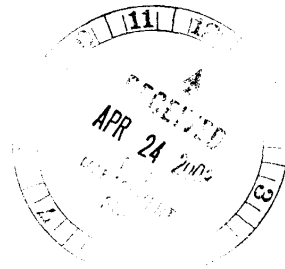
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GEORGIA SOUTHWESTERN
RAILROAD, INC.

Dated: April 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 PETITION AND MOTION FOR LEAVE TO INTERVENE

Georgia Southwestern Railroad, Inc. (“GSWR”), the successor in interest to the Georgia Great Southern Division, South Carolina Central Railroad, Co., Inc., hereby responds to the Petition of the Association of American Railroads for Leave to Intervene and to File Comments (“Petition”) and the Motion for Leave to Intervene and Participate (“Motion”) filed by Pioneer Railcorp, 16 of its Class III railroad subsidiaries, and the Arkansas-Oklahoma Railroad Company (collectively referred to as “Pioneer Railroads”). GSWR welcomes the Pioneer Railroad’s intervention although GSWR does not necessarily agree with one minor aspect of their comments. GSWR also does not object to the intervention request by the Association of American Railroads (“AAR”) even though the AAR seems to misunderstand the relief GSWR seeks in this proceeding.

GSWR is not asking the Surface Transportation Board (“Board”) the set compensation or to engage in contractual interpretations as AAR mistakenly claims. Rather, GSWR is asking the Board to revoke the outstanding NITU in this proceeding and, in so doing, to interpret the

provisions of 16 U.S.C. 1247(d) (“Trails Act”) and the Board’s rules implementing the Trails Act. The 13.62-mile rail line between Albany and Sasser, GA (the “Line”) was rail banked pursuant to indentures between the parties. The indentures do not contain any contractual terms that specifically govern the reactivation of rail service. Instead, the indentures expressly provide that the reactivation of rail service on the Line is governed by the Trails Act and the Trails Use Conditions imposed by the Board in this proceeding. Consequently, GSWR is not asking the Board to “create, modify, interpret or abrogate private contractual terms” [Petition at 5], but to interpret the statute and the applicable Board regulations which are expressly incorporated by reference in the indentures.¹

More specifically, GSWR is seeking an interpretation by the Board of the property interest an interim trail user receives pursuant to a conveyance made under the Trails Act. If that interest is truly “interim”, as the express terms of the Trails Act suggest, then the interim trail user’s rights necessarily expire or revert upon the revocation of the NITU. The termination of these “interim use” rights should, in turn, not be deemed a compensatory event, absent an express agreement between the parties to the contrary. The interim trail user will have fully received the benefit of its bargain: the interim use of the rail corridor for recreational purposes until such time as rail service is restored.² Thus, GSWR is not seeking to have the Board “insert

¹ AAR agrees that “reactivation should be authorized pursuant to statutory mandate....” Petition at 5. This is precisely what GSWR is seeking: the reactivation of rail service on the Line and an interpretation by the Board of the Trails Act’s “statutory mandate” concerning the restoration of rail service.

² If an interim trail user is concerned about the loss of any acquisition payments it makes to the railroad or financial investments it intends to make in the corridor, it can always provide for remuneration in an agreement. Any such remuneration, however, must be reasonable and not serve as an impediment to the restoration of rail service.

new terms into a private rail-banking agreement” [Petition at 4], but to interpret the provisions of the Trails Act and the Board’s regulations, the terms of which were expressly incorporated by reference into the indentures that govern the rail banking of the Line.

The AAR seems to argue that the Board is powerless to interpret the Trails Act and its own regulations because the Board’s role under the Trails Act is ministerial. Petition at 3. The authorities AAR relies on, however, involve the Board’s role in the initial banking of a rail corridor and not the un-banking of the corridor, as is the case here. In finding its role to be largely ministerial in the initial banking of a corridor, the Board correctly interpreted the Trails Act as permitting only voluntary arrangements. Under these circumstances, it would be folly for the Board to prescribe the terms and conditions of a rail-banking agreement, since the railroad has total discretion to reject any unwanted terms.³

While the initial rail banking of a corridor is voluntary on the part of the railroad, reactivation of rail service, at the abandoning railroad’s request, is mandatory. For example, the NITU issued in this proceeding specifically states that “[i]nterim trail use/rail banking is subject to the future restoration of rail service and to the user’s continuing to meet the financial obligations for the right-of-way.”⁴ Moreover, the Trails Act expressly provides that interim trail

³ In finding that the Trails Act permits only voluntary arrangements, the Board and its predecessor necessarily had to interpret the Trails Act, which is precisely what GSWR urges the Board to do in this proceeding. *See e.g., Rail Abandonments – Use of Rights-Of-Way As Trails*, 2 I.C.C. 2d 591 (1986), where the Board’s predecessor extensively interpreted the provisions of the Trails Act and its legislative history. The AAR, however, seems to suggest that the Board is relegated to a role of mindlessly issuing and revoking NITUs and CITUs, leaving it to other administrative or judicial bodies to sort out the consequences of the Board’s ministerial acts. GSWR maintains that this is hardly the role Congress intended for the Board under the Trails Act.

⁴ Decision issued on October 25, 1996, in this proceeding, slip op. at 2.

use is “subject to restoration or reconstruction for railroad purposes.” 16 U.S.C. 1247(d). Consequently, the interim trail user cannot prevent reactivation nor should it be permitted to obstruct reactivation through ransom demands. In turn, the Board’s role in reactivating a rail-banked line is not as limited as its role in issuing the NITU. Where, as here, the interim trail user objects to reactivation or agrees to reactivation only on its financial terms, the Board has an obligation to step forward and insure that the policy goals of Trails Act are achieved and that its own trail use conditions are not subverted.⁵

The AAR acknowledges that not all of the Board’s functions under the Trails Act are ministerial. Citing Docket No. AB-406 (Sub-No. 6X), *Central Kansas Railway Limited Liability Co. – Abandonment Exemption – In Marion and McPherson Counties, KS* (not printed), served May 8, 2001, and December 8, 1999; 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, AAR points out that the Board has the authority to revoke interim trail use if actions by a trail user make restoration of rail service impossible. This authority, however, would be largely meaningless if, as AAR suggests, the Board is without power to interpret the property interest the trail user possess in the corridor and to determine whether under the Trails Act the revocation or termination of that interest is a compensatory

⁵ In *Iowa Power – Const. Exempt. – Council Bluffs, IA*, 8 I.C.C.2d 858 (1990) (“*Iowa Power*”) and *N&W – Aban. St. Mary’s & Minster In Auglaize County, OH*, 9 I.C.C.2d 1015 (1993) (“*N&W*”), the Board’s predecessor explained at length the un-banking process. In *N&W*, the Board specifically addressed the nature of the interest the abandoning carrier retains and the interest the trail user acquires under the Trails Act. GSWR is simply asking the Board to reaffirm its decision in *N&W* and to further clarify that decision in light of the trail user’s demands in this proceeding for compensation. AAR’s contention that the Board is incapable or

event. Under AAR's interpretation, the Board could revoke a NITU on grounds the trail user is in violation of the Trails Act. The abandoning railroad, however, would be placed in the unenviable position of either having to pay the trail user the fair market value of the corridor or engaging in costly and protracted court litigation "to determine if compensation is required and, if so, what amount must be paid to a trail user" because, according to the AAR "the Board does not have such authority under the Trails Act." Petition at 3. Surely, the AAR cannot mean what it says.⁶

The AAR correctly points out that the Trails Act does not specify the amount the trail user must pay the railroad to establish the trail nor does it specify the amount the railroad must pay to the trail user for reactivation. The AAR surmises that, since Congress left the level of compensation for the initial rail banking to the parties, it must have done likewise for the reactivation of rail service. As already explained, AAR's logic is faulty. Because rail banking is voluntary, there was no need for Congress to specify compensation.⁷ The restoration of rail service or the un-banking of a line, however, is mandatory under the Trails Act. Thus, the proper inquiry is not whether Congress specified a level of compensation in the Act, but rather whether

powerless to take such action is wrong and directly at odds with the actions taken by the Board's predecessor in *Iowa Power and N&W*.

⁶ The AAR's articulated position in this proceeding is perplexing. If the AAR is simply seeking to protect from Board scrutiny private agreements its members entered into with trail users, its position is understandable and, for the most part, legally sound. If, however, its intention is to drag all railroads, including the smaller, non-AAR member railroads, into the self-defeating quagmire of protracted and costly litigation, the AAR comments are unwelcome and unwise. AAR's members undoubtedly have the financial wherewithal to make every un-banking a Supreme Court challenge. For the smaller railroads, the legal path suggested by AAR leads to the death knell for the rail banking program.

⁷ It is not possible for Congress or the Board to enforce a legally prescribed level of compensation where one of the parties has an absolute right not to enter into the transaction.

the Act vests in the interim trail user a property interest the withdrawal of which constitutes a compensatory act.

In enacting the Trails Act, Congress could have vested in the trail user a property right the withdrawal of which requires the abandoning railroad to pay the trail user fair market value for the return of the corridor. Congress clearly did not intend such a result since it would have undermined the primary policy objective of the Trails Act. In order for the trail user to be entitled to the fair market value of the corridor, its interests would have to be in fee and in perpetuity. Such perpetual interests, however, would defeat the very purpose of the Act:

“[I]n furtherance of the national policy 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....”

16 U.S.C. 1247 (d). The purpose of the Trails Act is to preserve rail corridors through interim recreational use for future reactivation of rail service and not to create permanent trails.

Furthermore, requiring the abandoning railroad to pay fair market value for the return of the corridor would essentially render the Trails Act a nullity. In most jurisdictions, railroads already have the right of eminent domain which involves the payment of fair market value for a condemned corridor. If the Trails Act required the same level of payment for the return of the corridor, the Act would largely be meaningless, since railroads can already condemn the rail-banked corridors.

The more plausible alternative is that Congress intended any conveyance under the Trails Act to be solely for interim recreational use of the corridor and that whatever interests the trail user may have in the corridor those interests expire or revert upon the reactivation of rail service.

The defeasance of such interim use interests would not be a compensable act. Consequently, there is a rational basis, other than the one suggested by AAR, for Congress not having expressly addressed compensation in the Trails Act.

The central issue in this proceeding – whether the defeasance of a trail user’s interests in a rail-banked corridor is a compensatory act – raises profound policy issues that only the Board, as the administrator of the Act, is competent to address. Since 1983, thousands of miles of former rail lines have been rail banked under the Trails Act. Tens of millions of Federal tax dollars have been appropriated and spent on the preservation of these corridors for future reactivation of rail service. Thousands of adjacent land owners with reversionary interests in rail-banked corridors have been deprived of the enjoyment of their property.

If the abandoning railroad is required to pay fair market value to the trail user as a prerequisite to restoring rail service on a rail-banked line, then the Trails Act is a cruel hoax, since very few, if any, banked lines will ever see rail service again.⁸ Such a result would mean that thousands of miles of former rail lines have been hijacked for permanent trail use, millions of Federal tax dollars appropriated for the preservation of rail corridors have been squandered, and thousands of adjacent land owners have been permanently deprived of their property.

Alternatively, if trail use is deemed to be only an interim recreational use of the corridor with the trail user’s rights in the corridor expiring upon the reactivation of rail service, then the Trails Act will have beneficial meaning and Congress’ stated goal of preserving rail corridors will have been achieved. The central issue in this proceeding is profound and goes to heart of

⁸ Of the thousands of miles of rail lines that have been rail banked since 1983, rail service has been reactivated on less than 10 miles.

the rail-banking program. Therefore, the Board's unique expertise in this area as the administrator of the rail banking program of some 20 years is essential. Following AAR's advice will undoubtedly lead to endless years of costly litigation and produce questionable and conflicting opinions from state and Federal courts that are not well versed in the intricacies of the Trails Act and the rail banking program. The beneficiary of such a course of action will, of course, be the trail users, since reactivation will, at a minimum, be delayed and, more likely, foreclosed given the enormous cost of the litigation suggested by AAR.

The Pioneer Railroads eloquently explain why small railroads cannot financial endure the costly litigation AAR suggests and have any hope of reactivating rail service on short stretches of track that will serve only a limited number of customers. GSWR also appreciates and wholeheartedly endorses the Pioneer Railroads' discussion of the public policy issues underlying the Trails Act and the need for small railroads to have a speedy and economic recourse before the Board when un-banking a corridor.⁹

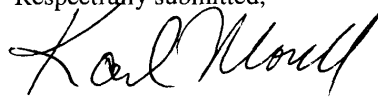
CONCLUSION

The Board is presented with essentially three options. First, the Board can run and hide as AAR suggests. This unattractive option would necessarily embroil railroads seeking to un-bank their former rail lines in endless and costly litigation which would ultimately serve as a strong deterrent to any further attempts at restoration of rail service by small railroads. Second, the Board could interpret the Trails Act as mandating the payment to the interim trail user of the fair

⁹ GSWR does not necessarily agree with the Pioneer Railroads' position regarding compensation. If the remuneration they suggest for improvements on the line is to be voluntary in nature, GSWR has no objection to the Pioneer Railroads' position. If that remuneration is to

market value of the corridor as a prerequisite to the reactivation of rail service. This second option would render the Trails Act a nullity, undermine Congressional intent, and expose the rail banking program as a fraud. Trail use would no longer be interim but permanent since unbanking would become economically unfeasible. The third option is for the Board to revoke the NITU in this proceeding and to declare that the revocation of the NITU and the concomitant termination of the trail user's rights in the Line are not compensatory events under the Trails Act. GSWR respectfully submits that this latter alternative will produce a result that is totally consistent with the terms of the Trails Act, promotes and fosters the laudable policy objectives of the Act, and fulfills the Board's duties and responsibilities under the Trails Act.

Respectfully submitted,



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Dated: April 24, 2003

be mandatory, however, GSWR must respectfully disagree because there is no legal support in the Trails Act for such a position.

CERTIFICATE OF SERVICE

I hereby certify that on April 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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