

SERVICE DATE – JANUARY 31, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36016

ANGELES A. ZORZI, TRUSTEE OF THE ANGELES A. ZORZI LIVING TRUST, AND ANTONIO AJA, JR. AND VIRGINIA D. AJA, TRUSTEES OF THE ANTONIO AJA, JR. TRUST AND THE VIRGINIA D. AJA TRUST—PETITION FOR DECLARATORY ORDER

Digest:¹ Petitioners ask the Board to find that a railroad right-of-way that passes through their land was de facto abandoned no later than 1960. The Board denies the petition for declaratory order, finding that the line has not been abandoned and remains part of the national rail network.

Decided: January 30, 2017

By petition filed on April 18, 2016, Angeles A. Zorzi, Trustee of the Angeles A. Zorzi Living Trust, and Antonio Aja, Jr. and Virginia D. Aja, Trustees of the Antonio Aja, Jr. Trust and the Virginia D. Aja Trust (collectively the Zorzis), request that the Board find that the section of the former Montpelier & Barre Railroad (the Montpelier & Barre) line that passes through the Zorzis' property (also referred to as the former Sabin Farm) in Montpelier, Vt., has been "de facto abandoned" and is no longer subject to the Board's jurisdiction. Pursuant to an agreed-upon procedural schedule, on May 23, 2016, the State of Vermont and the Washington County Railroad Company (collectively Vermont) replied in opposition to the petition, and the Zorzis filed rebuttal arguments on June 13, 2016.

For the reasons discussed below, the petition for declaratory order will be denied.

BACKGROUND

This case involves a rail line that passes through the former Sabin Farm in Montpelier. The rail line was built around 1870 by the Montpelier & Wells River Railroad. The Zorzis state that they currently own the former Sabin Farm, an approximately 100-acre parcel of land with frontage along Barre Street in Montpelier. (Pet. 1.) The line includes an approximately 2,460-foot railbed that passes through the property. (Id.)

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. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

In 1956, the Board's predecessor, the Interstate Commerce Commission (ICC), authorized the then-owner of the line, the Barre & Chelsea Railroad Company (the Barre & Chelsea), to abandon the segment that crosses the Zorzis' property, but imposed a condition that the railroad sell the line to any person who offered to purchase it for continued rail operation. The Montpelier & Barre made a timely offer and purchased the line after receiving ICC approval for the acquisition that same year. (Pet. 2; Vermont Reply 4.) See also Montpelier & Barre R.R. Acquis. & Operation, FD 19564, slip op. at 2-3 (ICC decided Jan. 10, 1957) (granting authority to acquire and operate the line). In 1958, the Montpelier & Barre also acquired a portion of the Central Vermont Railway line that ran parallel to the line it acquired in 1956, but was separated by the Winooski River. (Pet. 3; Vermont Reply 5-6.) See also Montpelier & Barre R.R.—Purchase Barre Branch (Portion)—Cent. Vt. Ry., FD 19936, slip op. at 1, 4 (ICC served Mar. 19, 1958). Specifically, the former Barre & Chelsea line (including the portion that crossed the Zorzis' property) ran along the north side of the river, while the former Central Vermont line started on the north side adjacent to the Barre & Chelsea line, but then crossed and ran along the south side of the river, before re-crossing the river and again running adjacent to the former Barre & Chelsea line. (Vermont Reply 5-6.)² In this decision, we will refer to the line on the north side of the river, which includes the portion that crosses the Zorzis' property, as the Northern Segment, and the line on the south side of the river as the Southern Segment. Soon after these acquisitions, the Montpelier & Barre removed the tracks from the Northern Segment that crossed the Zorzis' property. (Pet. 4; Vermont Reply 5.)

In 1980, following a significant reduction in traffic, the ICC authorized the Montpelier & Barre to abandon its line from Graniteville to Montpelier, including the Southern Segment, but conditioned the abandonment authority on permitting offers of financial assistance from any interested party. (Pet. 5-6.) See also Montpelier & Barre R.R.—Entire Line Aban.—from Graniteville to Montpelier Jct. in Wash. Cty., Vt., AB 202F, slip op. at 7 (ICC served Mar. 12, 1980). However, the ICC did not authorize abandonment on the Northern Segment, which traverses the Zorzis' property. (Pet. 5-6.) The Vermont legislature, intending to “temporarily preserve the existing railroad rights-of-way between Montpelier Junction and Barre Town for ultimate use as a transportation corridor,” authorized the state Secretary of Transportation to purchase the corridor. (Vermont Reply 6.) Accordingly, the State filed a timely offer of financial assistance to purchase the Southern Segment and ultimately, as part of the same transaction, also purchased the Northern Segment including the part that passed through the Zorzis' property. (*Id.* at 6-7; Pet. 6-7.) See also Montpelier & Barre R.R.—Entire Line Aban.—from Graniteville to Montpelier Jct. in Wash. Cty., Vt., AB 202F, slip op. at 1 (ICC served May 22, 1980). According to the State, the ICC authorized the State's lessee, the Washington County Railroad Company, to operate the line as of November 17, 1980. (Vermont Reply 8

² When the ICC approved the acquisition of the Central Vermont Railway parallel tracks by the Montpelier & Barre, the ICC stated that nothing in its decision was “to be construed as expressing an opinion as to whether either of the parallel tracks of the Montpelier [& Barre] . . . may be abandoned without our permission” Montpelier & Barre R.R.—Purchase Barre Branch (Portion)—Cent. Vt. Ry., FD 19936, slip op at 2-4 (ICC served Mar. 19, 1958); (Vermont Reply 4). As the Zorzis note (Pet. 4 n.2), no further records of ICC Docket No. FD 19936 could be located.

(citing Wash. Cty. R.R.—Operations—from Montpelier Jct. to Graniteville, Vt., FD 29536F (ICC served Jan. 2, 1981)).)

According to the Zorzis, they and their predecessors have used the railbed area to the exclusion of all others since the Montpelier & Barre removed the tracks on the Northern Segment in the late 1950s. (Pet. 1-2.) The Zorzis explain that, after they recently received partial approval (presumably from local authorities) to subdivide the property, the State asserted control over the right-of-way and denied the Zorzis the right to access the rail property. (*Id.* at 7.) The Zorzis seek to pursue their alleged rights to the property in state court and ask that the Board terminate controversy by finding that the Northern Segment was de facto abandoned no later than 1960. (*Id.* at 8-9.) They argue that the Montpelier & Barre's actions show that it intended to abandon the line and that the line was severed from the national transportation network when the railroad removed the tracks on the Northern Segment. (*Id.* at 8.)

Vermont counters that the Northern Segment was never abandoned. Vermont also states that, because of the degradation of the two bridges that cross the Winooski River on the former Central Vermont line, Vermont has taken concrete steps to reactivate the Northern Segment that crosses the Zorzis' property. These steps have included realigning the railbed near a bridge crossing and a 2010 federal grant application for funds to restore the tracks on the Northern Segment (a project that Vermont states it is still pursuing even though the grant application was denied). (Vermont Reply 11-15.)

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321³ to issue a declaratory order to terminate a controversy or remove uncertainty. *See Bos. & Me. Corp. v. Town of Ayer*, 330 F.3d 12, 14 n.2 (1st Cir. 2003); *Delegation of Auth.—Declaratory Order Proceedings*, 5 I.C.C.2d 675, 675 (1989). Here, the dispute is over whether the Northern Segment was de facto abandoned over 50 years ago. We conclude that the Northern Segment was never removed from the national rail network and remains within the agency's jurisdiction. As explained below, the agency retains jurisdiction over rail properties until abandonment authority has been sought, granted, and exercised. Accordingly, the Board will decline to issue a declaratory order stating that the Northern Segment has been de facto abandoned.

The Zorzis make two primary arguments regarding the status of the Northern Segment. First, they argue that, to determine whether a railroad abandoned a line, one must look at the railroad's intent and that certain actions, including cessation of operations, salvage of track and track material, and relinquishment of control over the right of way, are generally indicative of an intent to abandon. (Pet. 8.) Pointing to the removal of the rails, historical accounts, the failure of the Montpelier & Barre to include the Northern Segment in its 1980 abandonment application for the Southern Segment, and other factors, they assert that "the evidence overwhelmingly demonstrates that the Montpelier & Barre intended to abandon and, in fact, abandoned, the line as it crosses the Zorzi property." (*Id.* at 4-6, 8.) Second, they argue that severing a line from the

³ Section 1321 of title 49 was previously codified at 49 U.S.C. § 721.

interstate rail system is evidence of de facto abandonment. They state that the railroad “severed the disputed portion of the line from the rail system when it removed the rails.” (*Id.*)

Before addressing the Zorzis’ arguments, it is necessary to first explain the agency’s abandonment process. To “abandon” (i.e., permanently close and discontinue service over) a line of railroad, a railroad must seek advance authority under 49 U.S.C. § 10903, or an exemption from this authority under 49 U.S.C. § 10502.⁴ In general, the statutory requirement of § 10903 applies to all lines of railroad, including both “main” lines and “branch” lines, i.e., lightly-used lines over which carriers provide common carrier service to particular areas, communities, or industrial parks. See generally Kalo Brick, 450 U.S. 311.

A grant of abandonment authority is permissive, and the railroad may decide not to exercise that authority, in which case the line remains part of the national rail network and within the Board’s jurisdiction. Honey Creek R.R.—Pet. for Declaratory Order, FD 34869, slip op. at 3 (STB served June 4, 2008) (citing Hayfield N. R.R. v. Chi. & N.W. Transp. Co., 467 U.S. 622, 633-34 (1984)). As such, for a line of railroad to be abandoned, a carrier must exercise, or “consummate,” its abandonment authority. To consummate, the railroad must “manifest a clear intent to abandon through its statements and actions.” Honey Creek, FD 34869, slip op. at 3. Prior to 1996, the agency depended on a case-by-case evaluation of all the facts and circumstances to see if the railroad showed a clear intention to remove the line from the national rail system and relinquish the property interest, or if instead the record indicated an intent to preserve the right-of-way for future reactivation of rail service. See, e.g., Becker v. STB, 132 F.3d 60, 62 (D.C. Cir. 1997) (“In determining whether a railroad has abandoned a line, one must focus on the railroad’s objective intent. . . . In determining intent, we look at certain indicia: a line is fully abandoned when a certificate of public convenience and necessity . . . is issued and has become effective, tariffs have been canceled and operations have ceased.”) (citations omitted); see also Beaufort R.R.—Modified Rail Certificate, FD 34943, slip op. at 6-7 (STB served Mar. 19, 2008) (citing Norfolk & W. Ry.—Aban. Exemption—between Kokomo & Rochester in Howard, Miami & Fulton Cts., Ind., AB-290 (Sub-No. 168X), slip op. at 6 (STB served May 4, 2005)).

However, under regulations adopted in 1996, railroads are now required to demonstrate their intent to consummate abandonment authority by filing a “notice of consummation” with the

⁴ See also Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co. (Kalo Brick), 450 U.S. 311, 319-23 (1981) (agency has exclusive and plenary authority over the abandonment of rail lines); V&S Ry.—Pet. for Declaratory Order—R.R. Operations in Hutchinson, Kan., FD 35459, slip op. at 14 (STB served July 12, 2012) (“[O]nce a track has become a line of railroad subject to the Board’s jurisdiction, the property remains a line of railroad in the national rail system subject to full agency regulation until the Board grants abandonment authority and that authority is consummated.”); City of Creede, Colo.—Pet. For Declaratory Order, FD 34376, slip op. at 8 (STB served May 3, 2005) (same); Atchison, Topeka & Santa Fe Ry.—Aban. Exemption—in Lyon Cty., Kan., AB 52 (Sub-No. 71X), slip op. at 4 (ICC served June 17, 1991).

agency, typically within one year of being granted abandonment authority.⁵ The purpose of this notice of consummation requirement is to provide certainty and reduce disputes regarding the railroad's intent after receiving abandonment authority. Honey Creek, FD 34869, slip op. at 3; see also Aban. & Discontinuance of Rail Lines & Rail Transp. Under 49 U.S.C. 10903, 1 S.T.B.894, 904 (1996). The filing of a notice of consummation thus signifies that the railroad has exercised the authority granted and intends the property to be removed from the national rail transportation network. See Honey Creek, FD 34869, slip op. at 3; Aban. & Discontinuance of Rail Lines, 1 S.T.B. at 894-95, 904-05; see also 49 C.F.R. §§ 1152.29(e)(2), 1152.24(f), 1152.50(e), 1152.60(e). Conversely, if a railroad fails to file a timely notice of consummation, a new abandonment proceeding would have to be instituted if the railroad wants to abandon the line. In the meantime, the line remains an active line of railroad subject to Board jurisdiction. See 49 C.F.R. § 1152.29(e)(2); Honey Creek, FD 34869, slip op. at 4-5.

Here, Vermont asserts, and the Zorzis do not refute, that no abandonment authority for the Northern Segment was received and consummated. (See Pet. 2, 4, 6; Vermont Reply 14.) Nonetheless, the Zorzis argue that the Board should look to the railroad's actions and intent to determine that the Northern Segment was "de facto" abandoned, pointing to the cessation of operations, salvage, and relinquishment of railroad control over the right-of-way. (Pet. 3, 8.)

The Board's precedent is clear that a railroad cannot abandon a line of railroad without Board authority. Although the Board has on occasion used the term "de facto abandonment," the term has been used sparingly, and de facto abandonments have not been found to occur in the absence of a grant of final Board abandonment authority.⁶ E.g., Honey Creek, FD 34869. In 212 Marin Boulevard—Petition for Declaratory Order, FD 35825, slip op. at 4 (STB served Apr. 24, 2015), responding to an argument that a line was de facto abandoned due to severance from the national rail system, the Board stated that "[r]ailroad lines subject to the Board's licensing requirements remain subject to Board jurisdiction unless and until the Board authorizes the line's abandonment and the abandonment is consummated." In addition, in Missouri Central Railroad—Acquisition & Operation Exemption—Lines of Union Pacific Railroad, FD 33508, slip op. at 7 (STB served Apr. 30, 1998) (citation omitted), the parties argued that a line was de facto abandoned from long disuse, but the Board held that "it is well established that a rail line is not abandoned until this agency authorizes abandonment under 49 U.S.C. 10903 or the exemption provisions at 49 U.S.C. 10502." Lastly, the Board has held that railroads cannot

⁵ When the Board imposes certain types of conditions on an abandonment, the consummation period is extended until 60 days after the satisfaction of those conditions. 49 C.F.R. § 1152.29(e)(2); see, e.g., Sierra Pac. Indus.—Aban. Exemption—in Amador Cty., Cal., AB-512X, slip op. at 1 (STB served Feb. 25, 2005).

⁶ For example, the agency used the term in what would today be considered an adverse abandonment case. See Modern Handcraft, Inc.—Aban. in Jackson Cty., Mo., 363 I.C.C. 969, 969 (1981); see also Mass. Bay Transp. Auth.—Exemption—Discontinuance of Service in Arlington, Bedford, & Lexington, Mass., FD 31269, slip op. at 2 (ICC decided Aug. 22, 1990). In that context, authority from the agency to abandon was found to be required. Modern Handcraft, 363 I.C.C. at 972-73.

bypass the need for abandonment authority by unilaterally removing track. Honey Creek, FD 34869, slip op. at 6.

In this instance, the Board concludes that while the agency once authorized abandonment of the Northern Segment, which passes over the Zorzis' property, the authority was not exercised because the Montpelier & Barre timely purchased the line for continued rail service before abandonment could be consummated. (See Pet. 2, 4, 6; Vermont Reply 14.) No subsequent abandonment authority was ever sought, and as such, the Northern Segment could not have been abandoned and removed from the national rail system, de facto or otherwise. As a result, the Zorzis' reliance on an analysis of the railroad's intent is immaterial. Such an analysis (and the cases cited to by the Zorzis) apply only to instances in which abandonment authority has been granted by the agency, and then, only for abandonments that occurred prior to the notice of consummation requirement that was enacted in 1996.

The Zorzis, relying on decisions in RLTD Railway—Abandonment Exemption—in Leelanau County, Mich. (RLTD I), AB 457X (STB served Aug. 23, 1996), reconsideration denied (RLTD II) 2 S.T.B. 685 (1997), aff'd sub nom. RLTD Railway v. STB (RLTD III), 166 F.3d 808 (6th Cir. 1999), also argue that severing a line from the interstate rail system is evidence of abandonment and that the line over their property was, in fact, severed from the system when the railroad removed the rails. (Pet. 8.) However, contrary to the Zorzis' claim, the RLTD decisions do not stand for the proposition that a de facto abandonment occurs whenever a rail line has been physically severed from the interstate rail system. In that abandonment proceeding, which commenced prior to the agency's adoption of the 1996 consummation notice requirement, the Board was faced with the question of whether it continued to have jurisdiction over a line of rail that several parties claimed had been abandoned pursuant to agency authority granted 20 years earlier. In RLTD I, the agency looked to a railroad's intent to determine whether an abandonment was consummated, and, after a review of the railroad's actions and other indicia, concluded that the abandonment had been consummated. See RLTD I, AB 457X, slip op. at 2-3. On reconsideration, the Board specified six factors that were the basis of its conclusion that the railroad intended to consummate abandonment of the line, only one of which directly involved severance of the line from the national rail network. See also RLTD II, 2 S.T.B. at 687-88. Even more significantly, in the RLTD proceeding (unlike here), the agency had already authorized abandonment. Thus, the RLTD proceeding was a case in which the Board, prior to the existence of the notice of consummation requirement, had to determine if the railroad's actions indicated an intent to consummate its abandonment authority. The fact that the line was disconnected from the rail network was just one of the factors the Board used to determine the railroad's intent. In contrast, as noted, no abandonment authority was issued to Montpelier & Barre for the Northern Segment, obviating the need for such an analysis.

Moreover, the Board notes that the Zorzis have not conclusively shown that the Northern Segment was in fact severed. Removal of tracks alone does not mean that a line is severed from the national rail network. See Honey Creek, FD 34869, slip op. at 6. The fact that the State has

sought a grant to relay the track also indicates that the line is not severed.⁷ See, e.g., RLTD II, slip op. at 2 (explaining that a line is severed from the national rail network when another line connecting it with the interstate rail network has been abandoned, creating an inability to reach a main line).

For these reasons, the Board will deny the petition for declaratory order seeking a finding that the Northern Segment was de facto abandoned.⁸

It is ordered:

1. The Zorzis' petition for declaratory order is denied.
2. This decision is effective on its service date.

By the Board, Acting Chairman Begeman, Vice Chairman Miller, and Commissioner Elliott.

⁷ According to Vermont, the State purchased the line to preserve the existing rights-of-way in 1980, replaced a highway bridge and moved the former railbed to be available for future use in the early 2000s, applied for a grant to relay the tracks to the north of the river in 2010, and currently sees a continued need for the corridor. (See Vermont Reply 6, 11-14, 23-24.)

⁸ Because we find that the line was not de facto abandoned, we do not need to reach the argument that it was abandoned no later than 1960.