

BEFORE THE
SURFACE TRANSPORTATION BOARD

AB-290 (Sub-No. 404X)

ENTERED
Office of Proceedings
January 9, 2023
Part of
Public Record

NORFOLK SOUTHERN RAILWAY COMPANY
- ABANDONMENT EXEMPTION -
IN THE CITY OF GREENSBORO, NORTH CAROLINA

CITY OF GREENSBORO REBUTTAL TO NORFOLK SOUTHERN REPLY

The City of Greensboro, North Carolina (“Greensboro”) respectfully submits to the Surface Transportation Board (“STB” and “Board”) its rebuttal to the Norfolk Southern Railway Company (“NSR”) reply in opposition to its petition for clarification in the above-captioned proceeding. On December 7, 2022, Greensboro filed its petition for clarification from the STB that approximately 264’ of railroad right-of-way subject to the Notice of Interim Trail Use (“NITU”) in this proceeding may be narrowed to at most 50 feet in width in connection with a land sale to Kotis Properties (“Kotis”) to develop an important local grocery store that could not proceed without this transaction.

Greensboro filed its petition in accordance with the recent STB guidance that when a trail use sponsor proposes to narrow the right-of-way held under the National Trails Systems Act (“Trails Act”), 16 U.S.C. § 1247(d), and a certificate or notice of interim trail use, the sponsor must demonstrate “with adequate specificity that the remaining width of the right-of-way would be sufficient to support the reactivation of rail service.” *Missouri Pac. R.R. Co. – Abandonment Exemption – In Red River and Bowie Counties, Tex. (“Missouri Pac.”)*, AB-3 (Sub-No. 137X), slip op. at 4 (STB served July 29, 2021). The Board stated “[i]n such cases, the Board will [] issue a decision clarifying that the width of the right-of-way that the trail sponsor has demonstrated is not needed to reactivate rail service is no longer part of the NITU/CITU.” *Id.*

Greensboro clearly demonstrated in the Verified Statement of James R. Blaze (“Blaze V.S.”) attached to its petition that the proposed remaining right-of-way that would continue to be subject to the NITU is sufficient to permit the future reestablishment of rail service. NSR, who sold the rail line at issue in this proceeding to Greensboro, did not dispute this conclusion in its reply.

Instead, NSR argued that Greensboro’s petition for clarification is the inappropriate method to seek such an outcome when the rail carrier with the residual common carrier obligation objects to the land sale in the right-of-way even though the sale does not impact its ability to reactive rail service. NSR argues that an adverse abandonment application is the proper method despite the recent holding in *Missouri Pac.* NSR claims that because it opposes the petition for clarification, the holding in this recent case should not apply unless the incumbent railroad is in support of the request. NSR does concede as does Greensboro that “[t]here is no dispute over the basic facts in this proceeding.” NSR Reply at 2.

While the facts are not in dispute, it is worthwhile to review that on August 26, 2019, NSR filed a verified notice of exemption under 49 C.F.R. part 1152 subpart F—Exempt Abandonments to abandon this approximately 3.1-mile rail line in Greensboro at issue, extending between milepost CF-65.6 and milepost CF-68.7 (the “Line”). Notice of the exemption was served and published in the Federal Register on September 13, 2019 (84 Fed. Reg. 48,383).

A NITU was issued by the STB on October 10, 2019, thereby permitting the parties to negotiate an interim trail use/rail banking agreement for the right-of-way during the 180-day period prescribed by the Board. If the parties did not reach agreement within 180 days, NSR would have been permitted to fully abandon the Line. *See* 49 C.F.R. § 1152.29(d).

On November 8, 2019, Greensboro and NSR submitted to the Board a jointly filed notice pursuant to 49 CFR § 1152.29(h), confirming that the parties had entered an interim trail use and railbanking agreement for the Line. In the interim trail use/rail banking agreement reached between the parties, NSR had to require, in accordance with the NITU, Greensboro to assume, for the term of the agreement, full responsibility for managing the right-of-way, among other things. On November 9, 2019, NSR conveyed the Line to Greensboro by non-warranty deed subject to rail reactivation in accordance with Section 8(d) of the Trails Act, all applicable STB implementing regulations, and the above-captioned STB abandonment proceeding. (See Exhibit 1 of Greensboro Pet.) Greensboro paid a large sum of money to purchase the Line. After the sale, NSR removed all remaining track, ties, and ballast in the right-of-way of the Line.

The Line is called the Atlantic & Yadkin rail right-of-way. Existing encroachments were surveyed by Greensboro in 2019 (E/I Survey G-1316 A-BB) ahead of the transfer from NSR. (A detailed map of the A&Y Greenway Survey Plat is attached to the Greensboro Petition as Exhibit 1 in the Non-Warranty Deed, Exhibit B.) The claimed corridor width is 100 feet from center line based on documented rail easements rather than real property ownership and varies throughout the corridor. Existing encroachments when Greensboro obtained the Line according to the survey consisted of numerous structures, utility easements, public streets and bridges, private drives, and private parking areas. Documented vertical encroachments were located as close as 30 feet to the center line of the rail right-of-way. Some encroachments are documented by lease, easement, or letter of agreement while others have no known documentation. (See Exhibit 1, Exhibit B, of Greensboro Pet.)¹

¹ While in its reply NS claims it is concerned about its rail reactivation rights as the basis for its opposition, the numerous encroachments throughout the Line agreed to by NSR seem to

Despite NSR's proposed abandonment of the Line, sale of the Line to Greensboro, removal of the track on the Line, and existing encroachments throughout the Line, NSR now opposes this petition on the apparent ground that it is concerned about its residual common carrier obligation under the Trails Act because of this proposed minor encroachment.² It argues solely that Greensboro has chosen the procedurally improper route here (because NSR's opposition distinguishes this case from *Missouri Pac.*) and should have sought an adverse abandonment instead of this petition for clarification.

As noted, Greensboro carefully followed the guidance from the STB in *Missouri Pac.* by seeking clarification from the STB that approximately 264' of railroad right-of-way subject to the NITU in this proceeding may be narrowed to at most 50 feet and would still allow rail reactivation on the Line if ever needed. Therefore, Greensboro's petition should be granted based on these undisputed facts and this recent holding alone.

With respect to its argument that its opposition somehow changes things, NSR appears to conflate the requirements under the Trails Act and the Interstate Commerce Commission Termination Act ("ICCTA"). It applies an overly strict reading of the requirements for

demonstrate otherwise. In fact, it is evident that Greensboro during the time of its ownership is the superior steward of this Line's future capability to be used for freight service as it has not proposed or agreed to any encroachments except for the one at issue in this petition.

² There is no dispute that the STB under the Trails Act must "preserve established railroad rights-of-way for future reactivation of rail service" by prohibiting abandonment where a trail sponsor offers to assume managerial, tax, and legal liability for the right-of-way for use in the interim as a trail. See 16 U.S.C. § 1247(d); *Citizens Against Rails to Trails v. STB*, 267 F. 3d 1144, 1149-50 (D. C. Cir. 2001). The STB has emphasized that the right to reactivate a rail-banked line is not an exclusive right. See, e. g. , *Georgia Great Southern*; *Iowa Power-Const. Exempt. -Council Bluffs, Iowa*, 8 I. C. C. 2d 858, 866-67 (1990); *King County, Wash. -Acquis. Exemption-BNSF Ry.*, FD 35148 (STB served Sept. 18, 2009). While NSR may have a contractual right to reactivate rail service on the Line, any person can reactivate rail service on the Line if it demonstrates that it is a bona fide petitioner. See *King County, supra*.

abandonment under the ICCTA at 49 U.S.C. § 10903 but ignores the concurrent applicability of the Trails Act to the matter. In *Missouri Pac.*, the Board chose to harmonize these two federal statutes as it is required to do³, thereby ensuring Congress’s intent in both these statutes is followed by requiring a trail user to petition for clarification of its NITU.

This logical process now required by the Board allows the two purposes behind the Trails Act to be satisfied – the trail on the Line will continue to be available and rail reactivation will not be foreclosed by this land sale.⁴ It also permits the purposes behind the ICCTA to be

³ When another *federal* law potentially conflicts with the purposes of § 10501(b), the Board or a court “must strive to harmonize the two laws, giving effect to both laws if possible.” *Ass’n of Am. R.Rs. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097-98 (9th Cir. 2010). *See also Joint Pet. for Declaratory Order—Bos. & Me. Corp.*, 5 S.T.B. 500, 509 n.28 (explaining that two federal statutes should be harmonized unless there is a “positive repugnancy” or “irreconcilable conflict” between them), *recons. denied* 5 S.T.B. 1041 (2001). *Assoc. of Amer. Railroads – Pet. for Declaratory Order*, FD 36369 (STB served Dec. 30, 2020).

⁴ Two congressional purposes are evident under the Trails Act. First, Congress intended to “encourage the development of additional trails” and to “assist recreation[al] users by providing opportunities for trail use on an interim basis.” H.R.Rep., at 8, 9; S.Rep., at 9, 10 (same), U.S.Code Cong. & Admin.News 1983, p. 119; *see also* 16 U.S.C. § 1241(a) (Trails Act “promote [s] the preservation of, public access to, travel within, and enjoyment and appreciation of the open-air, outdoor areas and historic resources of the Nation”). Second, Congress intended “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.” H.R.Rep., at 8; S.Rep., at 9, U.S.Code Cong. & Admin.News 1983, p. 119; *see also* 16 U.S.C. § 1247(d). *Presault v. I.C.C.*, 494 U.S. 1, 17 (1990). Section 1247(d) of the Trails Act requires the Board to “condition... abandonment or discontinuances” in a manner consistent with the Trails Act. It is the fundamental purpose of the Trails Act to preserve rail rights-of-way based on property interests that are less than fee simple. *See Vermont & VT Ry—Discontinuance—Crittenden Co., VT*, 3 I.C.C.2d 903 (1987). Application of the Trails Act averts the break-up of a rail corridor that is held by a property interest that is less than fee simple by statutorily precluding the vesting of reversionary property interests while the corridor is used for interim trail use or returned to active rail service. *See* H.R.Rep. No. 98–28, 98th Cong. at 8–9 (1983), reprinted in (1983) U.S.Code Cong. & Ad.News 119–120. *Boston and Maine Corp. – Exemption – Discon. of Service in Essex County, MA*, AB-32 (Sub-No. 37X) (ICC decided June 20, 1988).

satisfied.⁵ Obviously, there will be no adverse effect on rail interstate commerce by not using the abandonment provisions under the ICCTA here for numerous reasons. The STB will still have full regulatory authority over the Line because the Trails Act does not allow a party to completely ignore the abandonment provisions in the ICCTA when needed.⁶ It simply places the Line in a suspended state as a trail subject to rail reactivation. If a party wants to reactivate the rail line, it can seek such authority from the Board. If a party would like to take the Line out of the purview of the Trails Act and the ICCTA, it could seek to abandon the Line at the appropriate time.

However, Greensboro does not seek to reactivate rail service (nor does NSR), and it does not seek to abandon the Line. It wants to maintain the present state of the Line as a trail but remove a small sliver of the right-of-way that it owns which will have no impact on rail reactivation. Greensboro simply is following the guidance of the Board and the intent of Congress by adhering to the policy behind the Trails Act but maintaining the purposes behind the

⁵ Effective January 1, 1996, the ICCTA abolished the Interstate Commerce Commission and created a new STB to regulate, *inter alia*, rail transportation in the United States. 49 U.S.C. § 10501(a)(1); *Friberg v. Kansas City Southern Ry. Co.*, 267 F.3d 439, 442 (5th Cir. 2001). The purpose of the ICCTA is to “build[] on the deregulatory policies that have promoted growth and stability in the surface transportation sector.” H.R.Rep. No. 104–311, at 93 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 805. With respect to rail transportation, the ICCTA seeks to implement a “[f]ederal scheme of minimal regulation for this intrinsically interstate form of transportation,” and to retain only regulations “that are necessary to maintain a ‘safety net’ or ‘backstop’ of remedies to address problems of rates, access to facilities, and industry restructuring.” *Id.* at 93, 96, 1995 U.S.C.C.A.N. at 805, 808; *see also* 49 U.S.C. § 10101(2).

⁶ In some respects, this situation regarding a CITU/NITU is comparable to a discontinuance of service under 49 U.S.C. § 10903, *et seq.* Under discontinuance authority or an exemption, a carrier is relieved of its common carrier obligation to provide service. However, it still retains the line and the residual common carrier obligation, and, as a consequence, it may not abandon or transfer the line without STB approval or an exemption. *Norfolk and Western Ry. Co. – Aban. Between St. Marys and Minster in Auglaize County, OH*, 9 I.C.C.2d 1015 (1993).

ICCTA if rail service is needed in the future. In other words, the STB provided the correct path for dealing with these situations in *Missouri Pac.*, and the opposition of NSR to the land sale is irrelevant.⁷ Consequently, Greensboro's petition should be granted.

Respectfully submitted,

/s/ Daniel R. Elliott

Daniel R. Elliott
GKG Law, P.C.
1055 Thomas Jefferson St., NW
Suite 620
Washington, DC 20007
(202) 342-5248
delliott@gkglaw.com

Attorney for City of Greensboro, NC

Dated: January 9, 2023

⁷ The Trails Act and its implementing regulations require trail sponsors to assume “full responsibility” for managing the right-of-way and for any legal liability arising out of the right-of-way. 49 C.F.R. § 1152.29(a)(2). As part of this responsibility, a trail sponsor must also make assurances that the right-of-way is kept available for “future reconstruction and reactivation ... for rail service.” *Id.* § 1152.29(a)(3). In order to meet these requirements, it has been determined that the Trails Act and its implementing regulations require that a trail sponsor must have the same control over the entire right-of-way corridor that would be held by a railroad in order that the trail sponsor can ensure that any and all uses made of the right-of-way are consistent with the restoration of rail service. *Illig v. U.S.*, Fed. Cl. 619, 631 (2022).

Certificate of Service

I certify that I have, on this 9th day of January 2023, served by email copies of the foregoing document on all parties of record in this proceeding.

/s/ Daniel R Elliott
Daniel R. Elliott