

SERVICE DATE - AUGUST 30, 2016

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1242

HARTWELL FIRST UNITED METHODIST CHURCH—ADVERSE ABANDONMENT AND
DISCONTINUANCE—HARTWELL RAILROAD COMPANY AND THE GREAT WALTON
RAILROAD COMPANY, INC., IN HART COUNTY, GA.

Digest:¹ This decision waives certain requirements, such as revenue and cost data, that normally pertain to discontinuance and abandonment applications, but would be difficult or impossible for Hartwell First United Methodist Church of Hart County, Ga., to comply with when it files an application for adverse abandonment and discontinuance.

Decided: August 26, 2016

In a petition filed on May 26, 2016, Hartwell First United Methodist Church (Hartwell First or Petitioner) of Hart County, Ga., seeks waiver of certain Board regulations and exemption from related statutory provisions in connection with the filing of a third-party, or “adverse,” application for abandonment and discontinuance authority regarding a rail line owned by Hartwell Railroad Company (HRC), and over which The Great Walton Railroad Company, Inc. (GWRC) has trackage rights. As discussed below, the Board partially grants Hartwell First’s motion for waivers and exemptions.

BACKGROUND

The Line is the stub end of a line of railroad between M.P. 0.0 at Bowersville, Ga., and M.P. 10.5 at Hartwell, Ga. According to Hartwell First, predecessors of HRC built the Line in the 1870s, and HRC granted GWRC trackage rights in 1990. The portion of line at issue here consists of approximately 0.25 miles of railroad tracks and associated right of way between Athens Street and the end of the line at South Forest Avenue, in Hartwell, Hart County, Ga. (the Line). Hartwell First currently owns property on both sides of the Line that it wishes to develop.

Petitioner states that there has been no service on the Line for more than 20 years, and that the grade crossings at two streets have either been removed or paved over. Hartwell First contends that there is no longer any demand for rail service or any opportunities for new service but that HRC and GWRC have refused Hartwell First’s request that HRC voluntarily abandon

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).

the Line and that GWRC discontinue service over it. Accordingly, Hartwell First states that it intends to seek removal of Board authority over the Line by filing an application for adverse abandonment and discontinuance authority so that it can then seek to quiet title to the right-of-way that splits its property.

In anticipation of filing its application, Hartwell First seeks waivers and exemptions from some of the statutory and regulatory requirements of such a filing. Hartwell First argues that the Board has routinely granted such waivers and exemptions in adverse abandonment and discontinuance proceedings. The Petitioner states that much of the information required by the Board in abandonment and discontinuance proceedings is inapplicable or irrelevant to an application for adverse discontinuance or abandonment. Furthermore, Hartwell First states that it does not possess much of the required information because it has never directly owned, or operated over, the Line.

On June 15, 2016, HRC and GWRC submitted a letter advising the Board that they do not oppose Hartwell First's request for waivers and exemptions to the extent the request is consistent with Board precedent and procedure. However, they dispute Hartwell First's claim that there has been no freight service for over 20 years, and state that they intend to oppose Hartwell First's adverse abandonment application.

Hartwell First's request for waivers and exemptions will be granted to the extent discussed below.

DISCUSSION AND CONCLUSIONS

The Board's regulations require that abandonment and discontinuance applications conform to the requirements of 49 C.F.R. pt. 1152 subpart C. In appropriate circumstances, however, such as the filing of a third-party or adverse abandonment or discontinuance application, the Board may waive inapplicable and unneeded regulations and grant exemptions as appropriate from statutory provisions.²

System Diagram Map. Hartwell First requests an exemption from 49 U.S.C. § 10903(c), which requires carriers to maintain a system diagram map (SDM) and to identify on that map rail lines planned for abandonment or discontinuance of service. Hartwell First also seeks a waiver of 49 C.F.R. § 1152.22(a)(5), which requires reference to inclusion of the rail line subject to the discontinuance or abandonment request on the carrier's SDM or narrative, the date on which the line was first listed there for abandonment or discontinuance, and a copy of the line description that accompanies the carrier's map. In support, Hartwell First argues that these requirements are

² See Riverview Trenton R.R.—Adverse Aban.—in Wayne Cty., Mich. (Riverview), AB 1230 (STB served Apr. 10, 2015); Lackawaxen-Honesdale Shippers Ass'n—Adverse Discontinuance of Operating Auth.—in Wayne & Pike Ctys., Pa. (Lackawaxen), AB 1110 (STB served Jan. 23, 2014).

inapplicable, because Hartwell First is not the carrier and does not maintain or have access to an SDM. Hartwell First states, however, that it will file with its application a detailed map of the Line, as required under 49 C.F.R. § 1152.22(a)(4).

We will exempt Petitioner from the requirements of 49 U.S.C. § 10903(c) and waive 49 C.F.R. § 1152.22(a)(5). Exemption and waiver of the system diagram map requirements are customary in adverse proceedings, because the applicant generally does not have access to the SDM, as is the case here. See Paulsboro Ref. Co.—Adverse Aban.—in Gloucester Cty., N.J. (Paulsboro), AB 1095 (Sub-No. 1), slip op. at 3 (STB served July 26, 2012).

Notice of Intent. Hartwell First asks for waiver of the requirements of 49 C.F.R. § 1152.21 to permit it to deviate from the prescribed form of notice as set forth in the regulations. Hartwell First argues that the form of the notice is inappropriate for adverse abandonment and discontinuance proceedings, particularly in light of the exemptions and waivers it requests. Instead, it proposes to use the alternative language in Exhibit B of its petition.

The Board has approved form changes in other adverse abandonment cases when the substitute notice is in substantial compliance with the requirements of 49 C.F.R. § 1152.21. See Norfolk S. Ry.—Adverse Aban.—St. Joseph Cty., Ind. (St. Joseph), AB 290 (Sub-No. 286), slip op. at 3 (STB served Oct. 26, 2006). Hartwell First's amended notice of intent is in substantial compliance with the requirements of 49 C.F.R. § 1152.21, and the proposed changes are reasonable in the context of Hartwell First's forthcoming application. However, HRC and GWRC dispute language in the amended notice that states there has been no rail traffic on the Line for 20 years. Accordingly, we will require that Hartwell First amend the following language "The reason for the proposed adverse abandonment is that the Line has not been used to provide rail service for over 20 years" to say "Applicant claims that the Line has not been used to provide rail service for over 20 years." The Board has required adjustments to substitute notices in other proceedings. See Paulsboro, slip op. at 3. We will grant Hartwell First's request subject to this change.

Service on the Board. Hartwell First requests an exemption from 49 C.F.R. § 1152.20(a)(1), which requires applicants to serve a copy of the notice on the Board by certified letter. Hartwell First argues that it should be sufficient for it to file a copy of the notice of intent with the Board by electronic or other delivery after a proceeding has been instituted. We will grant this request. See Lackawaxen, slip op. at 4.

Service on Significant Users. Hartwell First requests a waiver of 49 C.F.R. § 1152.20(a)(2)(i), which requires copies of the notice be served on significant users of the Line. Hartwell First argues that there are no current shippers on the Line and that there have not been any for over 20 years. Although Hartwell First argues that notice on users should not be required, it says that it will serve a copy of the notice on HRC and GWRC, the carriers with authority on the Line and on the connecting rail line. As noted, HRC and GWRC dispute Hartwell First's claim that there has been no traffic on the Line for over 20 years. Accordingly,

we will deny this waiver request. However, we will require HRC and/or GWRC to identify any significant shippers and provide this information to Hartwell First. Hartwell First is required to then serve copies of the notice on any such shippers.

Service on Amtrak. Hartwell First asks for a waiver of 49 C.F.R. § 1152.20(a)(2)(x), which requires service on Amtrak. Hartwell First argues that service on Amtrak is not required, because Amtrak does not operate on the Line. We will grant this request. See Paulsboro, slip op. at 3.

Service on the Headquarters of Labor Organizations. Hartwell First believes that the employees of HRC and GWRC are not represented by labor organizations, and accordingly, that service on the headquarters of labor organizations should not be required under 49 C.F.R. § 1152.20(a)(2)(xii). However, Hartwell First does not support its assertion that the employees of HRC and GWRC are not represented by labor organizations. Accordingly, we will deny this request, but require HRC and/or GWRC to identify any duly certified labor organizations that represent their employees. Hartwell First is required to then serve its notice on any such labor organizations. In addition, Hartwell First shall serve its notice of intent on the U.S. Railroad Retirement Board. See Lackawaxen, slip op. at 4.

Posting at Agency Stations or Terminals. Hartwell First requests an exemption from 49 U.S.C. § 10903(a)(3), because it does not believe that there are any agency stations or terminals on the Line to be abandoned. As HRC and GWRC do not oppose this request, we will grant it. See St. Joseph, slip op. at 3.

Line Attributes. Hartwell First seeks a waiver of 49 C.F.R. § 1152.22(b)-(e), which require that discontinuance and abandonment applications include information regarding the condition of properties, service performed, attributable revenue and cost data, and rural and community impact. Hartwell First claims that it lacks sufficient information to provide adequately the information required by those sections. Because this information is typically not available to an adverse abandonment or discontinuance applicant, we will grant these waiver requests. See St. Joseph, slip op. at 5.

Federal Register Notice. Hartwell First requests waiver of the requirements of 49 C.F.R. § 1152.22(i), which prescribes the wording for the draft Federal Register notice. Hartwell First proposes to use the alternative language set forth in Exhibit C. We will grant this request, because we find that the substitute notice is in substantial compliance with the requirements of 49 C.F.R. § 1152.22(i). See Paulsboro, slip op. at 6.

Offers of Financial Assistance. Hartwell First asks for exemption from 49 U.S.C. § 10904 and waiver of the corresponding regulations at 49 C.F.R. § 1152.27, which govern offers of financial assistance (OFAs) to continue rail service. We will grant this request. The effect of granting an adverse abandonment is that the Board's primary jurisdiction is withdrawn, thus permitting state, local or other Federal law to apply where there is no overriding Federal

interest in interstate commerce. See St. Joseph, slip op. at 6. If the Board ultimately finds that the public convenience and necessity require or permit withdrawal of its regulatory authority in this adverse abandonment proceeding, it would be fundamentally inconsistent with the rationale underlying the adverse abandonment sought here to provide for further Board regulation under the OFA provisions of § 10904.³ For the same reasons, the Board will grant a corresponding waiver of 49 C.F.R. § 1152.27. See Paulsboro, slip op. at 6.

Public Use. Similarly, Hartwell First requests an exemption from 49 U.S.C. § 10905 and waiver of 49 C.F.R. § 1152.28, regarding public use conditions. We will also grant this request. Again, should the Board decide to withdraw its primary jurisdiction over the Line, it should not then allow its jurisdiction to be invoked to impose a public use condition. See Paulsboro, slip op. at 6.

Trails Use. Although Hartwell First contends that interim trail use is inappropriate where it would frustrate the purposes of the proposed abandonment, it acknowledges that the Board often defers a decision on whether to waive the interim trail use provisions found at 49 C.F.R. § 1152.29. As the Board has done in the past, we will not rule on Hartwell First's request at this time. This issue can be addressed, if need be, in a later decision. See Riverview, slip op. at 6.

Time Limit on Abandonment Authority. Hartwell First asks the Board to waive the requirement under 49 C.F.R. § 1152.29(e)(2) that the abandonment be consummated within one year after the abandonment application is granted. We will grant this request. The regulation presupposes that the applicant controls the timing of consummation once the Board issues a final decision authorizing abandonment. This is not the case in a third-party abandonment because, as Hartwell First notes, third parties would likely need to invoke other legal processes to obtain control of the right-of-way property. See Riverview, slip op. at 5.

Exemption Criteria. As indicated, Hartwell First seeks exemptions from the following statutory provisions corresponding to Board regulations previously discussed: 49 U.S.C. § 10903(c) (SDMs); 49 U.S.C. § 10903(a)(3) (Service of Notice); 49 U.S.C. § 10903(d) (Line Attributes); 49 U.S.C. § 10904 (OFAs); and 49 U.S.C. § 10905 (Public Use). We will grant these related exemptions because full compliance with the Interstate Commerce Act is not necessary here to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101. Rather, these exemptions would provide Hartwell First with a reasonable opportunity to make its case that there is no overriding present or future public need for service on the Line. Exemptions would promote the RTP by eliminating unnecessary procedures and thus would expedite regulatory decisions (§ 10101(2)) and foster sound economic conditions in transportation (§ 10101(9)). Other aspects of the RTP would not be adversely affected. Additionally,

³ Hartwell First also requests a waiver of the filing fees for this petition and its forthcoming application. That request will be addressed by the Board's Chief, Section of Administration, Office of Proceedings, the agency official delegated the authority to rule on filing fee waiver requests.

application of the statutory provisions from which we are granting exemptions is not necessary to protect shippers from an abuse of market power.

It is ordered:

1. The petition for waivers and exemptions is granted to the extent discussed above.
2. This decision is effective on its date of service.

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