

June 28, 2019

Surface Transportation Board
395 E. Street, S.W.,
Washington, D.C. 20423-0001

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Office of Proceedings
June 28, 2019
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Public Record

Re: Docket No. EP 749 (Sub-No. 1)
Docket No. EP 753
46966 EB (Service Date: June 6, 2019)
Public Comments
(Limiting Extensions of Trail Use Negotiating Periods)

Dear Sirs/Madam,

The undersigned are engaged in representing landowners in so-called “Rails-to-Trails” cases. In reading the above captioned STB decision concerning the proposed administrative rule-making, it has come to our attention that the proposed rule, as preliminarily drafted, does not address a necessary corollary concern to extensions of temporary and permanent trail use negotiating periods. That is the subject matter of railroads, which originally consent to railbanking, only for the subsequently-issued NITU to ultimately expire, or be vacated by an authorized trail operator, then resulting in a railroad’s subsequent inordinate delay or refusal to consummate the abandonment it was authorized by 49 C.F.R. § 1152.29(e) and the agency-issued Notice of Interim Trail Use *or Abandonment*. (Emphasis added).

The issue was properly framed in a Court of Federal Claims case styled, *Farmers Coop. v. United States*, 98 Fed.Cl. 797, (2011), *recons’d denied*, 100 Fed.Cl. 579, (2011)., when a railroad consented to four separate NITUs – all of which were either vacated or expired. The railroad never exercised the abandonment authority ordered in the NITU after the vacation or expiration of the NITUs. See 49 C.F.R. § 1152.29(d). ¹ Instead, the railroad did not seek consummation of

¹ 49 C.F.R. 1152.29(d)(1) provides,

(d) Exempt abandonment proceedings.

(1) If continued rail service does not occur under 49 U.S.C. 10904 and 1152.27 and a railroad agrees to negotiate an interim trail use/rail banking agreement, then the Board will issue a Notice of Interim Trail Use or Abandonment (NITU) to the railroad and to the interim trail sponsor for the portion of the right-of-way as to which both parties are willing to negotiate. *The NITU will:* Permit the railroad to discontinue service, cancel any applicable tariffs, and salvage track and materials, consistent with interim trail use and rail banking, as long as it is consistent with any other Board order, 30 days after the date the NITU is issued; and *permit the railroad to fully abandon the line if no agreement is reached 180 days after the NITU is issued, subject to appropriate conditions, including labor protection and environmental matters.*

abandonment from the STB after any of the four NITUs.² That is, the railroad did not consummate abandonment within one year of any of the NITUs,³ nor instituted any “new proceeding” to abandon the line thereafter. *Id.* To the present day, nearly eight years later, the railroad has never consummated abandonment.⁴

This Board has acted consistently in the application and interpretation of consummation of abandonment by the railroad. Obviously, abandonment primarily involves the “ ‘intent’ of the railroad – as evidenced by a spectrum of facts varying as appropriate from case to case – that should be the pivotal issue.” *Birt v. Surface Transp. Bd.*, 90 F.3rd 580, 585 (1996). While “cessation of operations, cancellation of tariffs, salvage of the track and track materials, and relinquishment of control over the right-of-way” are factors evidencing abandonment, and the STB NITU includes abandonment authority, such authority “once granted, is permissive, rather than mandatory.” *Wheeler v. Material Recovery of Erie*, 2009 WL 2957795 (W.D.Pa.2009), *aff’d on other grounds*, 398 Fed.Appx. 786 (3rd Cir.2010); *Lucas v. Township of Bethel*, 319 F.3d. 595, 603, (3rd Cir.2003), n. 11 (abandonment conditional unless consummated); *Birt, Id.*, 90 F.3d at 589 (“...an effective certificate of abandonment confers permissive authority on the railroad; until the railroad actually consummates abandonment, none occurs, and the Commission retains jurisdiction over the railroad's right-of-way.”); see also this Decision, n. 9.⁵ Abandonment under state law may vary.

(Emphasis added).

² 49 C.F.R. § 1152.29(e)(2) (“A railroad that receives authority from the Board to abandon a line [in a regulated abandonment proceeding under 49 U.S.C. 10903, or by individual or class exemption issued under 49 U.S.C. 10502] shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line [e.g., discontinued operations, salvaged the track, canceled tariffs, and intends that the property be removed from the interstate rail network]”). (Emphasis added).

³ See further, 49 C.F.R. 1152.29(e)(2) (“If, after 1 year from the date of service of a decision permitting abandonment, consummation has not been effected by the railroad's filing of a notice of consummation, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. In that event, a new proceeding would have to be instituted if the railroad wants to abandon the line.”)

⁴ See *Comments*, Marc Elster, AB-853 (Sub-No. 1X)(May 29, 2019; June 6, 2019); EP 749 1, see *Comments*, Marc Elster (June 18, 2019); *Farmers Coop. cases, Id.*

⁵ “The Board retains jurisdiction over a rail line throughout the interim trail use negotiating period, any period of railbanking/interim trail use, and any period during which rail service is restored. The Board’s jurisdiction is terminated once the CITU/NITU is no longer in effect and the railroad has lawfully consummated its abandonment authority by filing a notice of consummation under 49 C.F.R. § 1152.29(e)(2). See § 1247(d); *Hayfield N. R.R. v. Chi. & N. W. Transp. Co.*, 467 U.S. 622, 633 (1984). Upon such occurrence, the right-of-way will revert to any reversionary landowner. *Preseault*, 494 U.S. at 5, 8.”

This background reveals the problems associated with expiration/vacation of an NITU and consummation of abandonment extensions glaringly not addressed in the proposed rulemaking. While the referenced STB decision clearly states that the agency “retains jurisdiction over a rail line” in three discrete situations; (e.g. (a) “throughout the interim trail use negotiating period;” (b) “any period of railbanking/interim trail use;” (c) “any period during which rail service is restored.”) – it notably misses a fourth area of STB jurisdiction – between the expiration/vacation of the last NITU and until the railroad consummates abandonment. This is not an unsupported conclusion of law, but was among the findings of Judge Damich in *Farmers Coop. v. United States*, and as supported elsewhere herein.

In *Farmers Coop.*, the court made the following observation,

“Here, K & O [the railroad] was given the authority to abandon the lines, did in fact remove the tracks, etc., but never filed the requisite notice of consummation of abandonment. Since more than one year has passed since it obtained authority to abandon, it would need to begin a new proceeding to obtain the necessary authority once again. *It has not done so and on that basis STB jurisdiction over the two railroad corridors continues.* Plaintiffs note that “without K & O’s timely submission of the required Notice of Consummation to the STB, the agency’s jurisdiction remains intact. The regulation contemplates that the railroad simply may not ‘intend to consummate the abandonment,’ after expiration of the NITU” and ask rhetorically, ‘What then?’ ”

Id., 100 Fed.Cl. at 582. (Emphasis added).

The Court of Federal Claims then concluded, with the following statement, relevant to these comments,

“But, despite Plaintiffs’ quandary, it is not this court’s province to answer Plaintiffs’ question, ‘What then?’, or address how they might best extricate themselves from the consequences of the railroad’s failure to file the requisite notice of consummation, even though its abandonment of the rights-of-way seems evident under state law.”

Id., 100 Fed.Cl. at 584.

It is respectfully suggested that the STB has omitted a fourth material area of agency jurisdiction which the promulgated administrative regulations provide no meaningful limitation. Further, it is submitted that enlarging the trail use negotiations one year, with three agency “rubber-stamped” annual extensions, before good cause is even a consideration, appears to serve only the purposes of the intended beneficiary. While the proposed rule certainly provides those benefits, it fails to address this fourth area of jurisdiction – directly and proximately tied to these proposed newly-extended trail negotiations.

Our landowner clients are likewise entitled to closure of their servient estates from railroad-purposed easements taken in antiquity by state condemnation laws, right-of-way deeds, insufficient consideration deeds and the like. They would argue that the same largess shown by the proposed rule to the laudable goal of railbanking, should equally and contemporaneously compel the STB to amend this rule to address limitations on consummation of abandonment by the railroad under 49 C.F.R. § 1152.29(e). If there are limits on extensions of negotiating trail use, there likewise should be a concurrent amendment pertaining to the limitation of consummation of abandonment after these newly enlarged negotiation periods, and the likelihood of the termination/vacation of an NITU.

There are at least 6 reasons supporting the proposed amendment to this rule:

- (1) Extended trail use extensions addressed by the proposed rule directly and proximately create a longer period for consummation of abandonment, further prejudicing landowners' reversionary rights by forestalling those reversions;
- (2) The CFC has noted that consummation of abandonment is outside of any "Government action," but is primarily based upon the unlimited discretion of the railroad. *See Farmers Coop.* 100 Fed.Cl. at 583-84. The rule under consideration includes that presently unabated unilateral discretion for consummation, and artificially provides continued STB jurisdiction as set forth in the *Farmers Coop* cases;
- (3) If railroads are given more time for extensions as proposed, they will continue, if not increase, cases where abandonment consummation will proliferate with unbridled and unchecked railroad discretion;
- (4) There is no incentive nor penalty attached to railroads who enter into temporary NITU(s) or permanent trail use agreements which are vacated, for the carriers to exercise abandonment. History has unfortunately proven that railroads will many times sit on their option to consummate, all the while, railroad operations cease, the track is pulled, the railroad conveys its ROW interest to a non-railroad entity/individual, and servient estate landowners are left without an effective remedy, but to pay large STB filing fees they can't afford, to pursue adverse abandonments that will take additional years to resolve. It is open ended – the same problem this proposed rule hopes to address;
- (5) The delayed consummation of abandonment causes situations where railroads attempt to take advantage of landowners for the carriers' financial gain. The STB is currently considering these exact issues in Docket No. AB 1032X, *Nebraska, Kansas and Colorado Railway, LLC – Abandonment Exemption – In Decatur, Norton, and Phillips Counties, Kan., and Harlan County, Nebraska*. There, the railroad requested, and the STB granted, four consummation of abandonment deadlines by the railroad, all the while, the railroad allegedly entered into a contract with a non-railroad entity to sell the carrier's right-of-way property interest and, in turn, the non-carrier offered and sold landowners' back the interest it had purchased from the railroad. Such practices exhibit the per se abuse that unlimited and unregulated consummation of abandonments pose to landowners and the public to their prejudice;

- (6) The proposed rule means the one-year limit on consummating abandonment in 49 C.F.R. § 1152.29(e)(2), as currently comprised, will coincide with conclusion of only the first negotiating period, and may well result in concurrent extensions of both the negotiating and consummation of abandonment deadlines. Yet, only the NITU negotiating deadlines are subject to the proposed extensions and limitations – not the prospective consummation of abandonment deadline.

Based upon the above, the commenters suggest that this proposed rule be amended, or a separate amendment be filed by the STB concerning 49 C.F.R. § 1152.29(e), to include the following:

- (a) Except for good cause shown by the railroad, no consummation of abandonment shall be extended;
- (b) Any extensions of the consummation of abandonment deadline shall be limited to 180 days after the expiration of any NITU or vacation of a NITU;
- (c) Unless extended upon good cause, a railroad's consummation of abandonment shall automatically occur 180 days after the expiration or vacation of an NITU;
- (d) During any granted extension of the consummation of abandonment deadline or NITU, no railroad can sell, donate or otherwise remove or authorize removal of the ballast supporting the former railroad right-of-way to any non-railroad operating entity, unless for the continued railroad-purposed use in the right-of-way.

The commenters respectfully suggest that the proposed rule amendments provide no benefits to the landowners. Instead, they further operate to frustrate their enjoyment of unencumbered property rights in former rights-of-way. If landowners must undergo these additional, extended prejudices, it is submitted that they should, at least, be able to foresee the objective end of their indignities.

The landowners have shown the STB a basis for continued jurisdiction not contemplated by the agency or via the proposed rule. The unlimited, unregulated area of railroad consummation of abandonment extensions presents landowners the same quandary presented the CFC in *Farmers Coop*: after termination/vacation of NITUs, what mechanism in STB regulations compel a railroad to ever consummate abandonment, notwithstanding discontinuance of service, removal of track, ties and equipment from the right-of-way, and conveyance of all the railroad's right, title and interest to a non-railroad entity/individual? The landowners argue that the obvious and proven answer is none.

Perhaps the STB could reasonably fashion a rule remedying this unfair situation. The suggestions proposed herein do not threaten any trail or the railroad – it is only at the expiration of temporary or permanent railbanking that the landowners seek these changes. Furthermore, the proposed changes herein only operate after the railroad's verified notice of exemption, wherein the railroad has sought exempt abandonment from the STB of its interest in the first instance. It is fair and equitable to seek justice, where landowner injustices are frequent and compelling, but are

sanctioned by the law. It is by law, the landowners suggest, lies the basis for reasonable remedies proposed herein that would ameliorate some of those injustices.

Respectfully Submitted,

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