

SERVICE DATE – APRIL 6, 2020

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1269 (Sub-No. 1X)

IOWA TRACTION RAILWAY COMPANY—DISCONTINUANCE OF SERVICE
EXEMPTION—IN CERRO GORDO COUNTY, IOWA

Digest:¹ The Board will lift the abeyance in this proceeding and allow the notice of exemption to discontinue service to proceed. The Board finds that it cannot consider requests for interim trail use/rail banking for the line of railroad at issue because the line was previously abandoned and is no longer within the Board's jurisdiction.

Decided: April 1, 2020

On November 6, 2019, Iowa Traction Railway Company (Iowa Railway) filed a verified notice of exemption under 49 C.F.R. part 1152 subpart F—Exempt Abandonments and Discontinuances of Service to discontinue service over approximately 3.0 miles of rail line, between milepost 155.5, located approximately 100 yards south of Elm Drive, and milepost 152.5, located approximately 600 yards north of County Highway B-20, in Mason City, Cerro Gordo County, Iowa (the Line). Because the notice and subsequent filings raised questions about the proposed transaction that needed to be considered before further action could be taken, the proceeding was held in abeyance on November 27, 2019, pending further Board order. The Board is now lifting the abeyance and allowing the notice of exemption to discontinue service to proceed. However, while the Board has jurisdiction and authority over Iowa Railway's discontinuance of service, for the reasons discussed below, the Board cannot entertain requests for interim trail use/rail banking of the right-of-way because the Line was previously abandoned and is therefore no longer within the Board's jurisdiction.

BACKGROUND

According to Iowa Railway, Chicago & North Western Transportation Company (CNW) obtained authority to abandon the Line in 1987² and consummated the abandonment. (Verified Notice 2.) Iowa Railway states that, following consummation of the abandonment, the Line was

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

² See Chi. & N.W. Transp. Co.—Aban. Exemption—in Mason City, Iowa, AB 1 (Sub-No. 205X) (ICC served July 10, 1987).

acquired by Hermitage Homes, Inc. (Hermitage), a noncarrier. (*Id.* at 3.) In 1988, Iowa Traction Railroad Company (Iowa Railroad) obtained authority from the Board's predecessor, the Interstate Commerce Commission (ICC), to operate over the Line pursuant to a lease with Hermitage. See Iowa Traction R.R.—Operation Exemption—Hermitage Homes, Inc., FD 31353 (ICC served Nov. 23, 1988). In 2012, Iowa Railway obtained authority from the Board to replace Iowa Railroad as the operator of the Line through a change-in-operators exemption under 49 C.F.R. § 1150.31(a)(3). See Iowa Traction Ry.—Change in Operators Exemption—Rail Line of Backtrack, Inc., FD 35677 (STB served Oct. 5, 2012). By that time, Backtrack, Inc. (Backtrack), had succeeded Hermitage as the noncarrier owner of the Line, and Iowa Railway represents that Backtrack is the current owner of the Line. (Verified Notice 3; Iowa Railway Reply 4 n.2, Nov. 13, 2019.)

Iowa Railway states that, once discontinuance authority is obtained, Mason City will file a request for interim trail use/rail banking of the right-of-way under the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d). (Verified Notice 4.) Iowa Railway recognizes that only discontinuance authority is required to cease operations that have been resumed over a line for which abandonment has already been authorized and consummated. (*Id.*)³ It also recognizes that interim trail use/rail banking is generally not available when only discontinuance authority is sought. (Verified Notice 4.) But it argues that under the circumstances here, where authorized operations were resumed over an abandoned line, a grant of discontinuance authority is a sufficient predicate for interim trail use/rail banking. (*Id.*) In support, it cites a Board decision, issued by the Director of the Office of Proceedings, in Chillicothe-Brunswick Rail Maintenance Authority—Discontinuance Exemption—in Livingston, Linn, & Chariton Counties, Mo. (Chillicothe), AB 1001X et al. (STB served Jan. 15, 2008), and the ICC's 1987 decision denying reconsideration in State of Vermont—Discontinuance of Service Exemption—in Chittenden County, Vt., Docket No. AB 265 (Sub-No. 1X).⁴ (Verified Notice 4.)

On November 12, 2019, the National Association of Reversionary Property Owners (NARPO) filed a comment requesting that the Board reject Iowa Railway's notice, or, in the alternative, that the Board not entertain a request for interim trail use/rail banking of the right-of-way. (NARPO Comment 1.) According to NARPO, under the Board's rules, there can be no interim trail use/rail banking in a discontinuance proceeding. (*Id.*) NARPO also questions whether the Line is within the Board's jurisdiction, as the Line was authorized for abandonment in 1987 and the abandonment was consummated. (*Id.* at 2.)

³ Iowa Railway previously sought abandonment of the Line, but its notice of exemption was rejected for various reasons. See Iowa Traction Ry.—Discontinuance of Serv. Exemption—in Cerro Gordo Cty., Iowa, AB 1269X (STB served Aug. 5, 2019).

⁴ The ICC's 1987 decision includes relevant prior and subsequent history. See State of Vt.—Discontinuance of Serv. Exemption—in Chittenden Cty., Vt., AB 265 (Sub-No. 1X) et al. (ICC served Jan. 6, 1986) (Vermont Discontinuance I), pet. to stay denied, AB 265 (Sub-No. 1X) et al. (ICC served Feb. 7, 1986) (Vermont Discontinuance II), pet. for recons. denied, 3 I.C.C.2d 903 (1987) (Vermont Discontinuance III), aff'd sub nom. Preseault v. ICC, 853 F.2d 145 (2d Cir. 1988), aff'd, 494 U.S. 1 (1990) (collectively, State of Vermont).

On November 13, 2019, Iowa Railway filed a reply in opposition to NARPO's comment, reiterating its arguments that the Board has jurisdiction over the proposed discontinuance and that discontinuance authority under the circumstances here is sufficient to qualify the right-of-way for interim trail use/rail banking under the Trails Act. (Iowa Railway Reply at 3-4, Nov. 13, 2019.)

DISCUSSION AND CONCLUSIONS

When CNW consummated its authority to abandon the Line, the Line was removed from the national rail system and the Board's jurisdiction over the Line terminated. See Hayfield N. R.R. v. Chi. & N.W. Transp. Co., 467 U.S. 622, 633-34 (1984) (consummation of abandonment terminates the [agency's] jurisdiction); Baros v. Tex. Mexican Ry., 400 F.3d 228, 234 (5th Cir. 2005) ("Once a rail carrier abandons a line, the line is no longer part of the national transportation system, and the [Board's] jurisdiction terminates.") (internal citation omitted). When Iowa Railroad, and later Iowa Railway, was authorized to operate over the Line, the transportation service became subject to the Board's jurisdiction, but the underlying right-of-way did not return to the Board's jurisdiction. See Wisc. Cent. Ltd. v. STB (Wisconsin Central), 112 F.3d 881, 890 (7th Cir. 1997), pet. for partial reopening granted sub nom. Wisc. & Mich. Ry.—Discontinuance of Serv. Exemption—in Ashland & Iron Ctys., Wisc. & Gogebic Cty., Mich. (Wisconsin & Michigan Railway), AB 440X (STB served Oct. 22, 1997).⁵ That is because authorizing operations by a non-owning carrier over an abandoned line places only the transportation service under the Board's jurisdiction. See Wisconsin Central, 112 F.3d at 890; Dakota Rail, FD 30721, slip op. at 2.

Invocation of the Trails Act can serve to keep a right-of-way of a rail line that is subject to the Board's jurisdiction from being taken out of the national rail system. But under the precedent discussed above, the Trails Act cannot apply to lines that are not subject to Board jurisdiction. Where, as here, the Board does not have jurisdiction over the line itself, and indeed the underlying right-of-way has been removed from the national rail system, the Board cannot issue a notice of interim trail use or abandonment (NITU) authorizing negotiations for interim trail use/rail banking under the Trails Act. See, e.g., Wisconsin & Michigan Railway, AB 440X, slip op. at 2-3 (finding no jurisdiction to authorize interim trail use/rail banking over an abandoned line); Ill. Cent. Gulf R.R.—Aban.—in Dewitt & Piatt Ctys., Ill., 5 I.C.C. 2d 1054, 1062-63 (1988) (same); Dakota Rail, FD 30721, slip op. at 4 (same).

Iowa Railway's reliance on State of Vermont for the proposition that the Trails Act is available in a discontinuance proceeding where the line was previously abandoned is misplaced, as the line in State of Vermont was still within the agency's jurisdiction. It is true that State of Vermont authorized interim trail use/rail banking following a discontinuance by Vermont

⁵ Wisconsin Central cited Dakota Rail, Inc.—Petition for Exemption from 49 U.S.C. 10901, 10903, & 11301 (Dakota Rail), FD 30721, slip op. at 2 (ICC served Nov. 14, 1985), aff'd sub nom. Winter v. ICC, 828 F.2d 1320 (8th Cir. 1987).

Railway over a state-owned rail line.⁶ See Vermont Discontinuance I, AB 265 (Sub-No. 1X) et al., slip op. at 2. However, contrary to Iowa Railway's assertion here, the line in State of Vermont had not been previously abandoned. Although the prior owner of the line—Rutland Railway Corporation (Rutland)—received abandonment authority from the ICC,⁷ the agency subsequently stated that Rutland had not consummated that authority prior to selling the line to Vermont. See State of Vt., 320 I.C.C. at 615 n.6 (“At the date that [Vermont] acquired the facilities, certain mechanical procedures which would evidence the actual abandonment of the line had not been accomplished.”)⁸; see also State of Vt., Acquis. & Operation in Vt., 320 I.C.C. 330, 331 (1963) (“The line of railroad sought to be acquired, leased, and operated constitutes a portion of the line *authorized to be abandoned* in [Rutland Railway, 317 I.C.C. 393].”) (emphasis added). Moreover, in denying a petition for reconsideration in State of Vermont, the ICC explicitly rejected an argument that the line had been de facto abandoned in 1975, concluding that “the line remains within our jurisdiction” and that application of the Trails Act was proper. Vermont Discontinuance III, 3 I.C.C. 2d at 906-907.

Therefore, unlike the Line over which Iowa Railway seeks to discontinue service, which left the Board's jurisdiction when CNW consummated its abandonment authority, the line in State of Vermont remained within the agency's jurisdiction and available for interim trail use/rail banking. See Hayfield N. R.R., 467 U.S. at 633-34; Baros, 400 F.3d at 234; see also Birt v. STB,

⁶ In an earlier proceeding, by joint application, the State of Vermont sought authority to acquire and Vermont Railway sought authority to lease and operate the line. The ICC approved Vermont Railway's portion of the application to lease and operate the line but, on reconsideration, dismissed the application insofar as it involved Vermont, finding that Vermont did not become a common carrier when it purchased the line. See State of Vt., Acquis. & Operation in Vt., 320 I.C.C. 609, 610, 616 (1964) modifying and affirming 320 I.C.C. 330 (1963).

⁷ See Rutland Ry. Aban. of Entire Line, 317 I.C.C. 393 (1962).

⁸ The 1964 Vermont decision states that “certain mechanical procedures which would evidence the actual abandonment of the line had not been accomplished,” but it also states that Vermont did not “acquire a common carrier by railroad, since the status of the Rutland Railway Corporation as a common carrier had ceased to exist by reason of the abandonment of its entire line. Thus, instead of acquiring a common carrier, the State of Vermont merely acquired the abandoned line of a corporation that had ceased to be a common carrier by railroad.” State of Vt., 320 I.C.C. at 615 & n.6. The purpose of this statement is unclear, but the agency, in that proceeding and in subsequent decisions, has concluded that the line was authorized for abandonment but the abandonment was not consummated. See, e.g., Common Carrier Status of States, State Agencies & Instrumentalities, & Political Subdivisions, 363 I.C.C. 132, 137 (1980) (noting that the ICC ruled that Vermont “acquired a rail line authorized to be abandoned . . .”), *aff'd sub nom.* Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982); see also State of Vt., FD 22830, slip op. at 1 n.1 (ICC served Dec. 28, 1993) (approving a renewal and modification of Vermont Railway's lease of the line and suggesting that the parties could avoid seeking agency approval of future changes and extensions to the lease pursuant to the agency's procedure under 49 C.F.R. part 1150 subpart C, “[w]here a rail line is authorized for abandonment and later purchased by a State and leased to an operator under a Modified Certificate of Public Convenience and Necessity . . .”).

90 F.3d 580, 589 (D.C. Cir. 1996) (concluding that interim trail use/rail banking requests may be entertained as long as the Board retains jurisdiction over the right-of-way and the carrier indicates willingness to enter into negotiations); Norfolk & W. Ry.—Aban. Exemption—Between Kokomo & Rochester in Howard, Miami, & Fulton Ctys., Ind., AB 290 (Sub-No. 168X), slip op. at 8 (STB served May 4, 2005) (same).

Iowa Railway also relies on the 2008 Chillicothe decision to support its argument that the Trails Act is available in a discontinuance proceeding where the line was previously abandoned. In Chillicothe, Chillicothe-Brunswick Rail Maintenance Authority and Motive Rail d/b/a Missouri North Central Railroad were authorized to discontinue service over two overlapping segments of a line owned by the City of Chillicothe. The ICC had previously authorized the line for abandonment,⁹ and the abandonment had been consummated. See Notice of Consummation, Feb. 28, 1984, Norfolk & W. Ry., AB 10 (Sub-No. 27). In reliance on State of Vermont, a NITU was issued in Chillicothe permitting interim trail use/rail banking negotiations for a segment of the line. Chillicothe, AB 1001X et al., slip op. at 3.

However, under the court and agency precedent cited above, because the line in Chillicothe had been removed from the national rail system and thus from the Board's jurisdiction, the Trails Act was not available. The decision in Chillicothe appears to have been based on an incorrect understanding that the abandonment in State of Vermont had been consummated when the NITU was issued, Chillicothe, AB 1001X et al., slip op. at 2 & 3 n.3 (describing the line in State of Vermont as “previously abandoned”), when in fact, as discussed above, it had not. Unlike the line in Chillicothe and the Line over which Iowa Railway seeks to discontinue service, the line in State of Vermont remained within the agency's jurisdiction and available for interim trail use/rail banking under the Trails Act.¹⁰

Therefore, because the Line here is outside of the Board's jurisdiction, the Board cannot consider requests for interim trail use/rail banking of the right-of-way pursuant to the Trails Act, and no such requests will be accepted. A notice of exemption authorizing Iowa Railway's discontinuance of service over the Line will be served and published concurrently with this decision, and the exemption will become effective on May 6, 2020.

⁹ See Norfolk & W. Ry.—Aban., Discontinuance of Operations, & Discontinuance of Trackage Rights—in Chariton, Linn, Livingston, Daviess, Gentry, Nodaway, & Atchison Ctys., Mo.; Page, Fremont, Mills, & Pottawattamie Ctys., Iowa; & Douglas Cty., Neb., AB 10 (Sub-No. 27) (ICC served Nov. 10, 1983).

¹⁰ The Board is also aware of at least one other case, which Iowa Railway does not cite, in which the Board issued a NITU for an abandoned line. See Pioneer Indus. Ry.—Discontinuance of Serv. Exemption—Line in Peoria Cty., Ill., AB 1056X et al. (STB served Apr. 16, 2010). In Pioneer, as in Chillicothe, the Board properly granted the discontinuance of service, but, appearing to rely on an incorrect understanding of State of Vermont and Chillicothe, issued a NITU even though the line at issue had been fully abandoned previously. Pioneer, AB 1056X et al., slip op. at 5 (citing Peoria & Pekin Union Ry.—Exemption from 49 U.S.C. § 10901, FD 30545 (ICC served Sept. 24, 1984)).

It is ordered:

1. Notice of the exemption in this docket will be published in the Federal Register. Requests for issuance of a NITU will not be accepted. The exemption will become effective on May 6, 2020.

2. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.