

SERVICE DATE – DECEMBER 22, 2020

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36387

OHIO RAIL DEVELOPMENT COMMISSION—PETITION FOR DECLARATORY ORDER

Digest:¹ The Board finds that a rail line in Ohio owned by the Ohio Rail Development Commission remains within the Board’s jurisdiction and would be eligible for interim trail use/rail banking under the National Trails System Act, provided the current operator of the line requests and receives Board authority to discontinue common carrier service.

Decided: December 21, 2020

By petition filed February 18, 2020, the Ohio Rail Development Commission (ORDC) requests that the Board issue a declaratory order finding that, upon the existing operator’s receiving Board authority to discontinue common carrier service, ORDC may pursue interim trail use/rail banking for the 14.8-mile rail line it owns in Perry and Muskingum Counties, Ohio (the Line), pursuant to section 8(d) of the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d), and the Board’s regulations. For the reasons discussed below, the Board will issue a declaratory order finding that the Line remains within the Board’s jurisdiction and would be eligible for interim trail use/rail banking under the Trails Act, provided the current operator of the Line requests and receives Board authority to discontinue common carrier service.

BACKGROUND

ORDC states that the Line, formerly known as the Glass Rock Branch, includes the Fultonham Running Track from milepost 0.0 to milepost 3.1 (Glass Rock-East) and Z&W Industrial Track from milepost 45.8 to milepost 57.5 (Glass Rock-West). (Pet. 2, 4.) ORDC explains that the Line was originally part of the Consolidated Rail Corporation (Conrail) system and was part of a larger line that was the subject of an earlier Conrail abandonment application. (*Id.* at 2, 4.) On November 30, 1981, in Conrail Abandonment of Lines in Zanesville, Ohio (Conrail Abandonment), Docket No. AB 167 (Sub-No. 445N), Conrail filed an application pursuant to section 308 of the Regional Rail Reorganization Act of 1973 (3R Act), as amended

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

by the Northeast Rail Service Act of 1981 (NERSA), 45 U.S.C. § 748,² to abandon 40.8 miles of rail line in Zanesville, Ohio. In a decision served March 12, 1982, Conrail was authorized to abandon segments totaling approximately 38.2 miles of the 40.8 miles of rail line,³ (including all of the Line), and on July 13, 1982, the Interstate Commerce Commission (ICC) published an appraisal of the net liquidation value of 31.3 miles of the rail line in the Federal Register (47 Fed. Reg. 30,308).⁴

According to ORDC, the Ohio Rail Transportation Authority (ORTA)⁵ purchased the Line, “which was authorized for abandonment but not fully abandoned,” from Conrail in 1982. (Pet. 2, 5.) ORDC asserts that, because the Conrail Abandonment proceeding was undertaken pursuant to NERSA, statutory restrictions were placed on Conrail’s liquidation of the Line and consummation of its abandonment authority. (Pet. 4 & n.3 (citing 45 U.S.C. § 748).) ORDC states that, via a quitclaim deed dated July 30, 1982, ORTA purchased approximately 31.4 miles of the line authorized for abandonment in Conrail Abandonment, which included the Line. (Id. at 5.)

ORDC represents that, after ORTA completed its purchase, two rail carriers were authorized to operate on the Line. (Id. at 2, 6-8.) First, on March 23, 1983, Moxahala Valley Railway Company (MOXV) obtained a modified certificate of public convenience and necessity “to provide service over a portion of the lines abandoned by ConRail [sic]” in Conrail Abandonment. See Moxahala Valley Ry.—Operation—in Zanesville, Ohio, FD 30141, slip op. at 1 (ICC served March 23, 1983).⁶ Second, on February 27, 1987, Ohi-Rail Corporation (Ohi-Rail) was authorized to lease and operate the Line. See Ohi-Rail Corp.—Lease & Operation Exemption—Ohio Dep’t of Transp., FD 30986 (ICC served Feb. 27, 1987). ORDC states that Ohi-Rail continues to have authority to operate the Line, although no freight rail service has occurred over the Line in several decades. (Pet. 8.)

ORDC now wishes to pursue interim trail use/rail banking of the Line under the Trails Act, once Ohi-Rail receives authority to discontinue service.⁷ ORDC states that, while neither it

² NERSA established separate procedures for abandonments filed by Conrail. See Conrail Abans. Under NERSA, 365 I.C.C. 472, 472 (1981).

³ The remaining 2.6 miles of the line were subject to an offer of financial assistance pursuant to 45 U.S.C. § 748(d) and were not included in the abandonment authorization.

⁴ The ICC’s appraisal did not include certain segments of the rail line authorized for abandonment in the ICC’s March 12, 1982 decision.

⁵ ORDC states that it is the successor to ORTA and the Ohio Department of Transportation (ODOT). (Pet. 2.)

⁶ According to ORDC, in the fall of 1986, ODOT, as the successor to ORTA, provided formal notice to terminate and vacate MOXV’s operations for default after a 60-day transition period. (Pet. 7.)

⁷ According to ORDC, Ohi-Rail will seek authority from the Board to discontinue service. (Pet. 3.)

nor either of its predecessors has been subject to the Board's jurisdiction,⁸ the Line itself has at all times remained subject to the agency's jurisdiction. (Pet. 2, 10-11.) ORDC contends that Conrail was statutorily barred from exercising its abandonment authority granted in Conrail Abandonment, (*id.* at 12 (citing 45 U.S.C. § 748)), and notes that two operators sought and received operating authority for the Line, (*id.* at 2, 10). Therefore, ORDC argues that the Board should permit ORDC to directly invoke the Trails Act, citing various agency precedent. (*Id.* at 10-12, 14-15.)⁹

On July 21, 2020, the Board issued a decision stating that, before deciding the merits of ORDC's petition, it first needed to determine whether the Line remains within its jurisdiction. Ohio Rail Dev. Comm'n—Pet. for Declaratory Order, FD 36387, slip op. at 3-4 (STB served July 21, 2020). The Board identified conflicting information relating to its jurisdiction and requested comment and any relevant supporting information from Conrail concerning whether it consummated the abandonment before the 1982 sale to ORTA, and if not, whether that sale was executed pursuant to section 308(e)(3)(A) of NERSA. *Id.* at 4-5.

On August 20, 2020, Conrail, in response to the Board's request, commented that it had not been able to locate any information that directly answers the Board's questions. (Conrail Comment 1.) To further assist the Board, Conrail also provided copies of the deed and the internal closing report associated with the sale of the Line. (*Id.*, Attach.)

On September 4, 2020, ORDC replied, arguing that the information in Conrail's comment is consistent with ORDC's position that Conrail did not consummate the abandonment before selling the Line to ORDC's predecessor. (ORDC Reply 2.) ORDC notes that the deed Conrail provided refers to "lines of railroad" and argues that the record is "devoid of any evidence to suggest that Conrail exercised the authority granted and consummated abandonment of the Line." (*Id.*)

Also on September 4, 2020, the National Association of Reversionary Property Owners (NARPO) commented that if the Board determines that the Line remains under its jurisdiction, it should not allow interim trail use/rail banking of the Line because ORDC is only seeking a discontinuance. (NARPO Comment 1.)

⁸ ORDC states that it is "categorically exempt from the Board's jurisdiction," citing Ohi-Rail Corp., Docket No. FD 30986. (Pet. 10 & n.15.) In Ohi-Rail Corp., the ICC stated that "[t]he purchase by Ohio of the Conrail line under section 308(e) of the 3R Act did not require [ICC] authorization under 49 U.S.C. 10901 or 11343." Ohi-Rail Corp., FD 30986, slip op. at 1 n.2.

⁹ In the alternative, ORDC states that, if the Board decides that ORDC cannot directly invoke the Trails Act, ORDC is prepared to seek partial revocation of its exemption from Board regulation and avail itself of the Board's abandonment procedures under 49 U.S.C. § 10903. (Pet. 15-16.)

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Delegation of Auth.—Declaratory Order Proc., 5 I.C.C. 2d 675, 675 (1989). For the reasons discussed below, the Board will issue a declaratory order finding that the Line remains within the Board’s jurisdiction and would be available for interim trail use/rail banking under the Trails Act, provided Ohi-Rail, the current operator of the Line, requests and receives Board authority to discontinue service over it.

Status of the Line

Under section 308(b) of NERSA, the ICC was required to grant within 90 days “[a]ny application for abandonment . . . filed by . . . [Conrail] under this section before December 1, 1981, . . . unless, within such 90-day period, an offer of financial assistance [was] made . . . with respect to the line to be abandoned.” 45 U.S.C. § 748(b). Under section 308(e)(1), for any abandonment application granted under section 308(b), the ICC was required to “appraise the net liquidation value of the line to be abandoned” and “publish notice of such appraisal in the Federal Register.” Id. § 748(e)(1). Section 308(e)(3)(A) required Conrail to sell a line authorized for abandonment “[i]f, within 120 days after the date on which an appraisal [was] published in the Federal Register . . . , [Conrail] receive[d] a bona fide offer for the sale, for 75 percent of the amount at which the net liquidation value of such line was appraised by the [ICC].” Id. § 748(e)(3)(A)). If Conrail “receive[d] no bona fide offer . . . within such 120-day period,” Conrail could “abandon or dispose of the line.” Id. § 748(e)(3)(B).

Here, the Board finds that ORTA acquired the Line from Conrail under section 308(e)(3)(A) of NERSA before abandonment was consummated. In accordance with section 308(b) of NERSA, on November 30, 1981, Conrail filed an application to abandon the Line in Conrail Abandonment, which the ICC granted on March 12, 1982.¹⁰ Pursuant to section 308(e)(1), on July 13, 1982, the ICC published an appraisal of the Line’s net liquidation value in the Federal Register. (47 Fed. Reg. 30,308). According to ORDC, and as confirmed by the deed and closing report attached to Conrail’s comment, on July 30, 1982, 17 days after the ICC published the appraisal, ORTA purchased the Line via quitclaim deed, indicating that Conrail received ORTA’s offer to purchase the Line within the 120-day period prescribed under section 308(e)(3)(A) of NERSA. (See Pet. 5; Conrail Comment, Attach. at 3, 32.)¹¹ In addition, the lease and purchase agreement attached to MOXV’s application for a modified certificate

¹⁰ Because a timely offer of financial assistance was filed for a portion of the Line, Conrail Abandonment, AB 167 (Sub-No. 445N), slip op. at 1, the ICC’s grant of abandonment authority was not inconsistent with the 90-day period outlined in section 308(b). See 45 U.S.C. § 748(b).

¹¹ Neither ORDC nor Conrail provided any other information indicating whether ORTA’s purchase conformed with section 308(e)(3)(A) of NERSA—such as more detail on ORTA’s offer to purchase the Line, including whether the offer was for at least 75% of the net liquidation value published in the Federal Register.

indicated that MOXV would assume “all obligations and liabilities associated with line operation and disposition as specified by [s]ection 308(e) of [NERSA].” MOXV Appl., Attach. IV at 3, Moxahala Valley Ry., FD 30141. Based on the foregoing, the record here sufficiently demonstrates that ORTA acquired the Line under section 308(e)(3)(A) of NERSA and that Conrail did not consummate the abandonment. Because the abandonment was not consummated, the Line remains within the Board’s jurisdiction. 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).

As discussed in the Board’s July 21, 2020 decision, the Board acknowledges that certain statements made in other dockets suggest that the abandonment was consummated. In Docket No. FD 30141, MOXV, in its application for a modified certificate, represented that it was “electing to be exempt from ICC jurisdiction since the lines it will operate have been fully abandoned.” (MOXV Appl. 2, Mar. 7, 1983, Moxahala Valley Ry., FD 30141.) In the same docket, the ICC indicated that the Line had been abandoned when it “authorized [MOXV] to provide service over a portion of the lines abandoned by Conrail [sic].” See Moxahala Valley, FD 30141, slip op. at 1. In addition, in Docket No. FD 30986, in which Ohi-Rail was authorized to operate the Line, Ohi-Rail filed a letter on February 11, 1987, supplementing its notice of exemption stating that “[t]o the best of Ohi-Rail’s knowledge,” the Line “was the subject of a petition for abandonment filed by [Conrail] in November, 1981,” and “the property was in fact abandoned in March, 1982.” (Ohi-Rail Letter 1, Feb. 11, 1987, Ohi-Rail Corp., FD 30986.) The ICC, however, later stated in its notice of exemption authorizing Ohi-Rail’s operations that ODOT purchased the Line from Conrail “pursuant to section 308(e) of the [3R Act], after Conrail had filed a[n] application under section 308 to abandon” the Line. See Ohi-Rail Corp., FD 30986, slip op. at 1.

The Board finds that these conflicting statements in other dockets, taken together, are insufficient to overcome the documentary evidence described above, including documents provided by Conrail itself, indicating that ORTA acquired the Line under section 308(e)(3)(A) of NERSA and that Conrail, in fact, did not consummate the abandonment.

Interim Trail Use

When a rail carrier that has received authority to abandon a rail line exercises, or “consummates,” that authority, the line is removed from the interstate rail network, and the Board’s jurisdiction over the line terminates. See Hayfield, 467 U.S. at 633-34; Baros, 400 F.3d at 234. However, after a rail line is authorized for abandonment and before that abandonment is consummated, a party may file a request for interim trail use under the Trails Act. See 16 U.S.C. § 1247(d); 49 C.F.R. § 1152.29. If a rail line is “rail banked” (i.e., an interim trail use/rail banking agreement is reached and such trail use is established) under the Trails Act, the line remains within the Board’s jurisdiction. See 16 U.S.C. § 1247(d) (rail banked lines “shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.”) The Board may entertain properly filed requests for interim trail use/rail banking under the Trails Act as long as it still has jurisdiction over the line and the

carrier is willing to enter negotiations. See Birt v. STB, 90 F.3d 580, 589 (D.C. Cir. 1996); 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).

Relying primarily on City of Fishers—Petition for Partial Revocation of Exemption, FD 36137 (STB served May 31, 2018), ORDC argues that, because the agency authorized the Line for abandonment, the Line remains within the Board’s jurisdiction, and ORDC is a state entity that is not subject to Board regulation, it can directly invoke the Trails Act and request interim trail use.¹² In City of Fishers, the Board allowed the state entities to directly invoke the Trails Act without seeking to revoke their exempt status or commencing a new abandonment proceeding, explaining that the availability of the Board’s trail use procedures derives from the line owners’ willingness to enter into negotiations for trail use on a line that has been authorized for abandonment but remains within the Board’s jurisdiction. See City of Fishers, FD 36137, slip op. at 6.

Like the line owners in City of Fishers, ORDC is a state entity. The acquisition of the Line by ORDC’s predecessor (ORTA) under section 308(e)(3)(A) of NERSA did not require agency authorization. See Del. Otsego Corp.—Exemption from 49 U.S.C. 10762(c)(3), 10901, 11343, FD 29867, slip op. at 3 (ICC served Apr. 15, 1982) (finding that parties that consummate a sale under section 308(e) of NERSA need not file for authority to acquire and/or operate the line under 49 U.S.C. § 10901). In addition, when ORTA, a state entity, purchased the Line under section 308(e)(3)(A) of NERSA, it acquired a line “approved for abandonment” that had not been “fully abandoned.” See Common Carrier Status of States, 363 I.C.C. at 135.¹³ Therefore, the Board agrees with ORDC that it is exempt from agency regulation.

The Board therefore finds that, based on the facts presented, ORDC may pursue interim trail use/rail banking under the Trails Act without seeking to revoke its exempt status or commencing a new abandonment proceeding. See City of Fishers, FD 36137, slip op. at 6. If Ohi-Rail is authorized to discontinue service on the Line, then any potential trail sponsor may file, in accordance with the Board’s regulations, a request for issuance of a certificate of interim trail use or abandonment (CITU) in Conrail Abandonment, Docket No. AB 167 (Sub-No.

¹² Under agency precedent, where a state entity acquires a line approved for abandonment, the acquisition is exempt from Board regulation, as is the state entity after the acquisition has taken place. Common Carrier Status of States, State Agencies & Instrumentalities, & Political Subdivisions (Common Carrier Status of States), 363 I.C.C. 132, 135-36 (1980), aff’d sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). Operators of state-owned lines acquired under Common Carrier Status of States obtain modified certificates to operate merely by providing notice to the Board. See 49 C.F.R. §§ 1150.23 & 1150.24.

¹³ The Board also notes that MOXV obtained a modified certificate “to provide service over a portion of the lines abandoned by ConRail [sic].” Moxahala Valley Ry., FD 30141 (ICC served March 23, 1983). The agency’s modified certificate regulations were adopted in 1980 for lines acquired under Common Carrier Status of States. See Common Carrier Status of States, 363 I.C.C. at 138-39 (adopting rule for obtaining modified certificates).

445N).¹⁴ See 49 C.F.R. § 1152.29(b)(1). If ORDC, as the owner of the Line, is willing to negotiate with the potential trail sponsor for interim trail use/rail banking, the Board will issue a CITU authorizing a one-year period of negotiations for ORDC and the trail sponsor to reach an interim trail use rail/banking agreement. See id. § 1152.29(b)(1), (c).

It is ordered:

1. ORDC's petition for declaratory order is granted, as discussed above.
2. This decision is effective on its service date.

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

¹⁴ NARPO's contention that the Board should not allow interim trail use/rail banking because ORDC is only seeking discontinuance authority is incorrect. This Line has already been authorized for abandonment, and, as discussed in this decision, if Ohi-Rail is authorized to discontinue service on the Line, requests for interim trail use/rail banking may therefore be filed in the Conrail Abandonment docket; the Board would not entertain requests for interim trail use/rail banking in the discontinuance docket.