



WEST VIRGINIA DEPARTMENT OF TRANSPORTATION

State Rail Authority

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Byrd E. White, III
Secretary of Transportation

August 18, 2021

302879

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

ENTERED
Office of Proceedings
August 18, 2021
Part of
Public Record

Re: Docket No. AB 1314X, The Elk River Railroad, Inc. –
Abandonment Exemption – In Kanawha & Clay Counties, WV

Dear Ms. Brown:

Attached for e-filing in the above referenced docket, please find Comments submitted on behalf of the West Virginia State Rail Authority (“WVSRA”), pursuant to the Surface Transportation Board’s Decision served in this proceeding on August 3, 2021.

Please contact the undersigned if you have any questions regarding this Comment. Thank you for your attention to this matter.

Respectfully submitted,

Lucinda K. Butler
Executive Director
West Virginia State Rail Authority

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. AB 1314X

**THE ELK RIVER RAILROAD, INC
—ABANDONMENT EXEMPTION—
IN KANAWHA & CLAY COUNTIES, W. VA**

**COMMENTS OF THE
WEST VIRGINIA STATE RAIL AUTHORITY**

The West Virginia State Rail Authority (“WVSRA” or the “State”), a Class III rail carrier and governmental instrumentality of the State of West Virginia under the West Virginia Department of Transportation, respectfully submits these comments in response to the Surface Transportation Board’s (“STB” or “Board”) decision served in this proceeding on August 3, 2021 (“Decision”), regarding the Notice of Exemption for Abandonment (“Notice”) submitted by the Elk River Railroad, Inc. (“TERRI”).

As TERRI explained in its July 2, 2021 Notice, TERRI is seeking an exemption to permit the abandonment of 53.4 miles of its rail line located between Clendenin, WV and North Line, WV (south of Duck), including 0.8 miles of track extending south from Hartland, WV, in Kanawha and Clay Counties, W. Va. (“TERRI’s Line”).¹ Subject to receiving the necessary regulatory authority from the Board, TERRI and WVSRA have negotiated, and intend to enter

¹ TERRI’s July 2, 2021 Notice of Exemption and accompanying Combined Environmental and Historic Report provide sufficient background about TERRI’s Line and substantial information regarding the parties’ intended interim use of TERRI’s Line as a trail. Thus, WVSRA will not repeat that information here.

into, an agreement for the purchase and railbanking of TERRI's Line for interim trail use as a pedestrian and bicycle trail ("Agreement"), pursuant to the National Trails System Act, 16 U.S.C. § 1247(d) ("Trails Act"), and the Board's interim trail use regulations, 49 C.F.R. § 1152.29. Pursuant to the negotiated Agreement, WVSRA has coordinated with the West Virginia Division of Natural Resources, which will operate the trail as a State Park.

In its Decision, the Board requested TERRI respond to whether the proposed abandonment of its Line will result in severing the adjoining 18-mile line of railroad owned and operated by WVSRA, known as the Buffalo Creek & Gauley Railroad ("BC&G"), from the national rail system, and if so, how that would impact the abandonment exemption TERRI is seeking in this proceeding; the Board also invited WVSRA to comment.²

WVSRA strongly supports TERRI's proposed abandonment of its Line, as it will allow for the efficient interim use of an otherwise inactive rail line for the public's benefit, while preserving the Line for possible reactivation of rail service. The Board's concerns regarding potential isolation of track "to which a common carrier obligation is attached . . . as a result of the *abandonment* of an adjoining segment"³ are inapplicable to the BC&G and should not affect TERRI's entitlement to the abandonment exemption it seeks in this proceeding. Because TERRI intends to railbank the Line, and not consummate abandonment, the Line will remain in the national rail system and will not isolate the BC&G, or impede WVSRA's ability to fulfill its

² As the party seeking the abandonment exemption, TERRI's filing addresses the legal issues regarding the Board's queries in great detail. WVSRA adopts and incorporates the arguments made in TERRI's Supplemental Filing and submits these Comments to provide the Board with additional context regarding the proposed transaction between TERRI and WVSRA.

³ *ABE Fairmont, LLC—Aban. Exemption—In Fillmore Cnty., Neb.*, AB 1106X, et al., slip op. at 4 n.3 (STB served Jan. 29, 2018) (emphasis added).

common carrier obligation, in the unlikely event a shipper locates to the BC&G and makes a reasonable request for service.

BACKGROUND

The BC&G is an approximately 18-mile line of railroad, which begins at a junction point with TERRI's Line in Dundon (MP 62.2 on TERRI's Line; MP 0.0 on the BC&G) and extends east to Widen (MP 18.0) in Clay County, West Virginia. It is owned and operated by WVSRA as a common carrier line and connects with the interstate rail network via TERRI's right-of-way, which interchanges with the Appalachian & Ohio Railroad, Inc. at Gilmer, WV ("AO"). AO then interchanges with CSX Transportation, Inc. at Grafton, WV. There are currently no shippers on the BC&G, and it has not carried any freight traffic in over twenty (20) years.⁴

WVSRA acquired the BC&G from TERRI pursuant to the Board's class exemption procedures⁵ governing the acquisition of a rail line by a Class III rail carrier for continued rail operations⁶ to facilitate the operation of excursion passenger trains over the otherwise inactive rail line.⁷ As WVSRA represented to the Board in its November 14, 2020 Verified Notice of

⁴ See *W. Va. State Rail Auth.—Acquis. & Operation Exemption—Elk River R.R.*, FD 36458 (STB served Dec. 2, 2020) (authorizing WVSRA to purchase the BC&G from TERRI and to operate it as a common carrier line).

⁵ 49 C.F.R. §§ 1150.51-44.

⁶ See *W. Va. State Rail Auth.—Acquis. & Operation Exemption—Elk River R.R.*, FD 36458 (STB served Dec. 2, 2020) (authorizing WVSRA to purchase the BC&G from TERRI (including the real property, right-of-way and/or easement rights underlying the rail line) and to operate it as a common carrier line).

⁷ See, e.g., *Am. Orient Express Ry.—Pet. for Declaratory Order*, FD 34502 (STB served Dec. 29, 2005), *aff'd* 484 F.3d 554 (D.C. Cir. 2007) (finding operation of tourist passenger train was "transportation by a rail carrier," and therefore, subject to the Board's jurisdiction).

Exemption, once TERRI and WVSRA consummated their purchase and sale agreement for the BC&G, WVSRA assumed all common carrier rights and obligations with respect thereto.⁸

I. Granting TERRI's abandonment exemption will not sever the BC&G from the interstate rail network or impede WVSRA's ability to fulfill its common carrier obligation.

Pursuant to the parties' negotiated Agreement, TERRI intends to railbank its Line and transfer it to WVSRA for interim trail use as a pedestrian and bicycle trail. The trail will connect with the BC&G at Dundon and will operate in tandem with the excursion passenger trains over the BC&G, as well as 14 miles of walking trails alongside the BC&G's right-of-way. Since TERRI intends to railbank its Line subsequent to receiving an abandonment exemption, TERRI's Line will be preserved within the interstate rail network for possible reactivation of rail service and will not isolate the BC&G from the national rail system.

The Board has repeatedly held that under the Trails Act, "the Board must preserve established railroad rights-of-way for future reactivation of rail service by prohibiting abandonment where a trail sponsor agrees to assume full managerial, tax, and legal liability for the right-of-way for use in the interim as a trail."⁹ Furthermore, the Trails Act explicitly provides that if interim trail use "is subject to restoration or reconstruction for railroad purposes," it "shall not be treated, for [any] purposes . . . as an abandonment." 16 U.S.C. § 1247(d).

As this proceeding is currently being held in abeyance, and the Board has not yet published Notice of the Exemption in the Federal Register, WVSRA has not had an opportunity

⁸ WVSRA Verified Notice of Exemption at 2, *W. Va. State Rail Auth.—Acquis. & Operation Exemption—Elk River R.R.*, FD 36458 (notice filed Nov. 14, 2020).

⁹ *Norfolk & W. Ry.—Aban. Exemption—Between Kokomo & Rochester in Howard, Miami & Fulton Cntys., IN*, AB-290 (Sub-No. 168X), slip op. at 4 (STB served May 4, 2005) (railbanked segment of right-of-way was not removed from the national rail system) (internal quotation omitted).

to petition the Board for a notice of interim trail use but intends to do so once the Board reinstates the proceeding. Under the Board's regulations, WVSRA's petition would necessarily include a Statement of Willingness to Assume Financial Responsibility for the Line, including an acknowledgment that use of TERRI's Line is subject to possible future reconstruction and reactivation for rail service.¹⁰ Any notice of interim trail use issued by the Board would likewise "indicate that trail use is subject to future restoration of rail service."¹¹

While railbanking a right-of-way temporarily relieves the common carrier from providing service over the line, "the railroad (or any other approved rail service provider) may reassert control over the right-of-way to restore service on the line in the future,"¹² thus, "any interim trail use arrangement is subject to being cut off at any time by the reinstitution of rail service."¹³ Pursuant to the clear language of the Trails Act and the Board's regulations governing interim trail use, in the event a shipper submitted a reasonable request for service over the BC&G, WVSRA could – and indeed would be required to – petition the Board to vacate the notice of interim trail use and reactivate service over the Line in accordance with WVSRA's common carrier obligation.

The parties' negotiated Agreement similarly provides that either TERRI or WVSRA is free to "cut off" the interim trail use arrangement for the reactivation of rail service over the Line, should there be a need. Under the Agreement, both parties have agreed they will in no way hinder the other's ability to restore the Line for the reactivation of rail service and would work

¹⁰ 49 C.F.R. § 1152.29(a).

¹¹ *Id.* § 1152.29(d).

¹² *Norfolk & W. Ry* at 4.

¹³ See, e.g., *Chelsea Prop. Owners—Aban.—Portion of the Consol. Rail Corp.'s W. 30th St. Secondary Track in New York, NY*, AB-167 (Sub-No. 1094)A, *et al.*, slip op. at 8-9 (STB served June 13, 2005).

together “to take whatever corrective actions are necessary to permit the reinstitution of freight service.”¹⁴ Granting TERRI the abandonment exemption it seeks will not impede WVSRA’s ability to fulfill its common carrier obligation, since TERRI intends to subsequently railbank the Line, and “[i]f and when [WVSRA] wishes to restore rail service to all or part of [TERRI’s railbanked line], it has the right to do so.”¹⁵

TERRI and WVSRA’s comprehensive plan for TERRI’s Line and the adjoining BC&G promotes tourism and fosters economic development in the area, while preserving TERRI’s Line, and therefore, WVSRA’s connection to the interstate rail network. Granting TERRI’s abandonment exemption would allow TERRI to railbank the Line, and in doing so, benefit the public without jeopardizing WVSRA’s ability to fulfill its common carrier obligation to provide freight rail service over the BC&G, upon reasonable request.

II. Granting TERRI’s abandonment exemption is consistent with WVSRA’s operation of the BC&G as an active rail line and is in the public’s interest.

WVSRA intends to continue operating the BC&G as an active rail line, capable of supporting both excursion passenger trains, and any freight rail service, should such a need arise. In June 2016, a severe flood hit the area, causing extensive damage to the BC&G and destroying or removing much of the rail infrastructure on the right-of-way.¹⁶ The Federal Emergency Management Agency (FEMA) subsequently approved \$7.2 million to fund the restoration of the BC&G, with \$5.6 million dedicated to the contractor – Chesapeake Thermite Welding – to

¹⁴ *Id.* at 9.

¹⁵ *Id.* at 8.

¹⁶ The scope of the FEMA BC&G restoration project is extensive and includes: replacing a minimum of 13,000 ties; installing additional ties as necessary during the repair work (if a portion of the track is removed to conduct a repair, ties are also removed and subsequently replaced); install 28 new culverts; replace joint bars and tie plates as needed; construct a new bridge pier with new bridge ties, bridge steel and railroad steel; and repair bridge piers and replace lost bridge ties, bridge steel, and rail steel on existing damaged bridge.

perform the substantial repairs necessary to rebuild the right-of-way in accordance with the Federal Rail Association standards for Class 1 track. The contract was awarded in July 2021, with work beginning on the right-of-way at the start of August, to be completed within 300 days. In addition to restoring the BC&G, the FEMA grant will also fund the reinstallation of 14 miles of graveled walking path alongside the right-of-way. The FEMA restoration project is vital to maintaining the BC&G as an active rail line, as it will ensure the BC&G will be able to support not only the operation of an excursion passenger train, but any potential future freight rail service in accordance with WVSRA's common carrier obligation.

There have been no shippers on either TERRI's Line or the adjoining BC&G in over twenty (20) years, and neither line has carried any freight traffic since 1999. To promote the efficient use of rail lines, TERRI and WVSRA have negotiated an Agreement to railbank and transfer the Line to WVSRA for interim trail use as a pedestrian and bicycle trail. The trail would be operated in tandem with the adjoining BC&G, which, once repaired, will support the operation of excursion passenger trains and have 14 miles of walking paths alongside the BC&G right-of-way. This comprehensive plan will promote tourism and foster economic development in the area.

As explained, *supra*, granting TERRI an abandonment exemption will not negatively impact shippers on the BC&G (as there are none), nor will it impede WVSRA from fulfilling its common carrier obligation in the event a shipper does locate on the BC&G and makes a reasonable request for service. WVSRA has a clear understanding, and full commitment to fulfill, its common carrier obligation under 49 U.S.C. § 11101 to provide rail service over the BC&G upon reasonable request. Likewise, WVSRA understands that within the mandate of the Trails Act, if there is a need for freight rail service over the BC&G, WVSRA would be required

to reinstall the tracks and restore the right-of-way to reactivate rail service over all, or a portion, of TERRI's railbanked Line. The Board's grant of abandonment exemption to TERRI would allow WVSRA to efficiently use TERRI's Line as a trail to the public's benefit, while preserving the rail corridor to protect the BC&G's connection to the interstate rail network. However, should the Board require additional assurance that the BC&G will not be improperly separated from the interstate rail network, WVSRA endorses TERRI's proposal for a grant of exemption authority, subject to a condition that would prohibit TERRI from consummating abandonment over the Line prior to WVSRA also filing for, and receiving, authority to abandon the BC&G. Such a condition will adequately protect against lingering concerns the Board may have.

CONCLUSION

For the reasons stated herein, WVSRA respectfully requests that the Board reinstate this proceeding and expeditiously publish notice in the Federal Register, pursuant to the Board's regulations.

Respectfully submitted,



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VERIFICATION

I, Lucinda Butler, declare under penalty of perjury that I am the Executive Director of the West Virginia State Rail Authority (“WVRSA”), that I have read the foregoing Comments and know the facts asserted therein, and that the foregoing is true and correct. Further, I certify that I am qualified and authorized to cause the foregoing Comments to be filed with the Surface Transportation Board.

Executed on August 18, 2021.



Lucinda K. Butler, Executive Director
West Virginia State Rail Authority
120 Water Plant Drive
Moorefield, WV 26836

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of August 2021, I served copies of the foregoing Comments of the West Virginia State Rail Authority on all parties of record in this proceeding via first-class mail or more expeditious means.



Lucinda K. Butler
Executive Director
West Virginia State Rail Authority