

SERVICE DATE – OCTOBER 7, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1314X

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

Decided: October 7, 2021

On July 2, 2021, the Elk River Railroad, Inc. (TERRI), filed a verified notice of exemption under 49 C.F.R. part 1152 subpart F—Exempt Abandonments to abandon an approximately 53.4-mile rail line, extending between milepost 96.0 (at or near Clendenin, W. Va.) and milepost 43.6 (at or near North Line, south of Duck, W. Va.), including 0.8 miles extending south from milepost 67.2 (at or near Hartland, W. Va.) known as the Middle Creek Spur, in Kanawha and Clay Counties, W. Va. (the Line).

By decision served August 3, 2021, the proceeding was held in abeyance, and TERRI was directed to file supplemental information addressing whether abandonment of the Line, if consummated, would isolate a segment of track owned by the West Virginia State Rail Authority (WVRA), known as the Buffalo Creek & Gauley Railroad (BC&G Line), from the interstate rail network. Elk River R.R.—Aban. Exemption—in Kanawha & Clay Cntys., W. Va. (August 3 Decision), AB 1314X, slip op. at 1 (STB served Aug. 3, 2021).

On August 17, 2021, TERRI filed a supplement, arguing, among other things, that the proposed abandonment of the Line would not isolate the BC&G Line from the interstate rail network because TERRI and WVRA intend to enter an interim trail use/rail banking agreement for the Line's right-of-way under the National Trails System Act, 16 U.S.C. § 1247(d), which would expressly prohibit the abandonment of the Line. (TERRI Suppl. 1-2, 4-9, Aug. 17, 2021.) TERRI further argues that, because the proposed transaction would not remove the Line from the interstate rail network, the BC&G Line would not become stranded.¹ (Id. at 4-8.) On August 18, 2021, WVRA commented in support of TERRI's notice of exemption, arguing that, because TERRI intends to railbank the Line, the BC&G Line will not be stranded, and WVRA's ability to fulfill its common carrier obligation on the BC&G Line will not be impeded. (WVRA Comment 2-7, Aug. 18, 2021.)

¹ In its supplement, TERRI also responded to an argument from the National Association of Reversionary Property Owners (NARPO) raised in a July 28, 2021 comment that the Board should not allow TERRI to railbank the Line because the Line is not connected to the interstate rail network. According to TERRI, the Line connects to the interstate rail network at Gilmer, W. Va. (TERRI Suppl. 1, 3, Aug. 17, 2021.)

The Board has also received comments asserting that a segment of the Line TERRI seeks to abandon through its notice of exemption was previously abandoned. (See Stephenson Comment 2, Sept. 7, 2021; Mangus Comment 1-2, Aug. 27, 2021; NARPO Comment 1, Aug. 17, 2021; Cooper Comment 1, July 30, 2021.) In particular, NARPO alleges that the Baltimore & Ohio Railroad (B&O) abandoned the segment of the Line from Clendenin to Hartland (Segment)² in 1979 and subsequently removed all the bridges, rails, ties, and ballast. (NARPO Comment 1, Aug. 17, 2021; see also Cooper Comment 1, July 30, 2021.) NARPO further states that TERRI was authorized to construct and operate a rail line on the Segment in Docket No. FD 31989 but alleges that TERRI never built the line, moved any traffic over it, or complied with any of the conditions imposed on the grant of construction authority.³ (NARPO Comment 1, Aug. 17, 2021; see also Cooper Comment 1, July 30, 2021.)

The comments filed in response to the August 3 Decision raise questions about whether the Segment is within the Board's jurisdiction. B&O was authorized by the ICC to abandon the Segment in Baltimore & Ohio Railroad Abandonment Portion Elk Branch Between Hartland & Clendenin, in Clay & Kanawha Counties, W. Va., AB 19 (Sub-No. 24) (ICC served May 10, 1978). In its 1992 petition for exemption seeking the construction and operation authority, TERRI acknowledged that it was proposing to acquire and reconstruct the Segment, which "B&O had earlier abandoned." See TERRI Pet. 4, Jan. 23, 1992, Elk River R.R.—Constr. & Operation Exemption—Clay & Kanawha Cntys., W. Va., FD 31989. The ICC conditionally granted TERRI's petition later that year, see Elk River R.R.—Constr. & Operation Exemption—Clay & Kanawha Cntys., W. Va., FD 31989 (ICC served May 28, 1992),⁴ and, in 1996, the Board granted final approval to the petition, subject to environmental conditions, see Elk River R.R.—Constr. & Operation Exemption—Clay & Kanawha Cntys., W. Va., FD 31989 (STB served Sept. 5, 1996).⁵

The agency's jurisdiction over the Segment terminated when the Segment was abandoned. See Hayfield N. R.R. v. Chi. & N.W. Transp. Co., 467 U.S. 622, 633-34 (1984) (holding that consummation of abandonment authority terminates the agency's jurisdiction); Baros v. Tex. Mexican Ry., 400 F.3d 228, 234 (5th Cir. 2005) ("Once a rail carrier abandons a

² B&O owned the Segment and was authorized to abandon it by the Board's predecessor, the Interstate Commerce Commission (ICC). See infra p. 2. TERRI was later authorized to construct and operate a rail line on the Segment and planned to acquire the right-of-way from B&O's successor, CSX Transportation, Inc. (CSXT). See infra p. 2 & note 4.

³ Several commenters also claim that when B&O abandoned the Segment, the property reverted to adjoining landowners. (See Stephenson Comment 1, Sept. 7, 2021; Stephenson Comment 1, Aug. 17, 2021; NARPO Comment 2, Aug. 17, 2021; Cooper Comment 1, July 30, 2021.)

⁴ According to its petition, TERRI planned to acquire the right-of-way from CSXT, B&O's successor, by voluntary purchase or by eminent domain. See TERRI Pet. 7, Elk River R.R., FD 31989.

⁵ In the same proceeding, TERRI was authorized to construct and operate a connecting segment from Clendenin to Falling Rock, which B&O had previously abandoned, but which is not part of TERRI's notice of exemption here.

line, the line is no longer part of the national transportation system, and the [Board's] jurisdiction terminates.") (internal citation omitted).⁶ Furthermore, the authority to construct and operate the Segment granted to TERRI in Docket No. FD 31989, which became effective on September 15, 1996, is permissive. See, e.g., Rocky Mountain Railcar & Repair, Inc.—Acquis. & Operation Exemption—Line of R.R. in Tooele Cnty., Utah, FD 35478, slip op. at 1 (STB served Apr. 13, 2018). Since the Segment was previously abandoned, if TERRI did not exercise the authority granted in Docket No. FD 31989, the Segment is not currently within the Board's jurisdiction and is not eligible for abandonment under 49 U.S.C. § 10903. See Jackson Cnty. Port Auth.—Pet. for Declaratory Ord., FD 35994, slip op. at 2 (STB served July 28, 2016) (holding that a noncarrier authorized to construct and operate a new rail line and to conduct operations did not become a common carrier where it did not undertake any rail construction or commence operations pursuant to the authority granted); Saratoga & N. Creek Ry.—Operation Exemption—Tahawus Line, FD 35559, slip op. at 8 (STB served May 14, 2012) (noting that if a carrier were authorized to operate as a common carrier over a line classified as private track, and exercised that authority, the line would become part of the national rail network, and the carrier would then need Board authority to abandon the line).

Therefore, this proceeding will continue to be held in abeyance to allow TERRI to file additional supplemental information addressing whether the Segment is within the Board's jurisdiction and eligible for abandonment under 49 U.S.C. § 10903. Specifically, TERRI should provide any relevant documentation that shows whether it ever exercised the construction and operation authority granted to it in Docket No. FD 31989, including whether it complied with the environmental conditions that were imposed. TERRI will be directed to file its supplement by November 8, 2021.

It is ordered:

1. This proceeding will continue to be held in abeyance.
2. TERRI shall submit a supplement, as described above, by November 8, 2021.
3. This decision is effective on its service date.

By the Board, Valerie O. Quinn, Acting Director, Office of Proceedings.

⁶ As to the claim that the property reverted to adjoining landowners when B&O abandoned the Segment, state law governs the disposition of reversionary property interests, if any, subject to the Board's jurisdiction to regulate abandonments. See Preseault v. ICC, 494 U.S. 1, 8 (1990).