

SERVICE DATE – FEBRUARY 11, 2022

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 857 (Sub-No. 2)

COLORADO LANDOWNERS—ADVERSE ABANDONMENT—
GREAT WESTERN RAILWAY OF COLORADO, LLC IN WELD COUNTY, COLO.

Digest:¹ This decision grants exemptions from certain statutory provisions and waives certain regulatory requirements that normally apply when filing an application for abandonment authority but are either unnecessary here or would be difficult or impossible for a group of landowners in Colorado to comply with should they file an application for adverse abandonment.

Decided: February 10, 2022

By petition filed on October 15, 2021, a group of landowners (Landowners)² seeks exemptions from certain statutory provisions and waivers of certain regulatory requirements regarding the filing of a third-party, or “adverse,” application for abandonment of approximately 6.2 miles of rail line (the Line) owned by Great Western Railway of Colorado, LLC (Great Western), in Weld County, Colo.³ As discussed below, the Board will partially grant the Landowners’ petition.

BACKGROUND

On April 16, 2008, in Great Western Railway of Colorado, LLC—Abandonment Exemption—in Weld County, Colo., Docket No. AB 857 (Sub-No. 1X), Great Western filed a verified notice of exemption under 49 C.F.R. part 1152 subpart F—Exempt Abandonments to abandon the Line. Notice of the exemption was served and published in the Federal Register on May 6, 2008 (73 Fed. Reg. 25,095). Subsequently, in a series of decisions, the Board imposed and later removed a historic preservation condition and issued a notice of interim trail use or abandonment (NITU), authorizing negotiations for interim trail use/rail banking of the Line under the Board’s regulations at 49 C.F.R. § 1152.29 (implementing the National Trails System

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 Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

² The 11 Landowners are listed in Appendix 1 to the petition. (Pet. 3; see also id., App. 1.)

³ The Line extends from milepost 0.0 at or near Johnstown, Colo., to milepost 6.2 at or near Welty, Colo. (Pet. 1.)

Act, 16 U.S.C. § 1247(d)). Six one-year extensions of the deadline to exercise abandonment authority were granted, ultimately until May 6, 2015. On August 28, 2014, Great Western filed a letter stating that, “[d]ue to recent industrial expansion in the area,” it had decided to reopen the Line and would not be consummating the abandonment. Accordingly, the abandonment authority expired without being exercised, and the Line remains part of the interstate rail network within the Board’s jurisdiction. See 49 C.F.R. § 1152.29(e)(2); Honey Creek R.R.—Pet. for Declaratory Ord., FD 34869 et al., slip op. at 4-5 (STB served June 4, 2008).

In their petition, the Landowners state that they own land adjacent to and/or within the right-of-way of the Line, and that such land is burdened by easements that permit use by Great Western for railroad purposes. (Pet. 3.) The Landowners assert that the Line has not been used for Board-regulated rail transportation for 40 years, and that there is no realistic prospect for such use of the Line in the foreseeable future. (*Id.*) According to the petition, the Landowners intend to seek adverse abandonment of the Line under 49 U.S.C. § 10903, thereby “paving the way for actions under Colorado law to free the land from the burden of the railroad easements.” (*Id.*)

Great Western filed a partial opposition to the Landowners’ petition on November 30, 2021. On December 20, 2021, the Landowners filed a reply to Great Western’s partial opposition and a request for leave to file, and on December 28, 2021, Great Western replied to the Landowners’ reply.⁴

The Board will partially grant the petition to the extent discussed below.

⁴ The Landowners argue that the Board should reject Great Western’s November 30 partial opposition because Great Western has not shown that it has standing to oppose the petition. (Landowners Reply 1, Dec. 20, 2021.) In response, Great Western argues that standing need only be shown by “a party seeking to invoke federal court jurisdiction.” (Great W. Reply 1, Dec. 28, 2021.) Great Western also argues that the Landowners’ reply is prohibited by 49 C.F.R. § 1104.13(c), which states that a “reply to a reply is not permitted.” (See Great W. Reply 1, Dec. 28, 2021.)

The Article III limitations on federal judicial power, including the requirements for standing, are inapplicable to administrative agencies such as the Board. See Cal. Ass’n of the Physically Handicapped, Inc. v. FCC, 778 F.2d 823, 826 n.8 (D.C. Cir. 1985) (noting that Article III restrictions on standing do not apply to the respondent agency, which “may choose to allow persons without Article III standing to participate in its proceedings”); see also Quaker Oats Co.—Transp. Within Tex. & Cal.—Pet. for Declaratory Ord., MC-C-30006, slip op. at 2 (ICC served Aug. 26, 1987). Additionally, the Board may consider “any public comments filed in response to a petition for exemption.” 49 C.F.R. § 1121.4(a).

Therefore, and in the interest of compiling a complete record, the Board will accept all filings submitted to date. See, e.g., City of Alexandria, Va.—Pet. for Declaratory Ord., FD 35157, slip op. at 2 (STB served Nov. 6, 2008).

DISCUSSION AND CONCLUSIONS

An application to abandon a rail line is governed by 49 U.S.C. § 10903 and the Board's regulations governing abandonment applications at 49 C.F.R. part 1152 subparts B and C. In appropriate circumstances, however, such as the filing of a third-party, or "adverse," abandonment application, the Board has waived inapplicable and unneeded regulations and granted exemptions from statutory provisions upon request. See, e.g., Landowners—Adverse Aban.—Ind. Sw. Ry. in Posey & Vanderburgh Cntys., Ind. (Ind. Landowners), AB 1065 (Sub-No. 3), slip op. at 3 (STB served Apr. 7, 2021); Alloy Prop. Co.—Adverse Aban.—Chi. Terminal R.R. in Chi., Ill., AB 1258, slip op. at 2 (STB served Aug. 16, 2017). The Landowners request waiver of the following regulations, and exemption from the following statutory provisions, as addressed below:

System Diagram Map. The Landowners request waiver of 49 C.F.R. § 1152.22(a)(5), which requires reference to the inclusion of the rail line subject to the abandonment request on the rail carrier's system diagram map (SDM) or narrative, the date on which the line was first listed there for abandonment or discontinuance, and a copy of the line description that accompanies the carrier's map. (Pet. 5.) The Landowners also request waiver of 49 C.F.R. §§ 1152.10 through 1152.14, which relate to SDM requirements, and the SDM requirements addressed in 49 C.F.R. § 1152.24(e)(1).⁵ (Pet. 5.)

The Board will grant the Landowners' request to waive 49 C.F.R. § 1152.22(a)(5), 49 C.F.R. §§ 1152.10 through 1152.14, and the relevant portions of 49 C.F.R. § 1152.24(e)(1). Waiver of the SDM requirements is customary in adverse proceedings because the applicant generally does not have access to the SDM. See Ind. Landowners, AB 1065 (Sub-No. 3), slip op. at 3; Port of Benton—Adverse Discontinuance of Rail Serv.—Tri-City R.R., AB 1270, slip op. at 4 (STB served Oct. 31, 2018). And, as explained in the exemption analysis below, the Board will exempt the Landowners from the related requirements of 49 U.S.C. § 10903(c)(2).

Service of Notice on Significant Users. The Landowners state that there are no current significant users of the Line and therefore seek waiver of the requirement under 49 C.F.R. § 1152.20(a)(2)(i) that they serve notice upon all significant users of the rail line. (Pet. 5.) Because the record indicates that no shippers are using the Line, the Board will grant this waiver request. See Ind. Landowners, AB 1065 (Sub-No. 3), slip op. at 3; Denver & Rio Grande Ry. Hist. Found.—Adverse Aban.—in Mineral Cnty., Colo. (Mineral Cnty.), AB 1014, slip op. at 2 (STB served Oct. 18, 2007). Further, as explained in the exemption analysis below, the Board will exempt the Landowners from the related requirements of 49 U.S.C. § 10903(a)(3)(D).

Service of Notice on Amtrak. The Landowners ask for waiver of 49 C.F.R. § 1152.20(a)(2)(x), which requires that the notice of intent be served on the National Railroad Passenger Corporation (Amtrak). The Landowners state that Amtrak does not operate over the

⁵ The petition refers to 49 C.F.R. § 1152.24(c)(1) rather than 49 C.F.R. § 1152.24(e)(1). (Pet. 5.) Given the context—addressing SDM requirements—and the fact that 49 C.F.R. § 1152.24(c) does not contain a subsection (1), the Board will interpret the petition as seeking waiver of 49 C.F.R. § 1152.24(e)(1).

Line. (Pet. 5.) The Board will grant this request. See Ind. Landowners, AB 1065 (Sub-No. 3), slip op. at 3.

Service of Notice on Labor Organizations. The Landowners seek waiver of 49 C.F.R. § 1152.20(a)(2)(xii), which requires that the notice of intent be served on the headquarters of all duly certified labor organizations that represent employees of the affected rail line. The Landowners state that there are no such labor organizations. (Pet. 6.) The Board will grant this request. See Ind. Landowners, AB 1065 (Sub-No. 3), slip op. at 4; Palmer Ranch Holdings Ltd.—Adverse Aban.—Seminole Gulf Ry., in Sarasota Cnty., Fla., AB 400 (Sub-No. 5), slip op. at 4 (STB served Sept. 21, 2011).

Posting of Notice at Agency Stations or Terminals. The Landowners seek waiver of 49 C.F.R. § 1152.20(a)(3), which requires posting of the notice of intent at each agency station or terminal on the line to be abandoned. According to the Landowners, there are no agency stations at which the notice of intent could be posted. (Pet. 6.) The Board will grant this request. See Ind. Landowners, AB 1065 (Sub-No. 3), slip op. at 4; Alloy Prop. Co., AB 1258, slip op. at 3. Further, as explained in the exemption analysis below, the Board will exempt the Landowners from the related requirements at 49 U.S.C. § 10903(a)(3)(B).

Notice of Intent. The Landowners request waiver of the prescribed form of the notice of intent found at 49 C.F.R. § 1152.21. The Landowners argue that the modified notice as provided in Appendix 4 to their petition is in substantial compliance with the regulation. (Pet. 6; see also id., App. 4.) Great Western does not appear to oppose the Landowners’ request for waiver of the prescribed form, but it objects to the portion of the modified notice stating that land adjacent to and/or within the rights-of-way of the Line has not been used for rail transportation for 40 years and that there is no reasonable prospect for such use in the foreseeable future.⁶ (Great W. Reply 2, Nov. 30, 2021; see Pet. 6, App. 4.)

The Board has approved changes to the form of the notice of intent in other adverse abandonment cases when the substitute notice is in substantial compliance with the requirements of 49 C.F.R. § 1152.21. See Ind. Landowners, AB 1065 (Sub-No. 3), slip op. at 4; Alloy Prop. Co., AB 1258, slip op. at 4. Here, the Board finds that the notice attached to Landowners’ petition as Appendix 4 is acceptable with the following modifications. First, the language “That land has not been used for Board-regulated rail transportation for 40 years” and “There is no reasonable prospect for such use in the foreseeable future” must be amended to “The Landowners claim that the land has not been used for Board-regulated rail transportation for 40 years” and “The Landowners claim that there is no reasonable prospect for such use in the

⁶ The Landowners assert that Great Western’s arguments relate “to the merits of adverse abandonment” rather than the requirements for the notice of intent. (Landowners Reply 1, Dec. 20, 2021). Great Western replies that its objection “simply noted that it intends to demonstrate that it has in the past and intends in the foreseeable future to provide transportation services.” (Great W. Reply 2, Dec. 28, 2021.) To the extent that Great Western’s arguments pertain to the proposed adverse abandonment, such arguments are inappropriate in the context of the Landowners’ request for exemptions and waiver here. See City of Chi., Ill.—Adverse Aban.—Chi. Terminal R.R. in Chi., Ill., AB 1036, slip op. at 3 (STB served July 10, 2009).

foreseeable future,” respectively. See Ind. Landowners, AB 1065 (Sub-No. 3), slip op. at 4 (requiring a similar modification); Alloy Prop. Co., AB 1258, slip op. at 4 (same). Further, the Landowners’ notice of intent must include the same regulatory language relating to trail use and an environmental assessment or environmental impact statement as discussed below with respect to their Federal Register notice.

Also, in providing instructions for written comments and protests, the Landowners’ notice should reference “Docket No. AB 857 (Sub-No. 2)” (rather than “STB AB-857 (Sub-No. 2X)”). Finally, the last paragraph of the modified notice should state: “Persons seeking further information concerning abandonment procedures may contact the Board’s Rail Customer and Public Assistance program at (202) 245-0238 or refer to the text of the abandonment regulations at 49 C.F.R. part 1152.” Accordingly, the Board will grant the Landowners’ request, subject to these changes.

Line Attributes. The Landowners seek waivers of 49 C.F.R. § 1152.22(b)-(d) and (e)(2)-(3), which require that abandonment applications include information regarding the condition of properties, service provided, revenue and cost data, and the rural and community impact. (Pet. 6-7.) Because the information required by 49 C.F.R. § 1152.22(b)-(d) and (e)(2)-(3) is not typically available to adverse abandonment applicants or has otherwise not been required of them, the Board will grant these waivers. See Ind. Landowners, AB 1065 (Sub-No. 3), slip op. at 4-5; see also N.Y. State Dep’t of Env’t Conservation—Adverse Aban.—Saratoga & N. Creek Ry. in Town of Johnsbury, N.Y., AB 1261, slip op. at 4 (STB served Feb. 27, 2018).

Environmental and Historic Impacts. The Landowners request waiver of 49 C.F.R. § 1152.22(f), which requires an abandonment applicant to submit information regarding the environmental and historic impacts of the proposed abandonment in compliance with 49 C.F.R. §§ 1105.7 and 1105.8. (Pet. 7.) The Landowners also request waiver of 49 C.F.R. § 1152.20(c), which requires the abandonment applicant to submit the environmental and historic reports described at 49 C.F.R. §§ 1105.7 and 1105.8 at least 20 days prior to filing an application. (Pet. 7.) The Landowners argue that Great Western filed environmental and historic reports as part of its verified notice of exemption in Docket No. AB 857 (Sub-No. 1X), the Board issued an environmental assessment (EA) in that docket, and there has been no change in carrier operations since that time. (Pet. 7.) According to the Landowners, the environmental and historic information in Great Western’s 2008 environmental and historic reports “is current to date and does not require re-analysis.” (Id.; see Landowners Reply 2, Dec. 20, 2021.) Great Western opposes these requests. (Great W. Reply 1, Nov. 30, 2021; see Great W. Reply 3, Dec. 28, 2021.)

These requests will be denied. The Board generally conducts a full environmental and historic review in adverse abandonment cases, and environmental and historic reports prepared in accordance with 49 C.F.R. §§ 1105.7 and 1105.8 give the Board the information necessary to conduct that review. See Palmer Ranch, AB 400 (Sub-No. 5), slip op. at 6; Norfolk S. Ry.—Adverse Aban.—St. Joseph Cnty., Ind. (St. Joseph), AB 290 (Sub-No. 286), slip op. at 4 (STB served Oct. 26, 2006). Furthermore, although the Board’s Office of Environmental Analysis prepared an EA in 2008 in connection with Great Western’s notice of exemption to abandon the

Line in Docket No. AB 857 (Sub-No. 1X), the information in that EA may no longer be current—notwithstanding the Landowners’ unsupported assertion that it is, (Pet. 7)—and the environmental and historic impacts of the Landowners’ proposed adverse abandonment may need to be reanalyzed. See Mineral Cnty., AB 1014, slip op. at 4; (see also Great W. Reply 1, Nov. 30, 2021.) Therefore, the Landowners will be required to comply with the requirements to prepare and submit both an environmental and historic report if they intend to file an application for adverse abandonment in this proceeding.

Federal Register Notice. The Landowners request waiver of the requirements of 49 C.F.R. § 1152.22(i), which prescribes the wording for the draft Federal Register notice, and they propose to use the alternative language set forth in Appendix 5 to their petition. (Pet. 7; see also id., App. 5.) Great Western objects to the Landowners’ proposed Federal Register notice, contending that it “fails to address the usual provisions governing railbanking”⁷ and “also fails to address the usual EHRs [environmental and historic reports] and OFA [offers of financial assistance] filing requirements.” (Great W. Reply 2, Nov. 30, 2021.) The Landowners reply that its Federal Register notice need not address OFA and railbanking provisions. (Landowners Reply 2, Dec. 20, 2021.)

The modified notice need not address OFA filing requirements because, as addressed below, the Board will grant the Landowners’ request for waiver of the Board’s OFA regulations. In addition, contrary to Great Western’s assertion, the form of the draft notice prescribed in 49 C.F.R. § 1152.22(i) does not require information concerning filing requirements for environmental and historic reports.⁸ However, because the Landowners’ request for waiver of the environmental and historic report provisions will be denied, the Landowners must include in their Federal Register notice the 49 C.F.R. § 1152.22(i) language pertaining to an environmental assessment or environmental impact statement. Additionally, the Federal Register must include language relating to trail use in accordance with 49 C.F.R. § 1152.22(i).

Further, in providing instructions for written comments and protests, the Landowners’ modified Federal Register notice should reference “Docket No. AB 857 (Sub-No. 2)” (rather than “STB AB-857 (Sub-No. 2X)”) and, similarly, the last paragraph of the modified Federal Register notice should state: “Persons seeking further information concerning abandonment procedures may contact the Board’s Rail Customer and Public Assistance program at (202) 245-0238 or refer to the text of the abandonment regulations at 49 C.F.R. part 1152.” The Board will grant the Landowners’ request to use the alternative language set forth in Appendix 5 to their petition, subject to these changes.

⁷ The Landowners have not requested waiver of the trail use provision at 49 C.F.R. § 1152.29, as Great Western appears to suggest. (See Great W. Reply 2, Nov. 30, 2021 (citing Riverview Trenton R.R.—Adverse Aban.—in Wayne Cnty., Mich., AB 1230 (STB served Apr. 10, 2015))); see also Riverview Trenton R.R., AB 1230, slip op. at 6 (declining to rule on a request for waiver of the trail use provisions and explaining that the issue could be addressed in a later decision).

⁸ Although reference is not required in the draft notice, the Landowners are required to submit environmental and historic reports at least 20 days prior to filing an application for adverse abandonment, as addressed above.

Offers of Financial Assistance. The Landowners ask for waiver of 49 C.F.R. § 1152.27 and exemption from 49 U.S.C. § 10904, which govern OFAs to continue rail service. (Pet. 8.) Great Western opposes this request, arguing that an OFA “would necessarily negate the approval of [an] adverse abandonment” and that the Board should not foreclose prospective users of the Line from seeking to acquire or subsidize continued service. (Great W. Reply 2, Nov. 30, 2021; see also Great W. Reply 2, Dec. 28, 2021.) In response, the Landowners argue that an OFA cannot be imposed as a condition to an authorized adverse abandonment. (Landowners Reply 2, Dec. 20, 2021.)

The Board will grant the Landowners’ request. A grant of the request for waiver of the Board’s OFA regulations will not affect the merits of an adverse abandonment application. If the application fails, the waiver would be mooted. But if the Board were to grant adverse abandonment authority here, it would be finding that the public convenience and necessity require or permit the removal of the Line from the interstate rail network. The effect of granting an adverse abandonment is that the Board’s primary jurisdiction is withdrawn, thus permitting state, local, or other federal law to apply where there is no overriding federal interest in interstate commerce. See Alloy Prop. Co., AB 1258, slip op. at 5; St. Joseph, AB 290 (Sub-No. 286), slip op. at 6. It would be fundamentally inconsistent with the rationale underlying the adverse abandonment sought here to provide for further Board regulation under the OFA provisions of 49 C.F.R. § 1152.27 and 49 U.S.C. § 10904. See Ind. Landowners, AB 1065 (Sub-No. 3), slip op. at 5-6; Alloy Prop. Co., AB 1258, slip op. at 5; St. Joseph, AB 290 (Sub-No. 286), slip op. at 6. Moreover, this waiver does not foreclose persons interested in potential rail service or preservation of the Line from participating in a Board proceeding concerning an adverse abandonment application by the Landowners.

Exemption Criteria. As indicated, the Landowners seek exemptions from the following statutory provisions corresponding to Board regulations previously discussed: 49 U.S.C. § 10903(c)(2)(A) and (B) (SDMs); 49 U.S.C. § 10903(a)(3)(D) (notice to shippers); 49 U.S.C. § 10903(a)(3)(B) (posting); and 49 U.S.C. § 10904 (OFAs). The Board will grant these exemptions because the application of these provisions is not necessary here to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101. These exemptions would promote the RTP by eliminating unnecessary procedures and thus would expedite regulatory decisions (§ 10101(2)) and foster sound economic conditions in transportation (§ 10101(9)). Other aspects of the RTP would not be adversely affected. Additionally, application of the statutory provisions from which the Board is granting exemptions is not necessary to protect shippers from an abuse of market power, including because, as previously stated, the record indicates that no shippers are using the Line.

It is ordered:

1. The petition for waivers and exemptions is granted to the extent discussed above.
2. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.