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SERVICE DATE – MARCH 25, 2022

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1314X

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

Decided: March 25, 2022

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 (WVSRA), known as the Buffalo Creek & Gauley Railroad (BC&G Line), from the interstate rail network. Elk River R.R.—Aban. Exemption—in Kanawha & Clay Cnty., W. Va., AB 1314X, slip op. at 1 (STB served Aug. 3, 2021).

On August 17, 2021, TERRI filed a supplement, arguing that the proposed abandonment of the Line would not isolate the BC&G Line from the interstate rail network because TERRI and WVSRA intend to enter an interim trail use/rail banking agreement for the Line's right-of-way under the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d), which would expressly prohibit consummating the abandonment. (TERRI Suppl. 1-2, 4-9, Aug. 17, 2021.) According to TERRI, because the Line would be subject to an interim trail use/rail banking agreement, the Line would not be removed from the interstate rail network, and the BC&G Line would therefore not become stranded. (*Id.* at 4-8.) TERRI further argues that, even if the Board were to find that the proposed abandonment of the Line would isolate the BC&G Line, it should nevertheless be entitled to abandon the Line because none of the Board's concerns regarding stranded segments are at issue, citing various Board precedent. (*Id.* at 8-10.) In addition, TERRI proposes that, should the Board need assurance that the proposed abandonment of the Line would not isolate the BC&G Line, the Board impose a condition prohibiting TERRI from

consummating the abandonment of the Line without WVSRA also filing for and receiving authority to abandon the BC&G Line. (Id. at 11.)<sup>1</sup>

On August 18, 2021, WVSRA commented in support of TERRI's notice of exemption, arguing that, because TERRI intends to railbank the Line, the BC&G Line would not be stranded, and WVSRA's ability to fulfill its common carrier obligation on the BC&G Line would not be impeded. (WVSRA Comment 2-7, Aug. 18, 2021.)

By decision served October 7, 2021, in response to comments asserting that a segment of the Line from Clendenin to Hartland (the Segment) was previously abandoned, TERRI was directed to provide additional supplemental information addressing whether the Segment is within the Board's jurisdiction. Elk River R.R.—Aban. Exemption—in Kanawha & Clay Cntys., W. Va. (Oct. 2021 Decision), AB 1314X, slip op. at 3 (STB served Oct. 7, 2021). The decision noted that the Segment was authorized for abandonment in 1979 in Docket No. AB 19 (Sub-No. 24), and that, in 1996, TERRI was authorized to construct and operate the Segment in Docket No. FD 31989. Id. at 2. The decision further noted that, because the Segment was previously abandoned, if TERRI never exercised the construction authority granted in Docket No. FD 31989 then the Segment is not currently within the Board's jurisdiction and is not eligible for abandonment under 49 U.S.C. § 10903. Oct. 2021 Decision, AB 1314X, slip op. at 3.

On November 3, 2021, TERRI filed an additional supplement stating that the Segment is not within the Board's jurisdiction and requesting that its notice of exemption be amended to remove the Segment. (TERRI Suppl. 2, Nov. 3, 2021.) TERRI reiterates its intention to abandon the remaining 24.6 miles of the Line (the Remaining Line) extending from Hartland (milepost 67.2) to milepost 43.6 (at or near North Line, south of Duck, W. Va.), including the Middle Creek Spur. (Id.) TERRI states that it still intends to enter an interim trail use/rail banking agreement with WVSRA for the Remaining Line's right-of-way under the Trails Act. (Id. at 3.)

On March 8, 2022, the Hon. Jim Justice, Governor of West Virginia, commented in support of TERRI's amended verified notice of exemption. (W. Va. Comment 1, Mar. 8, 2022.)

## DISCUSSION AND CONCLUSIONS

The verified notice will be dismissed in part, as the Segment is not within the Board's jurisdiction. Therefore, TERRI's request to remove the Segment from its notice of exemption will be granted.

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<sup>1</sup> In its supplement, TERRI also responds to an argument from the National Association of Reversionary Property Owners' 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, however, the Line connects to the interstate rail network at Gilmer, W. Va. (TERRI Suppl. 1, 3, Aug. 17, 2021.)

As to the Remaining Line, the verified notice will be rejected. The informal, streamlined class exemption process is typically reserved for routine transactions that are uncomplicated and noncontroversial. See, e.g., Iowa Traction Ry.—Aban. Exemption—in Cerro Gordo Cnty., Iowa, AB 1269X, slip op. at 2 (STB served Aug. 5, 2019). A notice that raises unresolved issues or questions that require considerable scrutiny may be rejected. See, e.g., V&S Ry.—Aban. Exemption—in Kiowa Cnty., Colo., AB 603 (Sub-No. 3X), slip op. at 2 (STB served June 17, 2014), appeal denied, (STB served Oct. 23, 2014).

TERRI's notice of exemption and related arguments raise such concerns and will be rejected. The Board has held that it will not allow track to which the common carrier obligation is attached to become isolated from the interstate rail network as a result of abandonment of the adjoining segment. See, e.g., ABE Fairmont, LLC—Aban. Exemption—in Fillmore Cnty., Neb., AB 1106X et al., slip op. at 4 n.3 (STB served Jan. 29, 2018) (citing Cent. Or. & Pac. R.R.—Aban. & Discontinuance of Serv.—in Coos, Douglas, & Lane Cntys., Or., AB 515 (Sub-No. 2), slip op. at 12 (STB served Oct. 31, 2008)). Here, abandonment of the Remaining Line, if consummated, would isolate the BC&G Line, an active rail line, from the interstate rail network.

TERRI argues that the BC&G Line would not become isolated because TERRI will not consummate the authority to abandon the Remaining Line, since TERRI and WVSRA intend to enter an interim trail use/rail banking agreement under the Trails Act for the Remaining Line's right-of-way. That present intention, however, does not ensure that the BC&G Line will not become isolated. Interim trail use/rail banking under the Trails Act is voluntary and consensual between the railroad and the trail sponsor. See, e.g., Citizens Against Rails-to-Trails v. STB, 267 F.3d 1144, 1151-52 (D.C. Cir. 2001); CSX Transp., Inc.—Aban. Exemption—in Boone Cnty., W. Va., AB 55 (Sub-No. 803X), slip op. at 2 (STB served Apr. 15, 2021). A railroad is not obligated to agree to negotiate with the proposed trail sponsor for interim trail use/rail banking. Even if the railroad agrees to negotiate, and a Trails Act condition is imposed, either party can terminate the negotiations at any time, in which case the Trails Act condition is removed and the railroad can consummate the abandonment of the line, assuming there are no other barriers to consummation. See, e.g., BNSF Ry.—Aban. Exemption—in Cook Cnty., Ill., AB 6 (Sub-No. 493X), slip op. at 1 (STB served July 28, 2021).

TERRI acknowledges that an unconditional abandonment authorization could isolate the BC&G Line and proposes that the Board impose a condition prohibiting TERRI from consummating the abandonment of the Remaining Line until WVSRA files for and receives authority to abandon the BC&G Line. However, such a condition is not typical in an abandonment, and it would be inappropriate to impose such a condition in an abandonment authorized under the streamlined class exemption process, which as noted is designed for routine and noncontroversial cases.

Finally, TERRI contends that, even if the Board finds the proposed transaction would isolate the BC&G Line, none of the Board's concerns regarding stranded segments are at issue, since both the Remaining Line and the BC&G Line do not have active shippers, do not handle overhead traffic, and have not carried freight traffic in over 20 years. In particular, TERRI argues that it should be authorized to abandon the Remaining Line for the same reasons articulated by the Board in Sierra Northern Railway—Abandonment Exemption—in Yolo

County, Cal., AB 874 (Sub-No. 1X) (STB served June 22, 2020), in which the Board granted a petition for exemption to abandon a line notwithstanding the possibility of creating a stranded segment. Sierra Northern, AB 874 (Sub-No. 1X), slip op. at 3. However, the Board allowed the abandonment in Sierra Northern to go forward under the “specific circumstances presented” in that case, which included, in particular, a reasonable likelihood that the stranded segment would be reconnected to the interstate rail network if a planned realignment project was completed. See id. at 4. In addition, the railroad in Sierra Northern, and the railroads in the other cases TERRI cites, sought abandonment authority through the more detailed abandonment application or petition for exemption procedures, not the streamlined and expedited class exemption process that TERRI is pursuing here.

For these reasons, TERRI’s verified notice will be rejected as to the Remaining Line.

It is ordered:

1. The verified notice of exemption is dismissed in part and rejected in part, as indicated above.
2. This decision is effective on its service date.

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