

SERVICE DATE – OCTOBER 24, 2022

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1324X

ALABAMA RAILROAD, LLC—ABANDONMENT EXEMPTION—
IN ESCAMBIA, CONECUH, AND MONROE COUNTIES, ALA.

Digest:¹ This decision permits Alabama Railroad, LLC, to abandon approximately 47.5 miles of rail line in Escambia, Conecuh, and Monroe Counties, Ala., subject to conditions.

Decided: October 21, 2022

Alabama Railroad, LLC (ARL), a Class III rail carrier, has filed a petition under 49 U.S.C. § 10502 for an exemption from the prior approval requirements of 49 U.S.C. § 10903 to abandon approximately 47.5 miles of rail line, extending from milepost 607.73 at Flomaton, Ala., to milepost 655.2 near Tunnel Springs, Ala., including all sidings and the MR Junction Spur between valuation stations 0+00 and 90+81 in Escambia, Conecuh, and Monroe Counties, Ala. (the Line). Notice of the petition was served and published in the Federal Register on July 26, 2022 (87 Fed. Reg. 44,485). As discussed below, the Board will grant the petition for exemption, subject to historic preservation and environmental conditions.

BACKGROUND

ARL purchased the Line from Alabama Railroad Co. (ALAB) in 2020. (Pet. 2); see Ala. R.R.—Acquis. & Operation Exemption—Line of Ala. R.R., FD 36450 (STB served Nov. 6, 2020). According to the petition, ARL has not moved any traffic over the Line since its purchase and no overhead traffic exists, as the Line is stub-ended and represents ARL's entire rail system. (Pet. 2.) ARL states that it doubts that future demand for service will materialize, particularly at volumes that would warrant restoring operations. (Id.) As such, ARL seeks to abandon the Line and salvage some or all of the Line's track assets. (Id.)

Before ALAB sold the Line to ARL in 2020, ALAB had obtained Board authority to abandon the Line, but the abandonment authority was never consummated. (Id. at 1-2); see Ala. R.R.—Aban. Exemption—in Escambia, Conecuh, & Monroe Cntys., Ala., AB 463 (Sub-

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).

No. 2X) (STB served Apr. 18, 2019).² According to the petition, landowners adjacent to the Line were unhappy that ALAB had not consummated abandonment of the Line and the landowners have threatened hostile state court action that would attempt to force ARL's divestiture of the Line's right-of-way. (Pet. 2-3.)

On August 12, 2022, certain landowners, who collectively own 53 parcels adjacent to the Line (Landowners), filed a reply in response to several statements in ARL's petition, stating, among other things, that they fully support the proposed abandonment. (Landowners Reply 1-2.) Landowners also state, however, that, while they would not seek a determination of abandonment in state court, they might pursue "state court action to quiet title in their interest in the fee ownership of the right-of-way and to recover whatever monies ARL has received for any type of use that is not a railroad purpose." (*Id.* at 2.)

On August 25, 2022, ARL filed for leave to file a rebuttal along with a rebuttal to Landowners' reply.³ ARL asserts that, based on prior communications with Landowners, anything short of consummation, including possible interim trail use, would be unacceptable to Landowners. (ARL Rebuttal 2.) ARL includes correspondence between Landowners and ARL discussing their respective positions and suggests, again, that Landowners might pursue a state court action if ARL does not consummate the abandonment over the entirety of the Line. (*Id.* at 3.)

DISCUSSION AND CONCLUSIONS

Exemption from 49 U.S.C. § 10903. Under 49 U.S.C. § 10903, a rail line may not be abandoned without the Board's prior approval.⁴ Under 49 U.S.C. § 10502, however, the Board

² ARL notes that the abandonment authority obtained by ALAB indicates that no common carrier service has been provided over the Line since at least 2017. (Pet. 6.)

³ Under 49 C.F.R. § 1104.13(c), a reply to a reply is not permitted. However, in the interest of a more complete record, the Board will grant ARL's request for leave and will accept ARL's rebuttal into the record. See City of Alexandria—Pet. for Declaratory Ord., FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing a reply to a reply "[i]n the interest of compiling a full record").

⁴ ARL and Landowners both discuss at length Monroe County Commission v. Nettles, 288 So. 3d 452 (Ala. 2019). In that case, the Alabama Supreme Court, applying state law, upheld a lower court's finding that a railroad had abandoned a rail line right-of-way, notwithstanding that the railroad had not consummated abandonment of the line and, instead, had properly railbanked the right-of-way under the National Trails System Act, 16 U.S.C. § 1247(d). Nettles, 288 So. 3d at 458, 462. However, the court's assertion of jurisdiction to decide the abandonment question is flatly inconsistent with the Board's exclusive and plenary authority over the abandonment of rail lines. 49 U.S.C. §§ 10501(b)(2), 10502, 10903; see also Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 320 (1981) ("[T]he authority of the [STB] to regulate abandonments is exclusive."); Grantwood Village v. Mo. Pac. R.R., 95 F.3d 654, 658 (8th Cir. 1996) ("[F]ederal law preempts state law on the question of abandonment while the [STB] retains jurisdiction over the right-of-way."). A rail line remains in the interstate rail network until its abandonment is

must exempt a transaction or service from regulation when it finds that: (1) continued regulation is not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not needed to protect shippers from the abuse of market power.

Detailed scrutiny of the proposed abandonment under 49 U.S.C. § 10903 is not necessary to carry out the RTP in this case. There are no active shippers on the Line. The record indicates that ARL has not moved any local traffic on the Line and that, because the Line is stub-ended, there can be no overhead traffic. (Pet. 2, 7.) In reply to the petition, Landowners state that they “fully support” abandonment of the Line. (Landowners Reply 2.) Here, granting an exemption would expedite regulatory decisions, foster sound economic conditions in transportation, reduce regulatory barriers to exit, encourage honest and efficient management of railroads, and provide for the expeditious handling and resolution of this proceeding. See 49 U.S.C. § 10101(2), (5), (7), (9), (15). Other aspects of the RTP would not be adversely affected by the use of the exemption process.

Regulation of the proposed abandonment is also not needed to protect shippers from the abuse of market power, as, again, there are no active shippers on the Line.⁵ And again, the Line is stub-ended and therefore not capable of handling overhead traffic.

Employee Protection. Where, as here, the carrier is abandoning its entire system, the Board generally does not impose labor protection under 49 U.S.C. § 10502(g), unless the evidence indicates the existence of (1) a corporate affiliate that will continue substantially similar rail operations or (2) a corporate parent that will realize substantial financial benefits over and above relief from the burden of deficit operations by its subsidiary railroad. See Miss. & Skuna Valley R.R.—Aban. Exemption—in Yalobusha & Calhoun Cntys., Miss., AB 1089X, slip op. at 3 (STB served Jan. 20, 2012); Wellsville, Addison & Galetton R.R.—Aban. of Entire Line in Potter & Tioga Cntys., Pa., 354 I.C.C. 744, 746 (1978); Northampton & Bath R.R.—Aban. near Northampton & Bath Junction, in Northampton Cnty., Pa., 354 I.C.C. 784, 786 (1978). Because the record does not indicate that ARL has a corporate affiliate or parent that will continue similar operations or that could benefit from the proposed abandonment, the Board will not impose employee protective conditions here.

authorized by the Board and the railroad consummates the abandonment by filing a timely notice of consummation with the Board. See, e.g., Baros v. Tex. Mexican Ry., 400 F.3d 228, 236 (5th Cir. 2005) (noting that the consummation notice requirement “implicitly recognizes that the decision actually to abandon a line rests with the carrier”); Honey Creek R.R.—Pet. for Declaratory Ord., FD 34869 et al., slip op. at 4-7 (STB served June 4, 2008); 49 C.F.R. § 1152.29(e)(2). Finally, the Board notes that Nettles was issued over two vigorous dissents and has been criticized in both federal and state court. See Five Mile Creek Greenway Cap. Improvement Coop. Dist. v. Corner Stone Ranch Inc., Case No. 2:20-cv-01037, 2021 WL 1816971, at *16-17 (N.D. Ala. May 6, 2021); Burgoyne v. Chi. Terminal R.R., 169 N.E.3d 815 (Ill. App. Ct. 2020).

⁵ Because regulation is not necessary to protect shippers from the abuse of market power, the Board need not determine whether the transaction is limited in scope. See 49 U.S.C. § 10502(a)(2).

Offers of Financial Assistance, Public Use, and Interim Trail Use/Rail Banking. The Board will not consider offers of financial assistance (OFA) in this case because no formal expressions of intent to file an OFA were filed by the August 5, 2022 deadline. See 49 C.F.R. § 1152.27(c)(1)(i). Additionally, no requests to negotiate for public use under 49 U.S.C. § 10905 or interim trail use/railbanking under 16 U.S.C. § 1247(d) were filed by the August 15, 2022 deadline. See 49 C.F.R. §§ 1152.28(a)(3), 1152.29(b)(2).⁶

Environmental and Historic Review. ARL submitted a combined environmental and historic report with its petition and notified the appropriate federal, state, and local agencies of the opportunity to submit information concerning the environmental impacts of the proposed abandonment. See 49 C.F.R. §§ 1105.7, 1105.8, 1105.11. The Board's Office of Environmental Analysis (OEA) examined the report, verified the data it contains, and analyzed the potential effects of the proposed action on the quality of the human environment.

In a Draft Environmental Assessment (Draft EA) served on September 2, 2022, OEA noted that the National Geodetic Survey (NGS) indicated that there are geodetic survey markers within and adjacent to the right-of-way. Accordingly, OEA recommended a condition requiring ARL to notify NGS at least 90 days prior to beginning salvage activities. OEA also stated that the U.S. Fish and Wildlife Service (USFWS) did not provide comments. However, in a previous consultation with the Board in 2019 related to Alabama Railroad—Abandonment Exemption—in Escambia, Conecuh, & Monroe Cnty., Ala., Docket No. AB 463 (Sub-No. 2X), USFWS noted that suitable habitat for the Red Hills salamander was known to be adjacent to the rail line and within the right-of-way in areas of Monroe County. To address potential impacts on the Red Hills salamander, OEA recommended a condition requiring ARL to refrain from storing or placing equipment or materials on any steep slopes and to implement the use of best management practices while conducting abandonment-related salvage activities in Monroe County. OEA determined that, with the implementation of the recommended mitigation measure, no federally threatened or endangered species would be adversely affected by the proposed abandonment.

The Draft EA also stated that the Alabama Historical Commission (State Historic Preservation Office or SHPO) responded to the combined environmental and historic report, concurring that the proposed abandonment would have no effect on any cultural resources. The SHPO also requested that a condition be imposed regarding the unanticipated discovery of artifacts or archaeological features. Accordingly, OEA recommended a condition requiring ARL to notify OEA, interested federally recognized tribes, and the SHPO upon the discovery of any unanticipated archaeological sites, human remains, funerary items or associated artifacts during ARL's abandonment-related salvage activities. Following the notification, OEA would need to consult with the SHPO, interested federally recognized tribes, the railroad, and other consulting

⁶ ARL states that it is in active discussions with prospective trail sponsors about the possibility of late-filing requests for issuance of a notice of interim trail use or abandonment (NITU) and that, to preserve the option of interim trail use, ARL is considering whether to seek a NITU itself. (ARL Rebuttal 2 n.3.) As of the date of this decision, the Board has received no NITU requests for the Line.

parties, if any, to determine whether appropriate mitigation measures are necessary. Comments on the Draft EA were due by October 3, 2022.

OEA issued its Final EA on October 7, 2022, noting that no comments on the Draft EA were received and recommending that the previously recommended conditions be imposed. Accordingly, the historic preservation and environmental conditions recommended by OEA will be imposed.

This action, as conditioned, will not significantly impact the quality of the human environment or the conservation of energy resources.

It is ordered:

1. ARL's request to file a rebuttal is granted and ARL's rebuttal is accepted into the record.
2. Under 49 U.S.C. § 10502, the Board exempts from the prior approval requirements of 49 U.S.C. § 10903 ARL's abandonment of the Line, subject to the conditions set forth in the Final EA.⁷
3. This exemption will be effective November 23, 2022.
4. Petitions to reopen and petitions to stay must be filed by November 8, 2022.
5. Pursuant to 49 C.F.R. § 1152.29(e)(2), ARL shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the Line. If consummation has not been effectuated by ARL's filing of a notice of consummation by October 24, 2023, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the one-year period, the notice of consummation must be filed no later than 60 days after the satisfaction, expiration, or removal of the legal or regulatory barrier.

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

⁷ If an interim trail use agreement under 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29 is ultimately reached for the Line (or a portion thereof), compliance with the conditions set forth in the Final EA are not required with respect to any portion of the Line covered by the interim trail use agreement for the duration of the agreement.