

BEFORE THE
SURFACE TRANSPORTATION BOARD

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THE BURLINGTON NORTHERN AND SANTA FE RY. CO.—
ABANDONMENT EXEMPTION—IN KING COUNTY, WA

STB DOCKET NO. AB-6 (Sub-No. 380X)

WAVERLY HILLS CLUB, INCORPORATED
—
REPLY TO MOTION OF KING COUNTY, WASHINGTON
TO HOLD PROCEEDINGS IN ABEYANCE

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Petitioner Waverly Hills Club, Incorporated (“the Club”), files this reply to the Motion filed by Respondent King County, Washington, to Hold Proceedings in Abeyance.

The Club first filed the Petition to Reopen NITU Decision or, in the Alternative, Petition For Declaratory Orders (Club’s Petition) at the Surface Transportation Board (Board). The Club then filed a Complaint in state court that King County removed to Federal District Court. The Complaint is a protective Complaint. The Club’s position stated in the Complaint is that the issues therein should be decided by the Board, but if the Board did not resolve some or all of the issues, then the court should do so. Ex. 1 to County Motion, Complaint at 15. The issues in the Complaint are also pled in the Club’s Petition here.¹

King County ignores the fundamental essence of the Club’s Petition. The Board is the best forum to address the issues raised in the Club’s Petition, and as a result, the County’s Motion is not well founded and should be denied.

A. The Club’s Petition seeks to de-railbank a portion of the rail line which leads to abandonment of that portion—a decision within the exclusive jurisdiction of this Board, hence abeyance is inappropriate.

The key point is that the Club is seeking to reopen the Redmond-Issaquah Corridor proceeding and have the Board issue an amended NITU to de-railbank a half-acre of the Corridor. The Board last touched this proceeding in 2000 when the

¹ There is one exception and that is whether the land use fees are authorized by the State Constitution which is a secondary issue after deciding whether the land use fees serve a legitimate railroad purpose.

Board reopened the NITU to allow the City of Issaquah to assume interim trail manager responsibility for the southerly 1.55 miles of the corridor—the management was transferred from King County control. STB Docket No. AB-6 (Sub-No. 380X) (served Apr. 5, 2000). The Club’s Petition seeks to have the Board reopen the amended NITU to modify the railbanked area, and then declare a portion of the right of way de-railbanked and subject to abandonment. The Club’s Petition states:

The Petition to Reopen urges the Board to de-railbank a small portion of right of way used by the Club. The Board has authority to do this by first reopening the former proceeding. Then, the Board would need to vacate the existing NITU and issue a replacement NITU for the remaining right of way. Finally, the Board would order immediate abandonment of the subject right of way portion.

Club Petition at 25. Thus, the Club’s Petition seeks a remedy that would lead to abandonment of a tiny portion of subject Redmond-Issaquah Line right of way.

The United States Supreme Court confirmed that the ICC, now this Board, has, “exclusive and plenary’ jurisdiction to regulate abandonments.” *Preseault v. I.C.C.*, 494 U.S. 1, 8 (1990) (quoting *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 321 (1981) (substantial discussion of abandonment authority). The Board’s exclusive jurisdiction over abandonments and also operation or discontinuance of rail lines—everything related to rail transportation—is specified in Federal law. 49 U.S.C. § 10501(b); *Pejepscot Indus. Park, Inc. v. Maine Cent. R. Co.*, 215 F.3d 195, 198-201 (1st Cir. 2000) (citing statute and discussing exceptions not applicable here). As restated by the Court of Appeals for the Sixth Circuit: “Thus, if a railroad line falls within its jurisdiction, the STB’s authority over abandonment is both exclusive and plenary.” *R.R. Ventures, Inc. v. Surface Transp. Bd.*, 299 F.3d 523,

530 (6th Cir. 2002) (citing *Preseault v. I.C.C.*, 494 U.S. at 8). The Board clearly has jurisdiction over the Redmond-Issaquah Corridor because the Line has only been discontinued and not abandoned per the Trails Act. 16 U.S.C § 1247(d); *Kansas & Oklahoma Railroad, Inc.—Abandonment Exemption in Hodgeman, Comanche, Kiowa, and Pratt Counties*, KS, STB Docket No. AB 853 (Sub-No. 1X), 2020 WL 2093755 at 3 (Service Date: April 30, 2020) (railbanked line “remains under the Board's exclusive jurisdiction as part of the interstate rail network” citing 16 U.S.C. § 1247(d)).

The natural result of the Board’s exclusive authority over abandonment decisions is that the Federal District Court has no authority over abandonment related matters. *Trevarton v. South Dakota*, 817 F.3d 1081, 1084 (8th Cir. 2016). In *Trevarton*, the plaintiff property owners filed a lawsuit in federal district court and sought to challenge a Board decision authorizing an interim trail use agreement. The Court of Appeals concluded that the district court lacked jurisdiction because of, “the STB's exclusive jurisdiction to determine whether a rail line has been abandoned.” *Id.* This proposition is not remarkable—only the Board can authorize abandonment. At the district court in *Trevarton*, the court noted that the parties stipulated to that point: “The parties acknowledge a railroad line cannot be abandoned without approval of the ICC.” *Trevarton v. South Dakota*, 2015 WL 1459620, at *4 (D.S.D. Mar. 29, 2015), *affirmed on this point, decision affirmed as modified*, 817 F.3d at 1084.

Similarly, the de-railbanking requested by the Club would result in abandonment of the tiny portion of the right of way used by the Club. *See Union Pac. R.R. Company—Abandonment between Echo & Park City & Between Keetley Junction &*

Phoston, in Summit & Wasatch Counties, UT, No. AB-33 (Sub-No. 55), 2006 WL 280874, at *1 (Jan. 31, 2006) (Board reopened case to modify CITU to abandon an unneeded portion of the railbanked line). As a result, the Board has exclusive jurisdiction over the de-railbank issue and cannot defer to the Federal District Court as requested by King County. There is no concurrent jurisdiction as suggested by the County'. County Motion at 7. Because of the exclusive jurisdiction, the Club did not raise the de-railbank request in the Club's Complaint in Federal District Court. *See* Waverly Complaint at 18 (Request for Relief), Exhibit 1 to King County Motion to Hold Proceedings in Abeyance.

King County's Motion completely ignores the importance of the Club's request to reopen the NITU to de-railbank a portion of the right of way and then abandon that portion. After noting that the Club's Petition seeks to reopen the NITU Decision on page 2, the County's Motion never addresses the Club's reopen request. Instead, the County's Motion focuses on trying to spin the Club's Petition as involving disputes over property law and unspecified state law issues. Even if the County's Motion did address the reopen issue, the law is clear that abandonment issues are within the exclusive jurisdiction of the Board. The Federal District Court cannot address the de-railbank issue, so holding this proceeding in abeyance will directly cause a delay in having this issue addressed by the Board as required by law. Waiting for the Federal District Court to determine that it has no jurisdiction over the de-railbank claim does not promote efficiency and the unnecessary delay would prejudice the Club. For these reasons alone, the County's Motion must be denied.

In summary, the Club's Petition to Reopen seeking to de-railbank and abandon a tiny portion of the Line is within the exclusive jurisdiction of the Board. The Club did not raise this issue in its Complaint removed to Federal District Court, and even if it did, that Court would have to defer to the Board on the de-railbank/abandonment issue. Abeyance would just cause unnecessary delay which would not be efficient and would prejudice the Club. Therefore, King County's Motion to hold these proceedings in abeyance should be denied.

B. The Board is the best forum to decide the declaratory relief issues raised in the Club's Petition, thus abeyance is inappropriate

The Motion by King County asserts that the Federal District Court is, "the more appropriate forum." Motion at 5. To the contrary, the Club's Petition involves important questions related to railroad abandonment and operations, and in particular questions related to a railbanked line. The Board has exclusive jurisdiction over such issues, so the Board is the best and only forum for these disputes. The Club's Petition raises three claims that are all related to the same factual background.

The first claim is the request to reopen the proceeding to modify the NITU, de-railbank a half-acre in the right of way, and then abandon that area. This claim is a federal law claim, and as explained above, the request includes partial abandonment which is within the exclusive jurisdiction of this Board. Thus, the blind assertion that the Federal District Court is the more appropriate forum is without basis.

The second claim in the Club's Petition is that the County is misusing the railroad and trail easements to arbitrarily assert exclusive use and possession of the right of

way, *i.e.* to uniformly exclude the underlying owners. One issue is whether the County can as trail manager, and non-railroad operator, assert railroad operations powers based on a railroad easement. This issue is a federal law claim within the exclusive jurisdiction of the Board because it relates to a railbanked line and to railroad operations. 49 U.S.C. § 10501(b). Similarly, the County's authority under the Trails Act is limited to using the trail easement for trail purposes which the Club contends does not include asserting exclusive use and possession. *See, e.g. Trevarton v. South Dakota*, 817 F.3d 1081, 1085 (2016) ("the interim operator may use the right-of-way **for trail purposes**," emphasis added).

The third claim in the Club's Petition seeks a declaration that the Waverly Beach use and minor improvements do not interfere with the trail, or future rail, operations. Again, railroad operations now or in the future are within the Board's exclusive jurisdiction under federal law. 49 U.S.C. § 10501(b). The facts on this issue are largely the same facts underlying the de-railbank request. The Board is the entity with significant knowledge and experience with railroad operations issues, so the Board is the right forum for this issue.

The Board is in the best position to review these issues to protect potential reactivation of the rail line. The Board has recognized that pre-existing rights of third parties, such as the Club, should be respected when those activities do not interfere with potential future railroad use as follows:

[P]re-existing rights of a third party to use part of the rail corridor are not impacted by railbanking and interim trail use under the Trails Act. In other words, trail use under the Trails Act should not prevent a third party from continuing to use a portion of the rail right-of-way in the same

manner it was used before the interim trail use on the line, so long as it does not interfere with the potential reactivation of rail service.

Club Petition at Ex. 30 (Letter from STB General Counsel to Department of Justice, 6/29/20). As a result, the Board will:

address disputes between third parties, trail sponsors, and/or railroads that are brought to it concerning whether rights and activities with a particular railbanked corridor interfere with or are preempted by the Board's jurisdiction over rail transportation under federal law.

Id. See, e.g., Jie Ao and Xin Zhou—Petition for Declaratory Order, Surface Transp.

Bd. Docket No. FD 35539, 2012 WL 2047726 (Service Date: June 6, 2012). The Board should also hear these issues to achieve uniformity on these railroad related disputes which affect the national transportation system. The concern is that there are 94 federal district courts and hundreds of state courts that could come to varied approaches to these issues causing inconsistent results on national issues.

The County's Motion does not address the actual issues raised in the Club's Petition, and thus the County argument that efficient is promoted by abeyance of this proceeding is not well founded. The Club's Petition is not raising any issues related to state and local safety, land use, and zoning regulations on recreational trails. County Motion at 7.² In fact, the County does not have any land use and zoning jurisdiction for this location—the City of Sammamish holds the land use and zoning authority here. The County's Motion also asserts the that state property rights are at issue, but the Club is seeking to have the Board decide the scope of the

² These preemption issues may be subject to concurrent jurisdiction with the courts, but the issues here relate to future railroad activation which is an entirely different subject. The County's Motion is incorrect in that regard. County Motion at 7.

federally granted easement under the 1875 Act and the federal grant under the Trails Act, both federal law issues are within the Board's oversight of railbanked lines.

The County's Motion is primarily based on the mistaken argument that the Board is not the best forum for these disputes. But the Board is the best forum to address the issues actually in the Club's Petition, so the County's argument that inefficiency will result fails. The County has not identified any particular claim needing to be decided by the Federal District Court that will resolve important issues and achieve efficiency. *Lowe's Companies, Inc. v. Rebel Motor Freight, Inc.*, ICC/STB No. 40287, 1991 WL 59341, *1 (I.C.C. 1991) (request for abeyance denied because, "our jurisdiction in this matter is not dependent upon the disposition of the court proceeding"). That is clearly the case here.

Instead, abeyance will cause the inefficiency and delay of having to wait for the Federal District Court to consider whether the issues in the Club's Petition should be decided by the Court or by the Board. That delay will prejudice the Club which could otherwise expect to have the Board move forward now to decide the issues in the Club's Petition. Otherwise, the concern is that the County will seek to have the Federal District Court decide the issues in the Club's Petition—in other words, to essentially usurp the Board's jurisdiction to decide these issues. That would be very prejudicial to the Club since the Club filed at the Board first and only filed in Court as a protective complaint in order to have the court address any issues remaining and not resolved by the Board.

In summary, The County's Motion fails to provide a clear reason for abeyance and the County's Motion should be denied.

Respectfully submitted this 24th day of March 2025.

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CERTIFICATE OF SERVICE

I hereby certify that I have on the 24th day of March 2025, caused to be served a copy of the foregoing Reply to Motion of King County, Washington, to Hold Proceedings in Abeyance upon all parties of record in this proceeding by email.

/s/ Charles A. Klinge

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