

Before the
SURFACE TRANSPORTATION BOARD

STB Docket No. AB 1242

ENTERED
Office of Proceedings
May 2, 2017
Part of
Public Record

**HARTWELL FIRST UNITED METHODIST CHURCH
- ADVERSE ABANDONMENT AND DISCONTINUANCE -
HARTWELL RAILROAD COMPANY AND
THE GREAT WALTON RAILROAD COMPANY, INC., IN HART COUNTY, GA**

**REPLY OF HARTWELL FIRST UNITED METHODIST CHURCH
TO PETITION FOR RECONSIDERATION OF WAIVE OF FILING FEES AND
REQUEST TO HOLD MATTER IN ABEYANCE**

On April 14, 2017, Hartwell First United Methodist Church (“Hartwell First” or “Applicant”) filed an application (the “Adverse Application”) seeking authority from the Board for the adverse abandonment and discontinuance of the approximately 0.25 miles of railroad tracks and associated right of way between Athens Street and the end of line at South Forest Avenue, in Hartwell, Hart County, Georgia (the “Line Segment”). The Line Segment is part of the line of railroad between Bowersville and Hartwell, Georgia (the “Hartwell Line”). Hartwell First was not required to pay a filing fee with the Adverse Application because the Board had previously granted Hartwell First’s request for a fee waiver. Following the filing of the Adverse Application, Hartwell Railroad Company (“HRT”) and the Great Walton Railroad Company, Inc. (“GRWR”) on April 18, 2017, filed a Petition for Reconsideration of Waiver of Filing Fees and Request to Hold Matter in Abeyance (the “Petition”).¹ GRWR has no standing or right to

¹ Together with the Petition, HRT filed a motion to be dismissed from the proceeding because it allegedly does not have any interest in the Hartwell Line (or the Line Segment). Hartwell First does not oppose the dismissal of HRT as set forth in the Reply to Motion to Dismiss being filed with the Board. Accordingly, this Reply will treat only GRWR as the petitioner.

appeal the waiver of filing fees. Moreover, even if the waiver were appealable by GRWR, it has not presented any grounds for reconsideration of the grant of the waiver. Accordingly the Petition should be denied.

BACKGROUND

Hartwell First initiated this proceeding on May 25, 2016, by filing a petition for waivers and exemptions. In the cover letter accompanying the petition for waivers, in accordance with the Board's regulations at 49 C.F.R. §1002.2(e), Hartwell First requested that the Board waive the filing fees that would otherwise apply in this proceeding. Although GRWR replied to the petition for waivers, it did not oppose or respond to the fee waiver request.² By notice dated December 8, 2016, in accordance with the provisions of 49 C.F.R. §1002(e)(2)(iii), the Board's Chief, Section of Administration, Office of Proceedings, advised Hartwell First that its request for a fee waiver had been granted.

DISCUSSION

GRWR's petition here is just another tactic to make this proceeding as long and as expensive as possible in an attempt to intimidate Hartwell First from pursuing the requested relief.³ The Board should deny the Petition, and allow this proceeding to continue so that the

² As discussed below, Hartwell First does not concede that GRWR, or any party other than an applicant, has the right to oppose or participate in the decision on whether to grant a fee waiver request.

³ As described in the Adverse Application, pp. 12-13, GRWR over Thanksgiving weekend began construction of a spur track on the property of Hartwell First despite having voluntarily removed the track previously at the location in 2008 (after not using the tracks since 1996), and not having any title or property interest in or to the land where the track was being laid. Hartwell First was forced to pursue an injunction from the local State Court, which was granted, and then to fight GRWR's wrongful removal of the action to Federal Court by having the case remanded to State Court where the matter remains pending. GRWR has now threatened to condemn Hartwell First's property which would again require Hartwell First to expend precious funds to defend its property. Additionally, GRWR sought to delay the filing of the Adverse Application by filing a letter on March 29, 2017, challenging the description of the end point of the Line

substantive issues of whether the Line Segment should be abandoned and/or discontinued can be determined on the merits. GRWR, of course, will not be affected one way or another by whether Hartwell First is required to pay the filing fees in this proceeding, or by whether the fees are waived. The only effect would be the adverse financial impact on Hartwell First by increasing its costs to proceed at the Board.

Initially, it must be determined if the decision to waive fees under 49 C.F.R. §1002.2(e) is subject to appeal, and if so, whether GRWR has standing to appeal the waiver granted to Hartwell First. The Board's appellate procedures are generally set forth in 49 C.F.R. Part 1115. In the Petition GRWR does not discuss either the type of decision it is appealing or the standards that the Board should apply.

It is not clear from the provisions of 49 C.F.R. §1002.2(e), whether a fee waiver decision is made by the Chief, Section of Administration, or if the decision is made by the Board with the Chief, Section of Administration merely tasked with providing the applicant with notice of the decision. In either event, a decision on a fee waiver request is made in the context of the Board's determination and assessment of fees under 49 C.F.R. Part 1002, and is outside of the related substantive proceeding. The waiver procedures relate to the Board's obligation to charge filing fees as directed by Congress, and the Board's right to waive those filing fees in the case of financial hardship or the public interest. As such a fee waiver request involves only the applicant

Segment as it was described in the Notice of Intent filed and published by Hartwell First. GRWR waited until after the Notice of Intent had been published twice and the day before the third publication, presumably to obtain the longest delay possible. GRWR filed its objection not having objected to the description in its response to the initial petition for waivers and exemptions (which included a draft notice of intent) filed in May 2016, or at any time thereafter. Moreover, the description of the Line Segment endpoint was based on the 1990 GRWR trackage rights notice. *See* Hartwell First letter response filed with the Board on March 30, 2017. The Adverse Application makes it clear that the Line Segment extends from Athens Street to the end of the Hartwell Line, regardless of the milepost.

and the Board, and not parties or potential parties in the related proceeding. A denial of a fee waiver request may adversely affect an applicant, but the grant of a fee waiver decision does not adversely affect or “injure” any other person (including GRWR in this proceeding). Indeed, the regulations acknowledge that only the applicant will be affected, and provide that only the applicant will be notified of the decision on the waiver request. *See* 49 C.F.R. §1002.2(e)(2)(iii). Accordingly, since Hartwell First is the only person substantively affected by the waiver decision, it is the only party that would have the right or standing to appeal the decision on its waiver request. *See Pemiscot County Pot Authority – Construction of a Line of Railroad in Pemiscot County, MO*, STB Finance Docket No. 34117 (served March 21, 2002) (allowing applicant to appeal denial of a fee waiver request). *Cf. Caddo Valley Railroad Company – Abandonment Exemption – In Clark, Pike and Montgomery Counties, Ark.*, STB Docket No. AB 1076(X) (served February 27, 2013), slip op. at 4 (unclear whether third parties have standing to challenge a fee waiver). The Board should use this opportunity to clarify and hold that third parties are not injured by a decision to grant a fee waiver to an applicant, and that third parties do not have standing to challenge or appeal the grant of a fee waiver.

Even if the fee waiver decision were to be considered as part of the adverse abandonment and discontinuance proceeding here, the decision is clearly of an interlocutory nature, and not subject to appeal. The scope of the Board’s appellate procedures is set forth in 49 C.F.R. §1115.1(a) (emphasis added):

These appellate procedures apply in cases where a hearing is required by law or Board action. They do not apply to informal matters such as car service, temporary authority, suspension, special permission actions, or to other matters of an interlocutory nature. Abandonments and discontinuance proceedings instituted under 49 U.S.C. 10903 are governed by separate appellate procedures exclusive to those proceedings. (See 49 CFR part 1152).

Although this is an abandonment and discontinuance proceeding, the Board has recently clarified that the Part 1152 procedures apply only to substantive decision on the merits. *Finch Paper LLC – Petition for Declaratory Order*, STB Docket No. FD 35981 (served January 11, 2017), slip op. at 5 fn. 9. A fee waiver does not require a hearing, and is clearly of an interlocutory nature. Thus, to the extent the waiver is a decision of the Board, the Board’s appellate procedures in 49 U.S.C. Part 1115 do not apply.

To the extent the fee waiver decision were to be considered an interlocutory decision of a Board employee (the Chief, Section of Administration), then an appeal would only be permitted only if the criteria of 49 C.F.R. §1115.9(a) were met. Section 1115.9(a) provides:

Rulings of Board employees, including administrative law judges, may be appealed prior to service of the initial decision only if:

- (1) The ruling denies or terminates any person's participation;
- (2) The ruling grants a request for the inspection of documents not ordinarily available for public inspection;
- (3) The ruling overrules an objection based on privilege, the result of which ruling is to require the presentation of testimony or documents; or
- (4) The ruling may result in substantial irreparable harm, substantial detriment to the public interest, or undue prejudice to a party.

The only criteria that would potentially apply to the Petition would be subsection (4), but GRWR clearly has not demonstrated how it would suffer irreparable harm or undue prejudice, or why there would be a substantial detriment to the public interest. GRWR at best argues that the fee waiver made it more likely that the Adverse Application would be filed, and that GRWR will have to spend its resources to defend what it believes to be a meritless application. Petition at 5. However, GRWR cannot demonstrate that the Adverse Application would definitely not been filed without the fee waiver. Further, Hartwell First of course disagrees about the merits of the

Adverse Application given that GRWR has not used the Line Segment for providing rail service for almost 20 years, and has leased the right of way for non-rail uses for the next 97 years. Thus, since there are substantial grounds to support the requested adverse abandonment and discontinuance, the waiver cannot be said to have encouraged an unfounded action.⁴ Moreover, there is nothing in the Board's regulations in 49 C.F.R. §1002.2(e) that suggests as GRWR contends (Petition, p.5), that the decision whether to grant a fee waiver involves a balancing of the hardship on the applicant with the cost that a respondent might incur. Requiring GRWR to defend against the properly filed Adverse Application will not cause it irreparable harm or undue prejudice.⁵ Accordingly, GRWR has not demonstrated that its appeal meets the criteria of 49 C.F.R. §1115.9, if that section is determined to apply.

Finally, if the fee waiver decision were to be determined to be an appealable Board decision other than an initial decision,⁶ then the criteria of 49 C.F.R. §1115.3 would apply. Section 1115.3 provides:

- (a) A discretionary appeal of an entire Board action is permitted. Such an appeal should be designated a "petition for reconsideration."
- (b) The petition will be granted only upon a showing of one or more of the following points:

⁴ The Petition and this Reply are clearly not the place to argue the merits of the Adverse Application, and Hartwell First will not do so here.

⁵ GRWR also complains about the funds it has had to expend on the State and Federal Court litigation. Besides being irrelevant to the issue of the fee waiver and participation in this Board proceeding, GRWR ignores that the State Court litigation resulted from its improper construction of a spur track on property to which it has no title or interest, and that the Federal Court litigation resulted from GRWR's improper attempt to remove the State Court litigation to Federal Court.

⁶ Appeals of initial decisions are covered by 49 C.F.R. §1115.2. An "initial decision" in the context of Section 1115.2 means an initial decision on the merits. *See Finch Paper, supra*, slip op. at 4. There clearly has not yet been an initial decision in the adverse abandonment and discontinuance proceeding.

- (1) The prior action will be affected materially because of new evidence or changed circumstances.
- (2) The prior action involves material error.

A fee waiver is discretionary and determined on a case-by-case basis depending on the circumstances presented. GRWR has not demonstrated that the decision granting the waiver involved material error. GRWR's counsel argues that the grant of a fee waiver here is inconsistent with Board precedent. However, GRWR does not point to any inconsistent Board decision. Rather counsel expresses that in another proceeding he "was informed" that a religious order he represented would not be granted a fee waiver. Petition at 8. However, it does not appear that in fact his client in the other proceeding actually applied for the waiver (or that any requested waiver was denied). Thus, there is no showing that there was an inconsistent determination in the other proceeding. Moreover, GRWR has not shown that Hartwell First and his other client, just because they both have religious affiliations, have similar financial conditions.

Moreover, GRWR has not presented any new facts that were not available previously, including when the fee waiver was requested. As described in the Adverse Application, p. 9-10, the land adjoining the Line Segment to the north was gifted to Hartwell First in 2002. Thereafter, in 2007, Hartwell First went forward with the acquisition of the yarn plant property on the south side of the Line Segment. It did so based on discussions it had with the owner of GRWR that he would allow Hartwell First to cross the right of way and tracks, and that he would eventually give the railroad's interest in the property to Hartwell First. And so Hartwell First went forward with the construction of a parking lot, gymnasium and children's playground, along with a sidewalk and road crossing to connect its property on both sides of Line Segment between Webb Street and Bank Avenue. Hartwell First also landscaped and maintained the

property on the north side of the right of way after GRWR voluntarily removed a spur track that was located on the property. The amount that may have been spent to acquire the yarn plant and to construct improvements in the approximately 10 years since the acquisition, is not relevant to the financial condition of Hartwell First today, the undesignated funds that it may have available, or the impact that paying the filing fees would have on Hartwell First and its community service projects. Nothing in the Petition demonstrates that the payment of the filing fees that would otherwise be applicable in this proceeding (\$1,400 for petition for waivers and exemptions; \$24,400 for filing of application) would not be a financial hardship for Hartwell First, or that the Board decision to grant the fee waiver was material error.

Additionally, GRWR makes substantial errors in the facts it chooses to raise (most of which go to the substantive merits of the Adverse Application and not to the financial condition of Hartwell First or the decision to grant of the waiver). For example GRWR asserts that Hartwell First has co-existed with the tracks and rail operations for over 130 years. Petition, p. 3. However, as noted above, Hartwell First only became “a neighbor” of the Line Segment when it was donated property on the north side of the Line Segment in 2002 – approximately six years after the last rail service was provided over the Line Segment. Hartwell First did not acquire the property on the south side of the rail segment until 2007, more than 10 years after the Line Segment last saw rail service.

Additionally, GRWR spends several pages discussing a license agreement entered into between Hartwell First and the railroad, and Hartwell First’s building plans for its properties (Petition at 5-8), although it is unclear how the license agreement and plans are relevant to the decision whether to grant a waiver. As noted above, the license agreement was entered into by Hartwell First based on discussions it had at the time with the owner of the railroad in which the

owner agreed to give his ownership interest in the property to Hartwell First in the future. The plans similarly contemplated this future development. Indeed, in 2008, the railroad voluntarily removed a spur track that was on the property of Hartwell First as contemplated by the plans. The issues over the Line Segment tracks remaining in place and interfering with Hartwell First's future development of its properties came to the fore when the railroad instead of giving its interest in the right of way to Hartwell First, leased the right of way to a non-profit, TORCH for a period of 99 years (with a purchase option at the end of \$1.00).⁷ A copy of the TORCH lease is attached to the Adverse Application as part of Volume II. GRWR conveniently does not mention the TORCH lease or its effect on GRWR's rights to use the right of way for rail service, or the fact that GRWR no longer has any rights under the license agreement (having assigned it to TORCH under the lease). While these are issues that relate to the merits of the Adverse Application, they do not relate in the slightest to the determination that was made to grant Hartwell First's fee waiver request, or to whether the decision represented material error.

GRWR has also not addressed the standards for abeyance or a stay of the proceedings, and none should be granted. *See, for example*, 49 C.F.R. §1115.3(f) (filing of petition for reconsideration does not automatically stay the effect of a prior action). Additionally, the Board should promptly deny the petition for reconsideration and continue with the schedule for the properly filed Adverse Application proceeding without delay.

⁷ A 99-year lease followed by a \$1.00 purchase option is actually more equivalent to a sale.

CONCLUSION

For the reasons set forth above, the Petition should be denied, and the proceeding should not be held in abeyance.

Respectfully submitted,



ERIC M. HOCKY
CLARK HILL PLC
One Commerce Square
2005 Market Street, Suite 1000
Philadelphia, PA 19103
(215) 640-8500

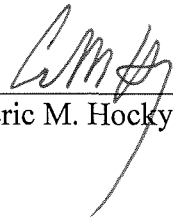
Attorneys for
Hartwell First United Methodist Church

Dated: May 2, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of May, 2017, I served a copy of the foregoing Reply to Petition for Reconsideration of Waiver of Filing Fees and Request to Hold the Matter in Abeyance by email on the following:

Richard H. Streeter
Law Office of Richard H. Streeter
5255 Partridge Lane, N.W.
Washington, DC 20016
rhstreeter@gmail.com



Eric M. Hocky