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SERVICE DATE – NOVEMBER 1, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1266X

CANONIE ATLANTIC CO.—ABANDONMENT EXEMPTION—HALLWOOD TO CAPE CHARLES, VA.

Docket No. AB 1267X

CASSATT MANAGEMENT LLC D/B/A BAY COAST RAILROAD—DISCONTINUANCE OF SERVICE EXEMPTION—HALLWOOD TO CAPE CHARLES, VA.

Docket No. AB 1276X

EASTERN SHORE RAILROAD, INC.—DISCONTINUANCE OF SERVICE EXEMPTION—HALLWOOD TO CAPE CHARLES, VA.

Digest:¹ This decision allows Cassatt Management LLC d/b/a Bay Coast Railroad and Eastern Shore Railroad, Inc., to discontinue service over, and Canonie Atlantic Co. to end its common carrier obligation to provide freight rail service over, approximately 49.1 miles of rail line in Accomack and Northampton Counties, Va., subject to conditions. This decision also denies a request for issuance of a public use condition and a notice of interim trail use or abandonment.

Decided: October 31, 2019

On July 15, 2019, Cassatt Management, LLC d/b/a Bay Coast Railroad (BCR), the Eastern Shore Railroad, Inc. (ESRR), and Canonie Atlantic Co. (CAC)² filed with the Board a petition under 49 U.S.C. § 10502 for exemption from the prior approval requirements of 49 U.S.C. § 10903 for BCR and ESRR to discontinue their lease operations over, and for CAC to abandon, approximately 49.1 miles of rail line in Accomack and Northampton Counties, Va. (the Line). The Line is located between milepost 45.7 at Taylor Street in Hallwood, Va., and the end

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 or relied upon as precedent. See Policy Statement on Plain Language Digests in Decision, EP 696 (STB served Sept. 2, 2010).

² BCR, ESRR, and CAC are referred to collectively as Petitioners. The petition states that CAC is acting on behalf of both ESRR (a wholly owned subsidiary of CAC) and BCR. (Pet. 3 n.2, V.S. Murray at 1.)

of the line at milepost 94.8 at Cape Charles, Va., and the car float operation from Cape Charles to Little Creek, Va. Notice of the petition was served and published in the Federal Register on August 2, 2019 (84 Fed. Reg. 37,943).

On August 23, 2019, the Virginia Bicycling Federation (VBF) filed a request for issuance of a public use condition and a notice of interim trail use or abandonment (NITU). There is ambiguity in the filing, however, as it begins by stating that the request is filed “on behalf of [VBF]” but is signed “on behalf of the Dahlgren Railroad Heritage Trail Association, Inc.” In a letter filed on September 9, 2019, counsel for both VBF and the Dahlgren Heritage Rail Trail Association (DHRTA),³ state that DHRTA is the actual prospective trail sponsor, and that VBF made the August 23, 2019 filing at the request and with the permission of DHRTA. CAC states that it is willing to negotiate an interim trail use agreement. CAC does not object to the public use condition request but notes that it is unnecessary given CAC’s agreement to the issuance of a NITU.⁴

The Board will grant the discontinuance and abandonment exemptions, subject to environmental, historic preservation, and standard employee protective conditions. The Board will deny the request for issuance of a public use condition and a NITU.

BACKGROUND

Petitioners state that, historically, the Line formed a part of a through route of the Pennsylvania Railroad, commonly known as the Delmarva Secondary Track, between Wilmington, Del., and Cape Charles, and from there by car float to Little Creek, where it connected with predecessors to Norfolk Southern Railway Company and CSX Transportation, Inc. (Pet. 3-4.) According to Petitioners, the Accomack-Northampton Transportation District Commission (ANTDC) was established as a political subdivision of the Commonwealth of Virginia on March 2, 1976, to preserve service over the Delmarva Secondary Track south of Pocomoke City, Md., the car float, and the Little Creek trackage. (*Id.* at 4.) Petitioners state that, beginning in 1981, ANTDC provided service over the Line “doing business as” ESRR. (*Id.* at 4-5.) According to Petitioners, CAC ultimately purchased the stock of ESRR from ANTDC. Several years later, ANTDC acquired CAC, keeping ESRR as a separate corporate subsidiary that provided all rail service over the entire Delmarva Secondary Track from Pocomoke City to Cape Charles, the car float, and the Little Creek trackage until 2006, when BCR replaced ESRR as the operating common carrier pursuant to a lease and operating agreement with CAC. (*Id.* at 5 (citing Cassatt Mgmt., LLC—Lease & Operation Exemption—

³ It is also unclear whether the correct entity name is Dahlgren Railroad Heritage Trail Association, Inc., or Dahlgren Heritage Rail Trail Association. For simplicity, this decision will refer to DHRTA.

⁴ CAC responded to VBF’s request by letter filed August 29, 2019. In a letter filed on September 10, 2019, CAC clarifies that it is willing to negotiate with DHRTA as the prospective trail sponsor.

Canonie Atl. Co. ex rel. Accomack-Northampton Transp. Dist. Comm’n, FD 34814 (STB served Feb. 6, 2006).)

According to Petitioners, BCR terminated all operations on April 30, 2018, with little advance notice and without seeking Board approval. (Pet. 5.) Petitioners state that because neither CAC nor ESRR has the equipment or personnel needed to resume operations on their own, they made the following arrangements for the line segments on either side of the Line: (1) Delmarva Central Railroad Company (DCR) agreed to lease the CAC-owned line from Pocomoke City to Hallwood, see Delmarva Cent. R.R.—Change in Operator Exemption—Cassatt Mgmt., LLC, FD 36196 (STB served June 4, 2018); and (2) Buckingham Branch Railroad (BBRR) entered into a lease and operating agreement with CAC for the Little Creek trackage, see Buckingham Branch R.R.—Change in Operators Exemption—Cassatt Mgmt., LLC, FD 36202 (STB served July 18, 2018). (Pet. 5-6.) According to Petitioners, DCR did not seek authority to operate beyond Hallwood because it concluded that the traffic south of Hallwood was insufficient to support viable operations on the Line and the car float. (*Id.*) Petitioners further state that DCR’s recent marketing efforts to find customers for the Line have been unsuccessful. (*Id.* at 6.) Petitioners state that the only customer at Cape Charles, Bay Shore Concrete, is out of business, and that the prospective buyer of Bay Shore Concrete’s property has not expressed interest in using rail and would not be able to meet any traffic commitments to keep the Line open. (*Id.*) Additionally, Petitioners state that while four other shippers have made minimal use of the Line, two of those shippers, Sharp Energy and Pep UP Propane, can obtain rail service from DCR north of Hallwood, and the other two, Crop Production Services and Helena Chemical, only generated 33 carloads of traffic for the period between April 1, 2017, and March 31, 2018. (*Id.*, V.S. Murray at “BCR Carload Information”).

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10903, a rail line may not be abandoned, nor service over the line discontinued, without the Board’s prior approval. Under 49 U.S.C. § 10502, however, the Board 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 discontinuance and abandonment under 49 U.S.C. § 10903 is not necessary to carry out the RTP in this case. The record indicates that traffic on the Line prior to April 2018 was minimal, that no traffic has moved over the Line in the year and a half since April 2018, and that DCR’s recent marketing efforts have been unsuccessful. Moreover, none of the four former customers still in business filed in opposition to the petition. Granting an exemption would expedite regulatory decisions, reduce regulatory barriers to exit, and provide for the expeditious handling of this proceeding. See 49 U.S.C. § 10101(2), (7) & (15). Other aspects of the RTP would not be adversely affected. Additionally, regulation of the proposed abandonment is not necessary to protect shippers from the abuse of market power

because, as discussed above, no shippers have made use of rail service over the Line since April 2018.⁵ Nevertheless, to ensure that former shippers are informed of this decision, the Board will direct CAC to serve a copy of this decision on Crop Production Services, Helena Chemical, Sharp Energy, and Pep UP Propane, so that it is received within five days of this decision's service date, and to certify contemporaneously to the Board that it has done so.

Employee Protection. Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. While Petitioners note that the Board has generally declined to impose labor protective conditions where a carrier is abandoning its entire system and goes out of business, (Pet. 14 n.11), Petitioners have not demonstrated that that is the case here. As described above, CAC owns and leases to DCR the Delmarva Secondary Track from Pocomoke City to Hallwood and owns and leases to BBRR the Little Creek trackage. (Pet. 5.) Accordingly, as a condition to granting this exemption, the Board will impose on CAC the employee protections set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979).

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

On September 13, 2019, OEA issued a draft Environmental Assessment (EA) in which it recommended that the Board impose four conditions on any decision granting abandonment authority. First, the National Geodetic Survey (NGS) has indicated that 82 geodetic survey markers are present in the right-of-way and could be disturbed by the proposed abandonment. OEA therefore recommended a condition requiring CAC to notify NGS at least 90 days prior to beginning salvage activities to allow time for the geodetic survey markers to be preserved.

Second, the U.S. Army Corps of Engineers, Norfolk District (USACE), indicated that the proposed abandonment would likely impact waters or wetlands regulated under Section 404 of the Clean Water Act, and permits may be required prior to conducting salvage activities. USACE also noted that the Line is adjacent to the Norfolk District Dredged Material Placement Area at the Cape Charles City Harbor and recommends coordination to determine whether Section 408 approval is needed. Accordingly, OEA recommended a condition requiring CAC to consult with USACE regarding potential impacts to waters of the United States, including wetlands, and to comply with the reasonable requirements of USACE.

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

Third, the Virginia Department of Environmental Quality - Office of Environmental Impact Review (DEQ-OEIR) reviewed the petition and did not find sufficient information to support a Federal Consistency Certification (FCC) for coastal zone impacts. DEQ-OEIR therefore requested additional FCC documentation from Petitioners to allow DEQ-OEIR to conduct a coordinated review and provide its consistency determination. Accordingly, OEA recommended a condition requiring CAC to consult with DEQ-OEIR and obtain state coastal management consistency certification and prohibiting CAC from filing its consummation notice or initiating any salvage activities related to abandonment (including removal of tracks and ties) until it reports the results of these consultations in writing to OEA and the Board has removed this condition.

Fourth, although Petitioners had served the historic report on the Virginia Department of Historic Resources (SHPO) pursuant to 49 C.F.R. § 1105.8(c), OEA had not heard from the SHPO by the time the EA was issued. Therefore, OEA was not able to consider the SHPO's opinion before determining whether the Line may be eligible for listing on the National Register of Historic Places (National Register). OEA accordingly recommended a condition requiring CAC to retain its interest in and take no steps to alter the historic integrity of all historic properties, including sites, buildings, structures, and objects within the project right-of-way (referred to as the Area of Potential Effect) eligible for listing or listed in the National Register until completion of the Section 106 process of the National Historic Preservation Act, 54 U.S.C. § 306108. The recommended condition also would require CAC to report back to OEA regarding any consultations with the SHPO and the public and prohibit CAC from filing its consummation notice or initiating any salvage activities related to abandonment (including removal of tracks and ties) until the Section 106 process has been completed and the Board has removed this condition.

Comments on the EA were due by October 11, 2019. In its final EA, issued on October 17, 2019, OEA states that it received seven comments.

Among public commenters, four federal or state entities that commented did not recommend any mitigation beyond that which was recommended in the draft EA. USACE indicated that, with the imposition of the previously recommended condition requiring CAC to consult with USACE regarding potential impacts to waters of the United States prior to commencement of any salvage activities, it has no further comments. The Virginia Marine Resources Commission (VMRC) indicated that the proposed abandonment is outside its jurisdiction and therefore would not require a permit from VMRC. The Virginia Department of Transportation, Hampton Roads District, stated that it does not anticipate that the proposed abandonment would have a direct impact on the state-maintained transportation network. Finally, the Virginia Department of Conservation and Recreation indicated that it does not anticipate adverse impacts to natural heritage resources, including any documented state-listed plants or insects.

The SHPO requested additional information on one potentially historic building that may be eligible for listing in the National Register. OEA states that the previously recommended condition under Section 106 of the National Historic Preservation Act will address the SHPO's concerns, and OEA therefore continues to recommend imposing that condition.

The Virginia Department of Environmental Quality, Tidewater Regional Office (DEQ-TRO) stated that there does not appear to be any wastewater or industrial stormwater point source discharges related to salvage activities that would necessitate a Virginia Pollutant Discharge Elimination System permit but noted that if impacts to wetlands or waters are determined by USACE, Virginia Water Protection permits could be required. DEQ-TRO also indicated that various other state regulations could be implicated, including those related to air quality, hazardous waste management, soil and water contamination, lead-based paint, and asbestos. In light of DEQ-TRO's concerns, OEA recommends a new condition requiring that CAC consult with DEQ-TRO prior to commencement of any salvage activities.

A local resident, John Paffrath, commented on, among other things, possible environmental consequences of the proposed abandonment, including possible impacts to the Chesapeake Bay resulting from diversion of rail traffic to trucks and his concern that portions of the Line are listed with the U.S. Environmental Protection Agency as brownfield sites. Additionally, Paffrath commented extensively on the history and historical significance of the Line. In reviewing and responding to Paffrath's concerns, OEA notes that because the record shows that there are no active customers on the Line, the proposed abandonment would not result in the diversion of rail traffic to trucks that could cause environmental impacts to the Chesapeake Bay. The Board notes, too, that the newly recommended condition imposed here requiring consultation with DEQ-TRO may help address many of the environmental concerns Paffrath raises, and the Section 106 historic preservation condition will address the possible impact of the proposed abandonment on historic resources consistent with the National Historic Preservation Act.

Finally, in the final EA, OEA recommends minor revisions to the previously recommended NGS condition.

With respect to the foregoing environmental matters, the Board agrees with OEA's analysis and, consistent with OEA's recommendation, will impose the five conditions included in the final EA.

Offers of Financial Assistance (OFAs). On October 10, 2019, New York, Philadelphia & Norfolk Railroad Resurrection, Limited (NYPN), which describes itself as a 501(c)(3) nonprofit Virginia corporation, filed a "Letter of Intent" to file an OFA. As indicated in the Board's August 2, 2019 notice, however, expressions of intent to file an OFA were due by

August 12, 2019.⁶ NYPN asks that its letter be accepted as timely but gives no reason why it could not have met the August 12 deadline.

On October 4, 2019, CAC (having received a service copy of NYPN's letter of intent before it was docketed with the Board) filed in response, requesting that the Board either reject the letter of intent as untimely, or find that the letter does not demonstrate preliminary financial responsibility as required by 49 C.F.R. § 1152.27(c)(1)(i) & (ii).

On October 16, 2019, NYPN responded to CAC, stating that while CAC "appear[s] to have correctly cited 49 CFR 1152.27(c)(1)(i) and (ii), and, 49 CFR 1152.27(c)(1)(C) for their respective propositions, [CAC] cites these rules outside of the context found[] in the entirety of the [s]tatute." (NYPN Reply 2.) NYPN then cites the provisions at "49 CFR 1159.29" as "provid[ing] the Board with the ability to accept late filings where the Board finds good cause for tardiness." (*Id.*) Although there is no part 1159 in the Board's regulations, NYPN may be referring to 49 C.F.R. § 1152.29, which does not apply to notices of intent to file an OFA. In any event, or if NYPN had intended to refer to 49 C.F.R. § 1152.25, NYPN has not shown good cause to accept its late filing and does not support its arguments for why the regulations governing the filings of notices of intent would not apply here.⁷

NYPN's letter of intent is untimely and does not demonstrate preliminary financial responsibility as required by 49 C.F.R. § 1152.27(c)(1)(i) & (ii). Therefore, the letter will be rejected. Because no formal expressions of intent to file an offer were filed by the August 12, 2019 deadline, the Board will not consider offers of financial assistance in this case. See 49 C.F.R. § 1152.27(c)(1)(i).

⁶ NYPN quotes the regulation providing that "an offer may be filed and served at any time after the filing of the abandonment . . . petition for exemption," 49 C.F.R. § 1152.27(c)(1)(iii)(A) (which NYPN incorrectly cites as § 1152.27(c)(1)(i)(A)), but that section refers to an OFA itself (i.e., an "offer"), not an expression of intent, which is a prerequisite and must be filed no later than 10 days after publication of the Board's notice of the exemption petition—here, August 12. See 49 C.F.R. § 1152.27(c)(1)(i).

⁷ NYPN also argues, among other things, that Petitioners' notice of intent to discontinue or abandon did not comply with the newspaper publication requirements specified at 49 C.F.R. § 1152.20(a)(4), requiring a notice of intent to be published at least once during each of three consecutive weeks in a newspaper of general circulation in each county in which any part of the line is located. (NYPN Reply 2.) The regulations under 49 C.F.R. § 1152.20, however, pertain to abandonment proceedings initiated by application, not proceedings under the Board's exemption procedures (for which there are special rules). See, e.g., 49 C.F.R. § 1152.60. The sample newspaper notices for discontinuance and abandonment exemption cases are at 49 C.F.R. § 1105.12, which requires that the notice appear only once in the newspaper rather than three times. Petitioners' notice of intent complies with the applicable newspaper publication requirements.

Interim Trail Use/Rail Banking. As indicated above, there is ambiguity as to whether VBF or DHRTA filed the request for the issuance of a NITU for the Line under the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d), and 49 C.F.R. § 1152.29.⁸ Under 49 C.F.R. § 1152.29(a), a prospective trail sponsor's request must include, among other things, a statement of willingness to assume responsibility for management of, legal liability for, and payment of taxes on, the right-of-way and an acknowledgement that interim trail use is subject to possible future reconstruction and reactivation of rail service at any time. While the filing includes a statement of willingness from VBF, there is no such statement from DHRTA in the record. Assuming that DHRTA is in fact the prospective trail sponsor, the absence of a statement of willingness from DHRTA renders the filing deficient. As such, the NITU request will be denied.

Public Use. Under § 10905, the Board may prohibit the disposal of rail properties that are proposed to be abandoned and are appropriate for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment. To justify a public use condition, a party must set forth: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be effective (up to 180 days); and (iv) justification for the imposition of the period of time requested. 49 C.F.R. § 1152.28(a)(2).

The August 23, 2019 request for a public use condition will be denied because, regardless whether VBF or DHRTA is the requestor, the request does not clearly set forth the public importance of the condition; rather, the filing includes a list of italicized, partially bracketed suggested "example" rationales and does not include specific information. Accordingly, the Board will deny the request for a public use condition.

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

⁸ By letter filed on September 3, 2019, DCR—which operates a rail line adjacent to the Line—seeks to clarify that the Line extends to milepost 45.7 at Taylor Street in Hallwood, not to Main Street, as the electronic map referenced by DHRTA's filing would indicate. In its September 10, 2019 letter, CAC, in addition to clarifying that it is willing to negotiate an interim trail use agreement with DHRTA, expresses agreement with DCR's clarification that the Line ends at Taylor Street.

It is ordered:

1. Under 49 U.S.C. § 10502, the Board exempts from the prior approval requirements of 49 U.S.C. § 10903 BCR's and ESRR's discontinuance of service on the Line, and CAC's abandonment of the Line, subject to the employee protective conditions set forth in Oregon Short Line and the following conditions:

- (a) CAC shall notify NGS at NGS.Infocenter@noaa.gov at least 90 days prior to beginning salvage activities.
- (b) Prior to beginning salvage activities, CAC shall consult with USACE regarding potential impacts to waters of the United States, including wetlands, and comply with the reasonable requirements of USACE.
- (c) CAC shall consult with DEQ-OEIR and obtain state coastal management consistency certification. CAC shall report the results of these consultations in writing to OEA and shall not file its consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties) until the Board has removed this condition.
- (d) CAC shall retain its interest in and take no steps to alter the historic integrity of all historic properties, including sites, buildings, structures and objects within the project right-of-way (the Area of Potential Effect) eligible for listing or listed in the National Register until completion of the Section 106 process of the National Historic Preservation Act. CAC shall report back to OEA regarding any consultations with the SHPO and the public and shall not file its consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties) until the Section 106 process has been completed and the Board has removed this condition.
- (e) Prior to beginning salvage activities, CAC shall consult with DEQ-TRO to address its concerns about potential impacts to waters and wetlands, air quality, and hazardous waste management, and comply with the reasonable requirements of DEQ-TRO.

2. CAC is directed to serve a copy of this decision on Crop Production Services, Helena Chemical, Sharp Energy, and Pep UP Propane, so that it is received within five days of this decision's service date and to certify contemporaneously to the Board that it has done so.

3. The request for imposition of a public use condition and NITU is denied.

4. This exemption will be effective on December 1, 2019.

5. Petitions to stay must be filed by November 15, 2019. Petitions to reopen must be filed by November 18, 2019.

6. Pursuant to 49 C.F.R. § 1152.29(e)(2), CAC 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 effected by CAC's filing of a notice of consummation by November 1, 2020, 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 satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Board Members Begeman, Fuchs, and Oberman.