

SERVICE DATE – LATE RELEASE AUGUST 31, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1242

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

Digest:¹ This decision directs The Great Walton Railroad Company to provide supplemental information about its agreement to lease the subject rail line to a third party.

Decided: August 31, 2017

On April 14, 2017, Hartwell First United Methodist Church (Hartwell First) filed an application under 49 U.S.C. § 10903 requesting that the Surface Transportation Board (Board) authorize the third-party, or adverse, abandonment and discontinuance of approximately 0.25 miles of rail line and associated right of way (the Line) owned by The Great Walton Railroad Company (GWRC) in Hartwell, Ga.² Notice of the application was served and published in the Federal Register on May 4, 2017 (82 Fed. Reg. 20,958).

BACKGROUND

In its application, Hartwell First states that it owns property on both sides of the Line. (Hartwell First Appl. 2.) Hartwell First seeks adverse abandonment and discontinuance so that it can quiet title to the property underlying the Line (which it claims to own), have the tracks removed, and pursue its development plans. (*Id.*) Among other arguments it makes in favor of adverse abandonment, Hartwell First points out that in 2015, GWRC leased the Line to a community group, TORCH of Hartwell, Inc. (TORCH), for 99 years to use as a public park,

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. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² Although this proceeding originally included Hartwell Railroad Company (HRC), the parties agreed that HRC has no interest in the Line, and the Board granted HRC's motion to be dismissed as a party in a decision served on June 2, 2017.

playground, farmer's market, and walking trail. (Id. at 8.) Hartwell First argues that the lease shows that GWRC had no expectation of resuming commercial operations on the Line. (Id.)

GWRC submitted a reply in opposition to the application on May 30, 2017. Among other things, GWRC argues that it intends to use the Line as part of a runaround track. GWRC claims the runaround track is needed to make service to a customer, Quality Holdings, LLC (Quality), safer and more economical.³ (See GWRC Opp'n 6-7, 14; id., V.S. Anderson 2.) Specifically, GWRC states that it would use the runaround to reposition locomotives after stopping at Quality's facility, southwest of the Line. (Id. at 14, 31.) GWRC asserts that, without the ability to reposition, it has had to push empty cars back to Bowersville with the locomotive at the rear of the train. (See id. at 14.) If the locomotive is at the rear of the train, GWRC states, Federal Railroad Administration rules require GWRC to stop and flag each of the 45 crossings along the way, and the conductor must hang off the grab bar on the side of the car for most of the trip. (See id., V.S. Anderson 2.) Thus, according to GWRC, the runaround track is necessary if GWRC is to continue serving Quality in a safe and economical fashion. (See GWRC Opp'n 6-7.) GWRC also indicates that the Line may be used by TORCH for tourist excursion service. (See id., V.S. Anderson 13.)

In its rebuttal, filed on June 13, 2017, Hartwell First contends (among other things) that GWRC would have abandoned the Line already, but for the fact that abandonment would cause GWRC to lose its title to the portions of the right of way on which it holds only an easement for railroad use, which would interfere with the TORCH lease and the rent GWRC receives under that lease. (See Hartwell First Rebuttal 5 & n.4.)⁴

DISCUSSION AND CONCLUSIONS

Before ruling on Hartwell First's adverse abandonment application, the Board will address GWRC's lease transaction with TORCH. It appears that GWRC, by means of the lease, may have unlawfully transferred the Line away, an action that could have a bearing on the request for adverse abandonment.

³ Quality is located on GWRC's line from Bowersville, Ga., to Hartwell. Aside from the 0.25-mile segment described above, the rest of the Bowersville-to-Hartwell line is not subject to this proceeding.

⁴ On July 3, 2017, GWRC submitted a motion to strike and a motion for leave to file surrebuttal. Hartwell First replied in opposition on July 23, 2017. Because the motion to strike and the motion to file surrebuttal relate to the merits of the adverse abandonment application, rather than the lease at issue in this decision, those pleadings will be addressed in a subsequent decision.

Acquisitions of rail lines, including leases as well as purchases,⁵ are subject to the Board's licensing authority. As the Board has stated, the acquisition of the physical assets of a rail line does not necessarily require the exercise of the Board's authority and does not always make the transferee a common carrier. Bhd. of Maint. of Way Emps. v. CP Rail Sys., FD 32835, slip op. at 3 (STB served June 10, 1997). That determination turns on whether, based on the transaction documents, the railroad's common carrier obligation will be affected or impaired by the transfer of the underlying assets. See id. In Brotherhood of Maintenance of Way Employees, for example, the Board held that the common carrier obligation would not be affected or impaired because the transfer agreement included terms maintaining and protecting the transferring carrier's right to continue freight service over the rail line, including a permanent trackage easement. See id.

In contrast, the Board and its predecessor agency, the Interstate Commerce Commission (ICC), have held that the transfer of the physical assets of a rail line was unlawful where the terms of the transfer "place[d] substantial limitations on [the railroad's] ability to provide rail service." E.g., S. Pac. Transp. Co.—Aban. Exemption—L.A. Cty., Cal., 8 I.C.C.2d 495, 507 (1992), reconsideration denied in pertinent part, 9 I.C.C.2d 385 (1993).⁶ In Southern Pacific, for example, the ICC held that the rights retained by the railroad were not permanent or unconditional, noting that the transferee received broad control over the rail lines, including management, operation, and maintenance, and the transferee had the option to acquire the lines outright. See S. Pac. Transp. Co., 8 I.C.C.2d at 508; see also Orange Cty. Transp. Auth.—Acquis. Exemption—Atchison, Topeka & Santa Fe Ry., 10 I.C.C.2d 78, 84, 90 (1994) (agreement extensively restricted the transferring railroad's freight service).

Here, GWRC contends that "there is nothing in the TORCH Agreement that precludes GWRC from using the tracks if a need exists." (GWRC Opp'n 25.) The lease itself, however, suggests otherwise. The lease contains several provisions that appear to grant full control of the leased property to TORCH. In Section 4.1, regarding "Permitted Uses," the lease states that "Lessor [GWRC] acknowledges that Lessee [TORCH] intends to develop the Leased Premises and Personal Property as a public park, and Lessor expressly approves such use." (Hartwell First Appl., App. 11 at 4.) In Section 7.2, regarding "Non-Interference," the lease states that "Lessor shall not unreasonably interfere with Lessee's use of the Premises in the exercise of Lessee's rights, or in the performing of Lessee's maintenance, repair, service, and other obligations under this Lease." (Id., App. 11 at 5.) In Section 7.3, regarding "Quiet Enjoyment," the lease states that "Lessor covenants that upon paying the Rent and observing and keeping all covenants, agreements, and conditions applicable to Lessee under this Lease, Lessee shall peaceably and

⁵ See, e.g., Flatiron Rail Inc.—Lease & Operation Exemption—Yreka W. R.R., FD 35946 (STB served Aug. 14, 2015) (notice of exemption to acquire a rail line by lease).

⁶ See 49 U.S.C. § 10901(a) ("[a] person may . . . in the case of a person other than a rail carrier, acquire a railroad line . . . only if the Board issues a certificate authorizing such activity . . .").

quietly have, hold and enjoy the Premises, without hindrance or molestation from Lessor or anyone claiming by, through or under Lessor . . .” (Id.) In Section 8.2, “Lessor Relieved of Duty to Maintain,” the lease states that “Lessee acknowledges that Lessor shall not be required to furnish any services or facilities, or to make any repairs or alterations, of any nature whatsoever with respect to the Premises. Lessee hereby assumes the full and sole responsibility for the condition, operation, repair, replacement, maintenance and management of the Premises.” (Id., App. 11 at 7 (emphasis added).) And under Article 16, TORCH receives an option to purchase the Line from GWRC, starting in 2052, for \$1.⁷ (Id., App. 11 at 3, 14-16.)

The terms of this lease appear even more likely to restrict freight service unduly than the agreements in cases like Southern Pacific and Orange County. In those cases, the agreements included at least some terms expressly providing for continued freight rail service alongside the terms that excessively restricted that service. See S. Pac. Transp. Co., 9 I.C.C.2d at 387 (railroad retained freight service rights under the transfer agreements); Orange Cty. Transp. Auth., 10 I.C.C.2d at 84 (railroad retained a permanent easement for service). Here, by contrast, the TORCH lease includes no term providing for continued freight rail service in the first place, and indeed, various terms, described above, appear to prevent service. In fact, it is unclear from the current record whether TORCH is even aware of the newly-conceived plans GWRC says it has to rebuild the Line and run freight trains through the area that TORCH plans to use as a park and playground.

GWRC also insists that, “even though it has leased the real estate that underlies the tracks, GWRC has retained the common carrier obligation to operate over the line.” (GWRC Opp’n 24-25.) Such claims carry little weight, as the ICC demonstrated in Southern Pacific; there, the railroad “argue[d] that it retained the line by keeping the common carrier obligation (which it expressly avows and which [the transferee] expressly disavows),” but the agency held that transferring the lines without sufficiently preserving freight service was unlawful nevertheless. See S. Pac. Transp. Co., 8 I.C.C.2d at 505, 508.

GWRC further states that TORCH’s project “will redevelop the historic area that surrounds the easternmost tracks and includes the old Hartwell railroad depot,” suggesting that the lease does not implicate the area around the runaround track. (GWRC Opp’n 23 n.24.) However, this claim is contradicted by the terms of the lease, which define the park area as “a tract of land located on Railroad Street, between South Forest Avenue and South Webb Street, and Seller’s railroad right-of-way and turntable extending from South Webb Street to Athens Street.” (Hartwell First Appl., App. 11 at 1.) That is, TORCH’s planned park includes not only the eastern area around the former depot, but also the area underlying the runaround track as well as GWRC’s right of way continuing west from the runaround track all the way to Athens Street.

⁷ TORCH obtains a right to purchase the Line only if it has paid all the rent due under the lease, which is \$331,250. (Hartwell First Appl., App. 11 at 3, 14.)

It is appropriate to resolve whether GWRC cut off the possibility of service when it transferred the Line, as such information could be relevant to the merits of Hartwell First's adverse abandonment and discontinuance application. Accordingly, GWRC will be directed to submit a response by October 2, 2017, explaining how it has retained the ability to provide freight service and why it believes that "there is nothing in the TORCH Agreement that precludes GWRC from using the tracks if a need exists." (GWRC Opp'n 25.) In its certificate of service, GWRC must certify that it has served this response on TORCH and Quality in addition to all parties of record. GWRC will also be directed to serve a copy of this decision on TORCH and Quality and certify to the Board that it has done so by September 7, 2017. Any replies to GWRC's response (which may be submitted by Hartwell First, TORCH, Quality, or any other interested person) will be due by October 30, 2017.

It is ordered:

1. GWRC is directed to submit a response by October 2, 2017, providing the information described above. In its certificate of service, GWRC must certify that it has served this response on TORCH and Quality in addition to all parties of record.
2. GWRC is directed to serve a copy of this decision on TORCH and Quality and certify to the Board that it has done so by September 7, 2017.
3. Replies to GWRC's response are due by October 30, 2017.
4. This decision is effective on its date of service.

By the Board, Board Members Begeman, Elliott, and Miller.