

SERVICE DATE – MAY 31, 2018

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36137

CITY OF FISHERS, CITY OF NOBLESVILLE, & HAMILTON COUNTY, IND.—PETITION
FOR PARTIAL REVOCATION OF EXEMPTION

Digest:¹ The Board finds that the cities of Fishers and Noblesville, Ind., and Hamilton County, Ind., may pursue rail banking of a line of rail under 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29 without the need for any revocation authority from the Board.

Decided: May 29, 2018

On August 1, 2017, the cities of Fishers, Ind., and Noblesville, Ind., and Hamilton County, Ind. (collectively, Petitioners), filed a petition to partially revoke their exempt status relating to a rail line they own that was previously authorized for abandonment. The 37.56-mile rail line, between milepost I-2.13 at Indianapolis, Ind., and milepost I-39.69 at Tipton, Ind. (the Line), was authorized for abandonment in 1991. Petitioners assert that, because they are state entities and the Line was acquired after it was authorized for abandonment, they are exempt from the Board's regulations based on agency precedent. Petitioners seek to partially revoke their exempt status so that they can invoke Section 8(d) of the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d), and the Board's interim trail use regulations, 49 C.F.R. § 1152.29, and ultimately rail bank the Line. For the reasons discussed below, the Board permits Petitioners to pursue rail banking of the Line under the Trails Act without the need to revoke their exempt status.

BACKGROUND

Petitioners state that the Line was previously owned by Norfolk and Western Railway Company (N&W), and operations over the Line were previously conducted by the Indiana Rail Road (INRD) pursuant to a lease authorized in 1989 by the Interstate Commerce Commission (ICC), the Board's predecessor agency. (Pet. 1-2.) Ind. R.R.—Lease & Operation Exemption—Norfolk & W. Ry., FD 31464 (ICC decided Jul. 3, 1989). In 1991, the ICC granted INRD authority to discontinue operations over the Line and N&W authority to abandon the Line.

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).

Norfolk & W. Ry.—Aban. Exemption—Between Indianapolis & Tipton in Marion, Hamilton, & Tipton Ctys., Ind., AB 290 (Sub-No. 117X), et al. (ICC decided Nov. 4, 1991).

According to Petitioners, the cities of Fishers and Noblesville purchased the Line from N&W in 1995, and Hamilton County became a joint owner of the Line in 2006. (Pet. 2, Pet. 2 n.2.) Petitioners state that the 1995 purchase was not subject to ICC licensing authority pursuant to Common Carrier Status of States, State Agencies & Instrumentalities, & Political Subdivisions (Common Carrier Status of States), 363 I.C.C. 132 (1980), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). Under that precedent, where a state entity acquires a rail line approved for abandonment and the abandonment has not been consummated, the acquisition is exempt from Board regulation, as is the state entity after the acquisition has taken place. Petitioners argue that, as political subdivisions of the State of Indiana, they were and remain exempted from agency regulation.

Petitioners state that the cities of Fishers and Noblesville contemplated at the time of purchase that the railroad corridor might be used for transit purposes and that the track and track material therefore remained in place following the purchase. (Pet. 3.) Petitioners further state that INRD may have operated over portions of the Line until 2003,² and that, until 2015, the Indiana Transportation Museum (ITM) provided passenger excursion train service over portions of the Line. (Id.)

On August 1, 2017, Petitioners filed a petition for partial revocation of their exempt status under Common Carrier Status of States. Petitioners' explain that they are seeking the partial revocation so that they can rail bank the Line pursuant to the Trails Act and the Board's interim trail use regulations, 49 C.F.R. § 1152.29.

In their petition, Petitioners argue that the Line remains within the Board's jurisdiction, and available for interim trail use, because the 1991 authority to abandon the Line was never consummated.³ (Pet. 5-6.) Citing Board precedent allowing trail use requests on lines acquired

² Operators of state-owned lines acquired under Common Carrier Status of States, whether the state entity itself or a third party, obtain modified certificates of public convenience and necessity (modified certificates) to operate merely by providing notice to the Board. 49 C.F.R. §§ 1150.23 and 1150.24. Here, there is no indication that INRD ever filed with the Board a notice for a modified certificate to operate under 49 C.F.R § 1150.23.

³ In 1996 the Board amended its regulations to require that abandonment authority be consummated by filing a notice of consummation with the Board, typically within one year of the Board's issuance of the authority. See 49 C.F.R. § 1152.29(e)(2); Aban. & Discontinuance of Rail Lines & Rail Transp. Under 49 U.S.C. 10903, EP 537, slip op. at 9-10 (STB served Dec. 24, 1996). Under 49 C.F.R. § 1152.29(e)(2), abandonment authority terminates if a notice of consummation is not timely filed. Prior to the effective date of that final rule, carriers that had obtained abandonment authority were not required to file notices of consummation. Instead, the

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under Common Carrier Status of States, Petitioners present two approaches for how they can invoke the Trails Act and the Board's related regulations to rail bank the Line under the circumstances at issue here. First, they suggest that the Board could partially revoke their exemption under Common Carrier Status of States to enable them to directly invoke the Trails Act, without the need for any new abandonment proceeding. (Pet. 9-10, citing Port of Tillamook Bay R.R.—Modified Rail Certificate, Docket No. FD 31676 (STB served July 26, 2016); Sammamish Transp. Co.—Notice of Interim Trail Use & Termination of Modified Certificate, Docket No. FD 33398 (Sub-No. 1) (STB served Feb. 26, 1998).) Alternatively, Petitioners state, the Board could revoke their exemption from regulation under Common Carrier Status of States to enable them to initiate a new abandonment proceeding and invoke the Trails Act via that proceeding. (Pet. 10-11 (citing Caldwell R.R. Comm'n—Exemption from 49 U.S.C. Subtitle IV, Docket No. FD 32659 (Sub-No. 2) (STB served Sept. 8, 2015)).) Petitioners request that, in the event the Board adopts this alternative, the Board exempt the new abandonment proceeding from the statutes and regulations pertaining to offers of financial assistance (OFA) (49 U.S.C. § 10904 and 49 C.F.R. § 1152.27) and public use (49 U.S.C. § 10905 and 49 C.F.R. § 1152.28). (Pet. 11-12.)

Since the filing of the petition, the Board has received numerous public comments from interested parties, discussed further below. On August 31, 2017, Petitioners filed a motion for leave to file a rebuttal to the comments, and a rebuttal. On September 22, 2017, the Board instituted a proceeding by granting in part two motions for extension of time to file comments, granting Petitioners' motion for leave to file a rebuttal, and accepting Petitioners' rebuttal. In that decision, the Board also extended the time period for filing comments on the petition and permitted Petitioners time to respond to the additional comments.

After the issuance of the Board's September 22, 2017 decision, the Board continued to receive comments on the petition from interested parties, including numerous comments filed after the comment deadline. On October 23, 2017, Petitioners filed a reply to the additional comments received by that date. In that filing, Petitioners presented additional legal paths through which they might pursue rail banking of the Line. These paths were (1) a Board ruling that Petitioners may create a trail on the Line "without the need to resort to the trails use process," or (2) a Board ruling that Petitioners "may invoke the Board's interim trails use procedures directly, and without the need for any intervening regulatory process." (Pet'rs Comments 4, 10, Oct. 23, 2017 (citing Port of Tillamook Bay R.R., Docket No. FD 31676; Sammamish Transp. Co., Docket No. FD 33398 (Sub-No. 1)).)

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agency would evaluate all the facts and circumstances to see if the railroad showed a clear intention to remove the line from the national rail system. See Becker v. STB, 132 F.3d 60, 62 (D.C. Cir. 1997); Birt v. STB, 90 F.3d 580, 585-586 (D.C. Cir. 1996); Black v. ICC, 762 F.2d 106, 112-113 (D.C. Cir. 1985).

In a decision issued January 5, 2018, the Board waived the service requirement in this proceeding for all pleadings and letters received by the Board as of that date; accepted all such pleadings and letters into the record;⁴ denied a motion to suspend and investigate; denied an additional request for an extension of time; and set a date by which Petitioners could respond to the comments and letters accepted into the record. On January 19, 2018, Petitioners filed an additional reply to the comments received, reiterating their earlier arguments as to how they might rail bank the Line without revocation of their exempt status. (Pet’rs Comments 4-5, Jan. 19, 2018.)

Comments on the Petition

The majority of the public comments filed with the Board are in opposition to the petition. Commenters opposed to the petition generally cite concerns about a loss of passenger excursion service that had been provided by ITM over the Line and concerns with the local government decision-making processes that preceded the filing of this petition. (See, e.g., Susan Hoskins Miller Comment 1, Aug. 7, 2017; Save the Nickel Plate, Inc. Comment 1, Aug. 30, 2017; Karen Lynn Williams Comment, Dec. 27, 2017.)⁵ Some comments also indicated potential interest in freight service over the Line. (See, e.g., Stone Spectrum Comment, Oct. 2, 2017; Crown Technology Comment, Oct. 5, 2017; Kokomo Grain Company Comment, Oct. 6, 2017; The Quikrete Companies Comment Oct. 13, 2017.)

On November 13, 2017, U.S. Rail Corporation (U.S. Rail) and ITM filed joint comments. They argue that, rather than partially revoking the exemption to allow direct invocation of the Trails Act, the Board should instead partially revoke to allow petitioners to file an abandonment proceeding, but only if that abandonment proceeding is subject to the OFA procedures under 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27. (U.S. Rail/ITM Comments 4, Nov. 13, 2017.) U.S. Rail and ITM argue that a full abandonment proceeding, including the OFA procedures, is necessary to allow them to prove “that there is an overriding public need for rail service over the [L]ine.” (*Id.* at 6.)

The Board also received comments from U.S. Senator Todd Young (Ind.) and three members of the U.S. House of Representatives: The Honorable Jim Banks (3rd District, Ind.);

⁴ These pleadings and letters were previously designated as correspondence and were added to the docket in this proceeding on January 24, 2018.

⁵ The Board received two filings styled as motions to deny the petition, and one filing styled as a petition to deny the petition. (Kraatz Mot. to Den. Pet., Sept. 12, 2017; Hoosier Rails to Trails Council Comment 1, Oct. 12, 2017; Kraatz Mot. to Den. Pet., Oct. 13, 2017.) These filings address the merits of the petition, and thus will be treated as comments, which the Board has considered in issuing this decision. To the extent these comments may be read as separate motions, they are denied as moot in light of the Board’s decision here.

the Honorable Trey Hollingsworth (9th District, Ind.); and the Honorable Susan Brooks (5th District, Ind.). Representatives Banks and Hollingsworth expressed support for the petition. Representative Brooks and Senator Young request that the Board expeditiously review the petition and issue a decision in accordance with established Board procedures and all applicable laws. In addition, the Board received comments from Mayor John Ditslear (City of Noblesville, Ind.) in support of the petition, and from Mayor Dave Kitchell (City of Logansport, Ind.) in opposition to the petition.

In response to the opposing comments, Petitioners argue that the commenters' views were appropriately considered in the local government decision-making process. (Pet'rs Comments 3-4, Oct. 23, 2017. See also Pet'rs Comments 11-12, Jan. 19, 2018.) Petitioners further state that, with regard to concerns about the loss of passenger excursion service, they are negotiating with an operator for tourist train service on a portion of the Line. (Pet'rs Comments 3, Oct. 23, 2017.) Petitioners also disagree with claims that there is a current need for freight service over the Line. They note that, over the past several years, they did not receive any requests for freight service to resume over the Line and that the commenters appear more concerned with excursion train service than freight service. (Pet'rs Comments 6-7, Jan. 19, 2018.) Petitioners also disagree with U.S. Rail and ITM's argument that an abandonment proceeding is necessary here, and reiterate that, under Board precedent, there are multiple paths through which they might approach rail banking. (Id. at 7-9.) Petitioners further argue that, even if an abandonment proceeding were necessary, an exemption from the OFA procedures is warranted because "[t]here is no genuine need for freight rail service on the [L]ine." (Id. at 9.)

DISCUSSION AND CONCLUSIONS

Petitioners have requested that the Board, under 49 U.S.C. § 10502(d), revoke their Common Carrier Status of States exemption so that they may utilize the Trails Act. However, as discussed below, based on Board precedent, revocation of the exemption is not required to invoke the Trails Act in these circumstances.

With regard to the status of the Petitioners and the Line, the Board agrees with Petitioners that the acquisition of the Line falls under Common Carrier Status of States and that Petitioners, as non-carrier state entities, are exempt from Board regulation. See Common Carrier Status of States, 363 I.C.C. at 137-138 ("Our mandate to promote transportation is best served by following the policy that mere ownership of a rail line by a State does not create common carrier status.") Moreover, in these circumstances, the Board finds that the abandonment authorized in 1991 was not consummated, either prior to the acquisition by the cities under Common Carrier Status of States or subsequent to the acquisition. As discussed earlier, see supra n.3, in evaluating whether an abandonment authorized prior to the 1996 was consummated, the Board looks at "all the facts and circumstances to see if the railroad showed a clear intention to remove the line from the national rail system" Zorzi—Pet. for Declaratory Order, FD 36106, slip

op. at 4 (STB served Jan. 31, 2017).⁶ In cases involving lines acquired by state entities under Common Carrier Status of States, the Board looks to see whether there is concrete evidence of the state owner's intent to "withdraw" the line from the national rail network. In such cases, the mere fact that a line is dormant under public ownership is not by itself enough to show an intent to abandon by the line owner. Beaufort R.R.—Modified Rail Certificate (Beaufort 2009), FD 34943, slip op. at 6 (STB served July. 20 2009). Here, the Line was authorized for abandonment in 1991 and sold to the cities of Fishers and Noblesville in 1995 with the trackage intact. (See Pet. 5-6.) Petitioners also note that INRD operations continued following the sale and that they could find no record of abandonment consummation. (Id.) Additionally, there is no other evidence indicating the Petitioners' had an intent to withdraw the Line from the national rail network. Accordingly, the Line remains subject to the Board's jurisdiction and Petitioners may invoke the Trails Act.

Based on these findings, the Board turns to the question of how Petitioners may rail bank the Line pursuant to the Trails Act and the Board's related regulations. Petitioners have presented multiple ways in which they might rail bank the Line. The Board finds that Petitioners can directly invoke the Trails Act without the need to revoke their exempt status or commence a new abandonment proceeding, because it has allowed similarly situated line owners to do so on lines acquired under Common Carrier Status of States. See Port of Tillamook Bay R.R., FD 31676, slip op. at 2; Sammamish Transp. Co., FD 33398 (Sub-No. 1), slip op. at 1; Beaufort 2009, FD 34943, slip op. at 8. While those decisions, unlike this proceeding, involved proceedings where interim trail use was sought when modified certificate operations were being terminated, the reasoning behind the availability of trail use procedures in those cases is not tied to the modified certificate operations, but rather only to the willingness of the owner of the line to enter into negotiations for trail use on a line authorized for abandonment that remains within the Board's jurisdiction. There is no legal basis for treating line owners who have a modified certificate operator when the line owner decided to pursue rail banking differently from line owners who are otherwise similarly situated but have no such operator.

The issues raised by the commenters do not alter this conclusion. The majority of the commenters raise concerns about the continuation of passenger excursion trains on the Line and the local government processes that preceded the filing of the petition with the Board. Additionally, some commenters claim there is an interest in freight rail service on the Line that should prevent rail banking. (U.S. Rail/ITM Comments 6, Nov. 13, 2017.) Although some of these concerns may be relevant to whether a proposed abandonment should be granted, here abandonment has already been authorized. Thus, the only question is how, in light of that abandonment authority, Petitioners may invoke the Trails Act and pursue rail banking. The commenters' claims that Petitioners may have violated state law in their decision-making process

⁶ See, e.g., Md. Transit Admin.—Aban. Exemption—in Somerset Cty, Md., AB 590 (Sub-No. 1X), slip op. at 3 (STB served May 13, 2015); Beaufort R.R.—Modified Rail Certificate, FD 34943, slip op. at 6-7 (STB served Mar. 19, 2008).

or in withholding information from the public are not issues for the Board to resolve. Nor are those concerns relevant to the question presented here: what the legal process should be for invoking the Trails Act for the Line. Moreover, the Board notes that Petitioners deny claims that they did not comply with state law regarding public involvement in decision-making. (Pet'rs Comments 8-9, Aug. 31, 2017.)

Finally, U.S. Rail and ITM argue that a new abandonment proceeding is necessary here, citing Caldwell, FD 32659 (Sub-No. 2). (U.S. Rail/ITM Comments 4-5, Nov. 13, 2017.) Caldwell, however, is inapposite. In that case, the Board revoked a Subtitle IV exemption to enable the owner of a line to initiate an abandonment proceeding and thereby invoke the Trails Act. Caldwell, FD 32659 (Sub-No. 2), slip op. at 3. However, the subject line in Caldwell had not been previously authorized for abandonment. The Line here is already authorized for abandonment; requiring a new abandonment proceeding is therefore unnecessary.

For the reasons discussed above, revocation of Petitioners' exempt status under Common Carrier Status of States is not necessary. The Board therefore denies the petition as unnecessary. Petitioners may pursue trail use of the Line under the Board's interim trail use regulations at 49 C.F.R. § 1152.29.

It is ordered:

1. Petitioners' petition to partially revoke their exemption under Common Carrier Status of States is denied as unnecessary.
2. Petitioners are permitted, as discussed herein, to pursue rail banking of the Line under 49 C.F.R. § 1152.29.
3. This decision is effective on its service date.

By the Board, Board Members Begeman and Miller.