

SERVICE DATE – MARCH 16, 2011

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1063

CERRO GORDO COUNTY, IOWA—ADVERSE DISCONTINUANCE—
IOWA TRACTION RAILROAD COMPANY

Digest:¹ Cerro Gordo County, Iowa plans to ask the Board to end Iowa Traction Railroad Company's obligation to operate over a section of rail line in the County. If the Board grants the County's request, it will ask a court to condemn the line section so that the County can use the property to relocate a public road. This decision permits the County to avoid certain statutory and regulatory requirements that apply to railroads when they ask the Board to terminate their obligation to operate, but which should not apply to applications filed by third parties.

Decided: March 14, 2011

On April 26, 2010, Cerro Gordo County, Iowa (County) filed a petition for (1) waiver of certain Board regulations and (2) exemption from certain statutory provisions in connection with an adverse or third-party application it plans to file under 49 U.S.C. § 10903. The County states that it intends to seek adverse abandonment of a 300-foot section of railroad right-of-way that crosses Road B-20 located in the County. As explained below, because the line's owner, Backtrack, Inc. (Backtrack), is a noncarrier and only Iowa Traction Railroad Company (IATR) has authority to operate over the section of line, the Board will treat the County's filing as a petition for waiver and exemption in connection with an adverse discontinuance application, rather than an adverse abandonment application.² As discussed below, the waiver requests and exemption requests will be granted in part.

BACKGROUND

The County plans to realign Road B-20, which would require the installation of a banked curve where the road crosses the rail right-of-way. According to the County, to complete the realignment, it must remove the crossing and also remove the railroad bed for a distance of

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 Accordingly, the title of this proceeding has been changed although the docket number remains the same.

approximately 300 feet, from a point 150 feet north of the centerline of the reconfigured Road B-20 to a point 150 feet south of the centerline. The County claims that the segment of line that intersects the road has not been used for more than two decades and that the line is in such a state of disrepair that it is unusable.

Backtrack owns the right-of-way as legal successor to noncarrier Hermitage Homes, Inc., which bought the property after Chicago and North Western Transportation Company abandoned it.³ Because the right-of-way had been abandoned, neither Hermitage Homes nor Backtrack needed or obtained authority from the Board or its predecessor, the Interstate Commerce Commission (ICC), to acquire it. IATR subsequently received authority from the ICC to operate over the right-of-way⁴ and therefore has a common carrier obligation on the line.

In a decision served August 19, 2010⁵ in this proceeding, we held that, because of Backtrack's status as a noncarrier and IATR's status as a carrier, the County should seek an adverse discontinuance of IATR's rights. The Board stated that, if the County wished to proceed with the matter, it must serve a copy of its waiver petition, together with a copy of the August 19, 2010 decision, on IATR,⁶ and certify to the Board that it had done so, by August 24, 2010. The County served IATR on August 23, 2010. On September 7, 2010, IATR filed a letter in which it adopted the reply of Backtrack to the County's waiver and exemption petition.

To facilitate the filing of its adverse application, the County requests the waivers and exemptions at issue here. According to the County, the Board and the ICC have consistently found that much of the information required in an ordinary (voluntary) abandonment or discontinuance proceeding is largely inapplicable or irrelevant to an application in an adverse proceeding. The County also states that, upon approval of its application, it will request the Board to immediately order the property transferred to the County.

³ Chi. & N. W. Transp. Co.—Aban. Exemption—Mason City, Iowa, AB 1 (Sub-No. 205X) (ICC served Nov. 20, 1987).

⁴ Iowa Traction R.R.—Operation Exemption—Hermitage Homes, Inc., FD 31353 (ICC served Nov. 23, 1988).

⁵ The County initially requested that the Board issue and make effective its decision on the waiver/exemption petition on or before April 28, 2010. In a letter filed on April 26, 2010, Backtrack opposed the expedited consideration request. In a decision served on April 29, 2010, the Board denied the County's request for expedited consideration and stated that replies to the waiver/exemption petition would be due no later than May 17, 2010.

⁶ On May 6, 2010, Backtrack filed a motion to reject the waiver/exemption petition or, alternatively, to file a reply in partial opposition. Backtrack argued that IATR has the right to operate over the right-of-way and is therefore a necessary party. Backtrack noted, however, that IATR was not named as a party or served with a copy of the County's petition.

DISCUSSION AND CONCLUSIONS

The Board's regulations require that abandonment and discontinuance applications conform to the requirements of 49 C.F.R. pt. 1152 subpart C—Procedures Governing Notice, Applications, Financial Assistance, Acquisition for Public Use, and Trail Use. In appropriate instances, however, such as the filing of a third-party or adverse abandonment or discontinuance application, the Board will waive inapplicable and unneeded provisions.⁷

Waiver of Filing Fees. The County states that, as a local government entity, it is entitled to a waiver of the filing fees for this petition and subsequent application. The Board's Chief, Section of Administration, Office of Proceedings, the agency official delegated authority to rule on filing fee waiver requests under 49 C.F.R. § 1002.2(e), has granted this request.

Notice of Intent and Federal Register Notice. In light of the various waivers and exemptions it seeks in its petition, the County requests that it be allowed to substitute the notice of intent required at 49 C.F.R. § 1152.21 with one that it has created. Similarly, the County requests that the form of the draft Federal Register notice, as required by 49 C.F.R. § 1152.22(i), be waived. The County proposes instead to use the draft notice it has attached to its petition.

We will grant these waivers, with exceptions. The County's notice of intent generally complies with the requirements of 49 C.F.R. § 1152.21. Because labor protection is mandatory, however, notwithstanding the alleged absence of adversely affected employees, the County must add language stating that the interests of railroad employees will be protected by the labor conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Amon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979). The County must also add a statement addressing federally granted rights-of-way as required in 49 C.F.R. § 1152.21. (The County's proposed Federal Register notice contains such a statement; the County may use the same statement in its notice of intent.) Moreover, as explained below, we will not waive environmental and historic regulations, so we will require that the City also include language relating to those regulations, as contained in 49 C.F.R. § 1152.21. Also as explained below, we will not reduce the time for filing protests, comments, and replies. The notice should therefore be modified to reflect the full 45-day comment period.

The Federal Register notice provided by the County is also generally acceptable. The County should make the necessary changes corresponding with those required for the notice of intent. Specifically, the County should insert employee protective conditions language, insert environmental and historic language, and change the length of the comment period to 45 days.

⁷ E.g., CSX Transp., Inc.—Adverse Aban.—in Shelby County, Tenn. (CSX Transp.—Shelby County, Tenn.), AB 1010, slip op. at 2 (STB served Oct. 10, 2007); City of Rochelle, Ill.—Adverse Discontinuance—Rochelle R.R., AB 549, slip op. at 2-3 (STB served June 5, 1998).

With these changes, we find the substituted notices acceptable and will allow the County to use them.⁸

General Exemption from 49 U.S.C. § 10903. The County asserts that it is not necessary for it to seek an exemption from the provisions of 49 U.S.C. § 10903, because that statute applies only to carriers. Backtrack and IATR oppose the request. Section 10903 applies to all abandonment and discontinuance proceedings. Consequently, adverse applicants must comply with the same statutory provisions as carriers, regardless of whether they are carriers or noncarriers. As such, the County's request for a blanket exemption from § 10903 will be denied. As noted, adverse applicants may, however, seek waivers from Board regulations and exemptions from statutory provisions as the County has done in this petition, but those waivers/exemptions must be requested from specific regulations/provisions and each request must contain an appropriate justification. As subsequently discussed, we will exempt the County from certain specific provisions of § 10903.

Service of Notice. The County seeks a waiver from 49 C.F.R. § 1152.20(a)(2)(i)-(xii), which requires notice to various persons, including significant users and labor organizations. This request will be granted, except with request to labor organizations, as subsequently discussed. We will also exempt the County from the corresponding statutory provisions, 49 U.S.C. § 10903(a)(3)(A) and § 10903(a)(3)(D). Application of those statutory requirements here is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101. Rather, the exemption will promote that policy by eliminating unnecessary procedures, and thus will expedite regulatory decisions (49 U.S.C. § 10101(2)), foster sound economic conditions in transportation (49 U.S.C. § 10101(5)), and encourage efficient management of railroads (49 U.S.C. § 10101(9)). Other aspects of the rail transportation policy will not be adversely affected. Additionally, regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. As IATR and Backtrack have not identified any shippers on the segment, discontinuance will not result in a disruption of service.

As for service on labor organizations, the County asserts that there are no known railroad employees on the line, but does not support this assertion. Moreover, because the line is under the control of IATR, the proposed transaction might involve some of IATR's represented employees. Accordingly, we will deny the 49 C.F.R. § 1152.20(a)(2)(xii) waiver request.⁹

⁸ The County should also compare both of its notices with the corresponding, current regulations, 49 C.F.R. § 1152.22(i) and 49 C.F.R. § 1152.21, and make corrections as appropriate. The County should change the title of the proceeding to conform to the one on this decision, change the references from abandonment to discontinuance, update the Board's address to 395 E Street, S.W., Washington, D.C. 20423, and revise the dates it states it filed or plans to file its application. Finally, the County should remove or correct the references to the website www.gpo.gov/nara.cfr; the website returns an error when entered into a web browser.

⁹ Although not part of its waiver/exemption request, the County asserts that because a grant here would result in an entire line abandonment/discontinuance, employee protective conditions should not be imposed in the circumstances. Backtrack and IATR disagree. Labor protection would be mandatory here should adverse authority be granted, with one exception.

(continued . . .)

Notice at Stations. The County requests a waiver from 49 C.F.R. § 1152.20(a)(3), which requires notice to be posted at all stations along a line. The County states that there are no stations along the line, a statement that IATR does not dispute. We will therefore grant the waiver from 49 CFR § 1152.20(a)(3). We will also grant the corresponding exemption from 49 U.S.C. § 10903(a)(3)(B). Application of § 10903(a)(3)(B) here is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101. Rather, the exemption will promote that policy by eliminating unnecessary procedures, and thus will expedite regulatory decisions (49 U.S.C. § 10101(2)), foster sound economic conditions in transportation (49 U.S.C. § 10101(5)), and encourage efficient management of railroads (49 U.S.C. § 10101(9)). Other aspects of the rail transportation policy will not be adversely affected. Additionally, regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. As IATR and Backtrack have not identified any shippers on the segment, discontinuance will not result in a disruption of service.

Publication. The County requests a waiver from 49 C.F.R. § 1152.20(a)(4), which requires newspaper publication of a notice of abandonment or discontinuance. Backtrack and IATR oppose the request. Newspaper publication is not onerous and ensures that all persons and entities with an interest in the line are given notice and the opportunity to participate in any proceedings. Therefore, we will deny this waiver request.

Environmental and Historic Regulations. The County seeks a waiver of the Board's regulations requiring environmental and historic reporting. Backtrack and IATR oppose the request. We will deny the County's request to waive those regulations. Following a typical adverse discontinuance, the Board would continue to have authority over the line until the Board later approved an abandonment. Here, however, approval of the County's proposed application would remove the Board's authority over the line segment because, as discussed above, Backtrack is a noncarrier over which the Board has no authority. Removal of the Board's authority over IATR would allow salvage of the tracks. Therefore, the adverse discontinuance, if approved, would likely result in salvage of the section of line to allow for the realignment of Road B-20 and such salvage could cause environmental and historic impacts. Finally, the County's argument that the realignment would not disturb historic sites and structures because none are present ignores the presence of the rail line itself, as well as the possible presence of archeological sites. For these reasons, we will deny waivers of 49 C.F.R. § 1152.22(f), 49 C.F.R. § 1152.20(c), 49 C.F.R. § 1105.7, and 49 C.F.R. § 1105.8, and require applicant to prepare and submit environmental and historic reports for Board analysis.

(. . . continued)

When issuing abandonment or discontinuance authority for railroad lines that constitute the carrier's entire system, the Board does not generally impose labor protection. See, e.g., Northampton & Bath R.R.—Aban. Near Northampton & Bath Junction in Northampton County, Pa., 354 I.C.C. 784, 785-86 (1978). Here, however, the record is clear that the segment of line at issue does not encompass all of IATR's authority.

System Diagram Map and Detailed Map. The County argues that an exemption from 49 U.S.C. § 10903(c)(2), which requires carriers to maintain a system diagram map identifying lines planned for abandonment or discontinuance of service, is not necessary because it is not a carrier. Moreover, the County seeks a waiver of 49 C.F.R. § 1152.10 through 49 C.F.R. § 1152.14 and 49 C.F.R. § 1152.24(e)(1). These provisions require a carrier to maintain, file, and publish a system diagram map, and require a line to appear on the map for at least 60 days before an abandonment or discontinuance application can be filed for that line. The County also requests a waiver from 49 C.F.R. § 1152.22(a)(5), which requires inclusion of the rail line on the map, the date upon which the line was first listed on the map, and a copy of the line description that accompanies the carrier's map. Finally, the County requests a waiver from 49 C.F.R. § 1152.24(a)(4), which requires submission of a detailed map of the line.

We will exempt the County from the requirements of 49 U.S.C. § 10903(c)(2) and waive the above regulations. Exemption and waiver of the system diagram map and detailed map requirements are customary in adverse proceedings because a third party generally does not have access to the system diagram map¹⁰ or a detailed map of the line, as is the case here. Application of 49 U.S.C. § 10903(c)(2) here is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101. Rather, the exemption will promote that policy by eliminating unnecessary procedures, and thus will expedite regulatory decisions (49 U.S.C. § 10101(2)), foster sound economic conditions in transportation (49 U.S.C. § 10101(5)), and encourage efficient management of railroads (49 U.S.C. § 10101(9)). Other aspects of the rail transportation policy will not be adversely affected. Additionally, regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. IATR and Backtrack have not identified any shippers on the segment and, therefore, discontinuance will not result in a disruption of service.

Line Attributes. We will partially waive the requirements of 49 C.F.R. § 1152.22(b)-(d), which require a description of the present physical condition of the line, estimated deferred maintenance and rehabilitation costs, a description of service performed on the line during the prior year, and computation of the revenues and avoidable costs attributable to the line. The County has adequately addressed the physical condition of the line and the amount of service provided. Because these requirements have been fulfilled, there is no need to waive them. However, because the County, as a third-party applicant, lacks revenue and cost data, we will grant the sought waiver of those requirements.

Offers of Financial Assistance. The County requests a waiver of the application of the offer of financial assistance (OFA) implementing regulations at 49 C.F.R. § 1152.27, and an exemption from the statutory provisions relating to OFAs.¹¹ We will grant the waiver and

¹⁰ Norfolk S. Ry.—Adverse Aban.—St. Joseph County, Ind., AB 290 (Sub-No. 286), slip op. at 4 (STB served Oct. 26, 2006).

¹¹ The County seeks waiver and exemption from 49 C.F.R. § 1152.27 (regarding financial assistance), but does not specifically reference the applicable statutory provision, 49 U.S.C. § 10904. Given its use of the word “exemption” and its requested waiver from the accompanying regulations, we assume it intended also to seek an exemption from § 10904.

exemption. We find, first, that application of § 10904 to the proposed adverse discontinuance is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101. If the adverse discontinuance were to be granted, the Board would be withdrawing its regulatory authority over the segment by finding that the public convenience and necessity no longer require or permit its operation as part of the interstate rail network. This withdrawal of the Board's jurisdiction would allow the County to proceed to state court and attempt to acquire land necessary to realign Road B-20. In such a situation, it would be fundamentally inconsistent to negate the Board's finding that the road realignment would outweigh continued inclusion of the line segment in the national rail network by providing for further Board regulation under § 10904, thus delaying or defeating the purpose of the adverse discontinuance.¹² No policy of 49 U.S.C. § 10101 requires the agency to engage in such regulatory inconsistency.

Moreover, an exemption from § 10904 would promote the rail transportation policy by expediting regulatory decisions (§ 10101(2)) and by reducing a regulatory barrier to an exit from rail service that the agency might find to be consistent with the public convenience and necessity (§ 10101(7)). Secondly, shippers do not need an opportunity to invoke § 10904 here to protect themselves from the abuse of railroad market power because, if the application were to be granted, the Board would be finding that rail service is not needed over this rail segment. For the reasons that support granting the exemption, we will also waive the application of the OFA implementing regulations at 49 C.F.R. § 1152.27, as requested by the County.

Sale for Public Use. The County requests a waiver of the application of the public use implementing regulations at 49 C.F.R. § 1152.28, and an exemption from the statutory provisions relating to public use.¹³ We will grant the waiver and exemption. Should we decide to withdraw our primary jurisdiction over the segment, we would not then allow our jurisdiction to be invoked to impose a public use condition.¹⁴ Specifically, with regard to the exemption criteria, we find, first, that application of 49 U.S.C. § 10905 is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101. The County has a prime role in determining the extent, if any, to which the line segment can be put to public use. Application of § 10905 to the proposed discontinuance would simply delay the public purposes to be sought by the County in filing its application (road realignment to promote public safety). By avoiding such needless delay, an exemption would reduce unnecessary Federal regulatory control over the line (§ 10101(2)) and provide for the expeditious handling of this proceeding (§ 10101(15)). Other aspects of the rail transportation policy will not be adversely affected. Secondly, regulation of the proposed third-party application under § 10905 is not necessary to protect shippers from the abuse of market power because, if the application were to be granted, the Board would be finding that rail service over these segments is not required by shippers. For the same reasons that we

¹² CSX Transp.—Shelby County, Tenn., slip op. at 5-6.

¹³ The County seeks waiver and exemption from 49 C.F.R. § 1152.28 (regarding public use), but does not specifically reference the applicable statutory provision, 49 U.S.C. § 10905. Given its use of the word “exemption” and its requested waiver from the accompanying regulations, we assume it intended also to seek an exemption from § 10905.

¹⁴ CSX Transp.—Shelby County, Tenn., slip op. at 6.

are approving the exemption, we will waive the public use implementing regulations at 49 C.F.R. § 1152.28, as sought by the County. This will also relieve the County from compliance with 49 C.F.R. § 1152.22(e)(4), which requires submission of public-purpose information in the application.

Trails Act. We will not rule on the County's request for waiver of the trail use provisions of 49 C.F.R. § 1152.29 at this time. There is no need to take such action now. These provisions would be applicable only if and when the Board grants the County's adverse discontinuance application. Therefore, this issue can be addressed, if need be, in a later decision.¹⁵

Time for filing of comments, protests and replies. The County requests that the time for filing of protests, comments, and replies, set at 45 days in 49 C.F.R. § 1152.25(c), be reduced to 20 days. The County argues that any reply will be uncomplicated due to lack of traffic on the line. IATR and Backtrack respond that this case is likely to be contested and warrants the full reply period. We will deny the County's request. A petitioner's mere assertion that a matter will be simple is not sufficient to justify significantly shortening the time period for comments. We have not yet heard IATR's version of the facts and will not know whether there are other persons who have an interest in the matter until the comment period opens.

Additional Matter. Finally, we will clarify that we will not order that the property at issue be conveyed to the County in the event we grant an adverse discontinuance. An adverse discontinuance would, in this case, remove our authority over the right-of-way and allow the County to pursue other legal remedies, such as a condemnation action in state court.¹⁶ 49 U.S.C. § 10905 does not, under any circumstances, give the Board authority to order a transfer as requested by the County.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The County's petition for exemption and waiver is granted in part and denied in part, as described above. The County is directed to amend its proposed notice of intent and Federal Register notice as discussed above.

¹⁵ Denver & Rio Grande Ry. Historical Found.—Adverse Aban.—in Mineral Cnty., Colo., AB 1014, slip op. at 5 (STB served Oct. 18, 2007); CSX Transp.—Shelby County, Tenn., slip op. at 6.

¹⁶ Consol. Rail Corp. v. ICC, 29 F.3d 706, 708-709 (D.C. Cir. 1994); Modern Handcraft, Inc.—Aban. in Jackson Cnty., Mo., 363 I.C.C. 969, 972 (1981); City of Chi., Ill.—Adverse Aban.—Chi. Terminal R.R. in Chi., Ill., AB 1036, slip op. at 4 (STB served June 16, 2010).

2. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Nottingham, and Commissioner Mulvey.