

SERVICE DATE – JUNE 29, 2018

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36164

ULSTER & DELAWARE RAILWAY REVITALIZATION CORP.—PETITION FOR  
DECLARATORY ORDER

Digest:<sup>1</sup> The Board finds that a line of railroad located in Ulster County, N.Y., was abandoned pursuant to § 304(b) of the Regional Rail Reorganization Act of 1973 and is, therefore, not subject to the National Trails System Act.

Decided: June 28, 2018

On January 16, 2018, the Ulster & Delaware Railway Revitalization Corp. (U&D), a non-profit tax-exempt New York corporation, filed a petition for declaratory order requesting that the Board determine whether a 38.6-mile segment (the Line) of a line of railroad known as the Catskill Mountain Branch, located in Ulster County, N.Y. (County), has been abandoned, and if so, whether the conversion of the Line's right-of-way into a trail could be done pursuant to the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d).<sup>2</sup> (U&D Pet. 2.) U&D states that, if the Board determines that the Line has not been abandoned, it seeks an order compelling the County to cease and desist any salvage-related activities absent agency approval. (*Id.* at 2-3.)

As discussed below, the Board finds that the Line was abandoned in 1977 pursuant to § 304(b) of the Regional Rail Reorganization Act of 1973 (3R Act), 45 U.S.C. § 744(b), and, as such, is no longer within the Board's jurisdiction and is not subject to the Trails Act.

BACKGROUND

According to U&D, the Catskill Mountain Branch is a line of railroad that formerly extended between milepost 2.9, at Kingston, and milepost 86.6, at Bloomville, in Ulster, Delaware, and Schoharie Counties, N.Y. (U&D Pet. 3.) The Catskill Mountain Branch connects in Kingston with a north-south mainline known as the River Line. (*Id.*) U&D states that the

---

<sup>1</sup> 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. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> U&D states that it is a corporation dedicated to the preservation of the Line as a historic rail corridor served by the excursion railroad passenger service provided by the Catskill Mountain Railroad (CMRR).

United States Railway Association (USRA) did not designate the Catskill Mountain Branch for conveyance to the Consolidated Rail Corporation (Conrail) under the Final System Plan (FSP) when Conrail was established, and instead the Catskill Mountain Branch was identified in the FSP as “available for subsidy.”<sup>3</sup> (U&D Pet. at 3-4.) U&D asserts that, absent a subsidy, the Catskill Mountain Branch was eligible for abandonment under the 3R Act. (*Id.* at 4.) U&D acknowledges that, in 1979, the County purchased the Line from the trustees of Penn Central Transportation Company (Penn Central). (*Id.*) U&D states that Conrail performed some limited freight operations over the eastern-most portion of the Line during the 1980s and, beginning in 1982, the County leased the entire Line, between Kingston and Phoenicia, to CMRR to provide excursion railroad passenger service. (*Id.*) Additionally, according to U&D, for the past several decades, the Line has suffered a series of devastating weather events, which has resulted in some segments of the Line being washed out or damaged. (*Id.* at 4-5.) U&D argues that there is uncertainty regarding whether the abandonment that the 3R Act authorized required further action before it became effective and, if it did, whether those required actions occurred. (*Id.* at 7, 9.) Additionally, if the Line was abandoned, U&D questions whether the right of way may be converted into a trail under the Trails Act. (*Id.* at 10.)

In its reply filed on February 22, 2018, the County states that it purchased a 38.7-mile portion of the former Catskill Mountain Branch (from approximately milepost 2.9 to approximately milepost 41.6) from Penn Central and the Owasco River Railway (Owasco River),<sup>4</sup> Inc., on July 24, 1979. (County Reply 3-4; *see* V.S. White 1-2, Ex. A.) According to the County, the last regular interstate passenger service on the Line ended in 1954, the last freight carrier ended its remaining operations on September 28, 1976, and abandonment of the Line was consummated in 1977. (*Id.* at 4.) The County states that, pursuant to § 304(b) of the 3R Act, Penn Central gave notice, effective March 1, 1977, of its intention to abandon the Catskill Mountain Branch from milepost 2.9, in Kingston, N.Y., to milepost 74.9, in Stamford, N.Y. (*Id.* at 24; *see* V.S. White 3, Ex. C.) The County further states that on April 1, 1977, the New York State Department of Transportation issued a notice of abandonment for the portion of the Catskill Mountain Branch that extended from milepost 2.9, in Kingston, to milepost 74.9, in Stamford, to all interested State agencies, transportation authorities, and local municipalities, as required by the 3R Act. (*Id.*; *see* V.S. White 3, Ex. D.) Thus, the County argues that abandonment of the Line was fully consummated pursuant to § 304(b) of the 3R Act. (County Reply 24-25.)

---

<sup>3</sup> Congress created the USRA, which was charged with designating which lines owned by certain bankrupt railroads were to be retained in active service through transfer to Conrail, a government-created successor railroad to the various northeastern railroads, and which lines would be allowed to be abandoned. The FSP was submitted to Congress on July 26, 1975, and was approved in § 601(e) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat 31 (1976).

<sup>4</sup> The Board notes that there is a discrepancy in the way that each party describes the length of the Line (U&D asserts that the Line is 38.6 miles, while the County states that the Line is 38.7 miles). A review of the Quitclaim Deed between Penn Central/Owasco River and the County, however, indicates that the Line extends 38.7 miles. (*See* V.S. White 1-2, Ex. A.)

While the County maintains that the Line was abandoned under the 3R Act, the County also argues that it can demonstrate that it consummated the abandonment by evaluating its own actions and intent subsequent to its purchase of the Line. (*Id.* at 27.)<sup>5</sup> The County asserts that the abandoned status of the Line is specifically mentioned in multiple other County documents starting in 1977, which provides additional proof that the Line was abandoned. (*Id.* at 6-8, 26; *see* V.S. White 4, Exs. E, H, T.) Moreover, the County also asserts that its treatment of the Line as abandoned was evident from the date of its purchase until the present time. (County Reply 26.) Therefore, the County argues that U&D's request for declaratory relief should be dismissed since the Board has no jurisdiction over the Line. (*Id.* at 27.)

On February 23, 2018, the NYCDEP, acting on behalf of the City of New York, a municipal corporation of the State of New York, filed a reply to U&D's petition supporting the County's position that the Line has been abandoned and is no longer subject to Board jurisdiction. (NYCDEP Reply 1.) On March 22, 2018, U&D filed a motion to strike and petition for leave to file a reply to a reply (U&D Reply to Reply). There, in addition to seeking to strike multiple County exhibits, U&D argues that the status of the Line in 1977 was unclear because County actions and statements after it purchased the Line indicated that it was uncertain whether the Line had been abandoned, and because Conrail had allegedly provided some limited service on the Line as late as 1993. (U&D Reply to Reply 9-10.)<sup>6</sup> The County opposes U&D's motion to strike and petition to file a reply.

#### PRELIMINARY MATTERS

U&D's March 22, 2018 Motion to Strike. On March 22, 2018, U&D filed a motion requesting that 17 exhibits from the County's February 22, 2018 reply be stricken from the record because the documents are irrelevant, "very old," or "voluminous and highly redundant." (U&D Mot. to Strike 6-7.) On April 10, 2018, the County filed in opposition to U&D's motion, arguing that each document that U&D seeks to strike is either uncontroverted evidence of abandonment of the Line under the 3R Act, or evidence of abandonment pursuant to the "owner's intent" standard applied by the Board to determine whether abandonment authorized prior to 1996 had been consummated.<sup>7</sup>

---

<sup>5</sup> Prior to a 1996 change in regulations, the agency depended on a case-by-case evaluation of all the facts and circumstances to see if the railroad showed a clear intention to remove the line from the national rail system, or if instead the record indicated an intent to preserve the right-of-way for future reactivation of rail service. *See, e.g., Becker v. STB*, 132 F.3d 60, 62 (D.C. Cir. 1997).

<sup>6</sup> On March 6, 2018, Ralph C. Mitchell, a resident of the County, filed a letter with the Board asserting, among other things, that the Line has not been abandoned, and encouraging the County to consider Board-sponsored mediation with U&D.

<sup>7</sup> On June 22, 2018, CMRR late-filed a response to the County's April 10 filing asserting, among other things, that certain statements made by CMRR's president, contained in  
(continued . . . )

U&D has failed to show that the exhibits in the County's reply are redundant, irrelevant, immaterial, impertinent, scandalous, or otherwise objectionable and therefore eligible to be stricken under 49 C.F.R. § 1104.8. Accordingly, U&D's motion to strike is denied.

U&D's March 22, 2018 "Reply to a Reply." U&D also requested leave to file a reply to the County's February 22, 2018 reply. U&D argues that it should be permitted to respond to the County's reply because the County's presentation omitted some key facts, and because some arguments raised could not have been anticipated by U&D. In its April 10, 2018 reply, the County argues that U&D has failed to demonstrate good cause for why its "reply to a reply" should be permitted here. According to the County, U&D has ignored the County's valid legal arguments and incontrovertible evidence, and, instead, has improperly raised issues that it could have raised in its original petition.<sup>8</sup> While the Board's regulations do not generally permit "replies to replies," see 49 C.F.R. § 1104.13(c), in the interest of having a more complete record, the Board will accept U&D's reply.

### DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, the Board may issue a declaratory order to terminate a controversy or to remove uncertainty. The Board has broad discretion to determine whether to issue a declaratory order. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C.2d 675, 675 (1989). Here, U&D has asked the Board to issue a declaratory order to determine whether the Line has been abandoned and, if so, whether the conversion of the Line's right of way into a trail could be done pursuant to the Trails Act. The Board will issue a declaratory order to remove uncertainty regarding the status of the Line. As explained below, the Board finds that the Line has been abandoned and that, therefore, it is not subject to the Trails Act.

It is well established that once an entity exercises abandonment authority, a rail line is removed from the national transportation system and ceases to be within the Board's jurisdiction. Hayfield N. R.R. v. Chi. & N. W. Transp. Co., 467 U.S. 622, 633 (1984); Preseault v. ICC, 494 U.S. 1, 5 n.3 (1990); Becker v. STB, 132 F.3d 60, 62-63 (D.C. Cir. 1997). In contrast, unless and until abandonment is actually consummated, a line that has been

---

( . . . continued)

an exhibit relied upon by the County to support the argument that the Line was abandoned, do not reflect CMRR's official position regarding this proceeding.

<sup>8</sup> In its April 10, 2018 reply, the County states that, should the Board accept U&D's "reply to a reply," the County requests the right to respond. The County also requests that the Board replace its prior verified statement with a corrected version (removing inadvertent references to "White V.S.") attached to its reply. Given the Board's finding, discussed below, that the Line was abandoned in 1977 under the 3R Act, an additional reply by the County is unnecessary. The Board will, however, accept the County's corrected verified statement.

authorized for abandonment remains within the Board's jurisdiction, because abandonment authority is permissive and not self-executing. See Beaufort R.R.—Modified Rail Certificate, FD 34943 (STB served July 21, 2009); Norfolk & W. Ry.—Aban. Exemption—Between Kokomo & Rochester in Howard, Miami, & Fulton Ctys., Ind., AB 290 (Sub-No. 168X) (STB served May 4, 2005); Maryland Transit Admin.—Aban. Exemption—in Somerset Cty., Md., AB 590 (Sub-No. 1X), slip op. at 3 (STB served Feb. 11, 2015). In other words, if an entity chooses not to exercise abandonment authority granted to it, the line remains subject to the Board's jurisdiction.

Rail lines excluded from transfer to Conrail under the FSP were eligible to be abandoned, without receiving authority from the Interstate Commerce Commission (the Board's predecessor), under simplified notice procedures pursuant to the 3R Act. Section 304(b) of the 3R Act, 45 U.S.C. § 744(b), provides that certain rail properties may be abandoned upon 30 days' notice in writing to any person (including a government entity) required to receive notice under § 744(a)(1)(C). Under § 304(c)(1) of the 3R Act, abandonment through these simplified notice procedures was authorized for a two-year period after the effective date of the FSP. 45 U.S.C. § 744(c)(1).

Here, the County provided a copy of Penn Central's notice of abandonment under § 304(b) of the 3R Act, in which Penn Central states its intent to abandon the Catskill Mountain Branch between milepost 2.9, in Kingston, and milepost 74.9, in Stamford, effective March 1, 1977. (County Reply, White V.S. Ex. C.) The County also provided a letter dated April 1, 1977, from the New York State Department of Transportation stating that it was notifying all interested state agencies, transportation authorities, and local municipalities that the Catskill Mountain Branch had been approved for abandonment. (*Id.*, White V.S. Ex. D.) The Board finds that these documents together sufficiently demonstrate that the Catskill Mountain Branch was abandoned under the notice procedures of the 3R Act in the spring of 1977—within the two-year window allowed under that Act.

U&D does not contest the validity of these notices, nor does it argue that Penn Central failed to comply with the requirements of § 304(b) or otherwise failed to consummate abandonment of the Catskill Mountain Branch (which includes the Line). (*See* U&D's Reply to Reply.) Instead, U&D asserts that it is not clear that the Line was abandoned because (1) other, more recent documents indicate that the County was unsure whether the Line had been abandoned, and (2) a 1995 letter from Conrail indicates that it was serving a portion of the Line as recently as 1993. (*Id.* 9-11.)

The County, however, explained that it only recently located Penn Central's 1977 notice of abandonment and the New York Department of Transportation's notification letter and, prior to locating those documents, had not been certain that the Line had been effectively abandoned. (County Reply 23-24; County Reply to Pet. for Leave to File Reply 5 n. 2.) The County's lack of awareness of these documents does not affect the fact that they demonstrate that abandonment of the Catskill Mountain Branch was consummated in 1977 pursuant to the 3R Act. Moreover, the 1995 letter from Conrail, submitted by U&D, references operations over a rail line other than

the one at issue here. Specifically, the Conrail letter discusses “the unused main track turnout at milepost [88 or 89] on the River Line.” (U&D Reply to Reply Ex. D.)<sup>9</sup> As noted above, the River Line connected to the Catskill Mountain Branch in Kingston at milepost 2.9 on that branch. Therefore, the reference to milepost 88 or 89 cannot be a reference to a milepost marker on the Catskill Mountain Branch but must instead be a reference to a milepost on the River Line, contrary to U&D’s claims. (U&D Reply to Reply Ex. D.) Moreover, because the segment of the Catskill Mountain Branch at issue here runs from milepost 2.9 to milepost 41.6, even if the milepost 88 or 89 reference in the Conrail letter was referring to a milepost on the Catskill Mountain Branch, it does not demonstrate any freight rail activity on the relevant portion of the line at issue here. And, ultimately, because the Board finds that the Line was conclusively abandoned under the 3R Act in 1977 and, thus no longer within the Board’s jurisdiction, any post-abandonment rail activities, even if they were conducted on the Line at issue here, are not controlling, or even relevant.

Therefore, because there is sufficient documentary evidence that the requirements of 45 U.S.C. § 744(b) were satisfied and the validity of that record has not been disputed, the Board finds that the Line was abandoned in 1977.

In addition, because the Board finds that the Line was abandoned more than 40 years ago, the Trails Act would not be applicable here as the Line is no longer within the Board’s jurisdiction. Specifically, the Trails Act is intended to preserve railroad rights-of-way that might otherwise be abandoned for future reactivation of rail service, while allowing the right-of-way to be used in the interim as a trail. See Preseault v. ICC, 494 U.S. 1, 5 (1990); Birt v. STB, 90 F.3d 580, 582-83 (D.C. Cir. 1996). The statute expressly provides that “such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.” 16 U.S.C. § 1247(d). As noted above, however, once an entity exercises abandonment authority, the rail line is removed from the national transportation system, in which case the line ceases to be within the Board’s jurisdiction. Hayfield N. R.R. v. Chi. & N. W. Transp. Co., 467 U.S. 622, 633 (1984); Preseault v. ICC, 494 U.S. 1, 5 n.3; Becker v. STB, 132 F.3d 60, 62-63 (D.C. Cir. 1997). Where, as here, abandonment of a rail line has been consummated, conversion of that line into a trail cannot be done pursuant to the Trails Act.<sup>10</sup>

It is ordered:

1. U&D’s petition for declaratory order is granted to the extent discussed above.

---

<sup>9</sup> The text is unclear as to whether the referenced milepost is at 88 or 89.

<sup>10</sup> This determination, however, does not preclude the use of this rail corridor as a trail under state, local, or other law. For example, the County claims that it has placed or intends to place a trail on a certain segment of the Line under state law. (See County Reply 7, 17-24 (discussing trail on the Ashokan segment between milepost 10.0 and milepost 21.6).) Because the Line has been abandoned, such a use under state or local law does not conflict with the Interstate Commerce Act or the Trails Act.

2. U&D's March 22, 2018 motion to strike is denied.
3. U&D's March 22, 2018 "reply to reply" is granted.
4. The County's request to file a reply to U&D's "reply to reply" is denied.
5. The County's corrected verified statement is accepted.
6. This decision is effective on its service date.

By the Board, Board Members Begeman and Miller.