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BEFORE THE SURFACE TRANSPORTATION BOARD
ENTERED
Office of Proceedings

SEP 16 2003

Part of
Public Record

BG & CM Railroad
acquisition and operation exemption--
Camas Prairie Railnet, Inc.

Finance Docket 34398



Motion to Dismiss

This motion, on behalf of BG & CM Railroad, seeks dismissal of the Notice of Exemption for BG & CM Railroad to acquire and to operate the line of railroad formerly owned and operated by Camas Prairie RailNet, Inc. from MP 0.0 near Spalding to MP 66.8 near Grangeville, in Lewis, Nez Perce and Idaho Counties, Idaho. Counsel for BG & CM Railroad is authorized to state that Camas Prairie RailNet, Inc. joins in this motion.

Underlying Facts

The Surface Transportation Board (STB) authorized the line in question for abandonment in Camas Prairie RailNet, Inc.-- Abandonment, AB 564, served Sept. 13, 2000, subject to certain environmental and historic conditions, since fulfilled. Camas Prairie RailNet, Inc. discontinued service on November 30, 2000, but also entered into a railbanking/interim trail use agreement with Camas Prairie Trail Conservancy (an entity affiliated with Camas Prairie RailNet, Inc.) pursuant to a CITU served May 15, 2001, pursuant to 16 U.S.C. § 1247(d). Pursuant to a CITU served January 6, 2003, BG & CM Railroad, Camas Prairie RailNet, Inc., and Camas Prairie Trail Conservancy contracted for BG & CM Railroad to acquire the line, including any right to reactivate rail service, and for BG & CM to become substitute

railbanker/trail manager. Camas Prairie RailNet, Inc. reserved certain property interests (e.g., utility rights) in the line.

Pursuant to its contract, BG & CM Railroad has now acquired the line and future operating rights. After discussions with shippers, BG & CM Railroad wishes to reactivate the line from MP 0 to MP 52 for contract rail service (as opposed to common carrier rail service). On September 9, 2003, BG & CM Railroad filed a petition for exemption (F.D. 34399) to this end with STB.

Argument

Ordinarily, a railroad acquiring rail assets and operational rights over track belonging to another must receive authority (or an exemption from pre-authorization requirements) from this Board. However, as an alternative, a "certificate of interim trail use" (CITU) clearly authorizes the transfer of rail assets. The main difference is that a CITU assumes that rail service will have ceased (been discontinued) at the time of transfer. Nonetheless, a CITU assumes that the assets will be subject to reactivation; that is a condition of the CITU.

In the situation at bar, the relevant rail assets were transferred pursuant to the CITU issued in Camas Prairie RailNet, Inc. -- Abandonment, AB 564, to BG & CM Railroad. Camas Prairie Railnet (the "abandoning" railroad¹) had already

¹ As used here, "abandoning" railroad shall mean the railroad which is seeking abandonment authority but later agrees to application of 16 U.S.C. § 1247(d) to the line. Under 16 U.S.C. § 1247(d), service on a line may be discontinued, and track and tie may be removed, but the line is kept intact for

discontinued all rail service (exercising that authority in November of 2000).

As understood by the parties, STB's practice² has been to assume that the right to reactivate service on a railbanked line (i.e., a line covered by a CITU or Notice of Interim Trail Use ["NITU"]) is held by the "abandoning" railroad, unless otherwise advised. While BG & CM Railroad does not contest that practice here (there seems no need to do so), there is no reason to make the assumption irrebuttable, and it is unreasonable to do so. In other words, there is no reason to insist that the right to reactivate may not be transferred by the "abandoning" railroad to a party acquiring the line for railbanking purposes.

There is nothing in 16 U.S.C. § 1247(d) or STB's regulations that indicates that a railbanking agreement cannot provide for the transfer of the right to reactivate to the railbanking party. To the contrary, this Board has indicated that under the language of the statute, the railbanking agreement can take any form so long as it is consistent with rail reactivation and the railbanker takes over the obligation to pay taxes, management responsibility, and tort liability.³

possible future rail reactivation ("railbanking"). In the interim, it may be used as a trail.

² Nothing in STB regulations provides that the right to reactivate remains or must remain in the "abandoning" railroad.

³ Indeed, as early as 1986, this Board's predecessor indicated that rail lines may be alienated when they are transferred for interim trail use, so long as the property is "subject to [federal] jurisdiction for future restoration of rail service (and as long as the transfer is consistent with

Transfer of the right to reactivate service to the trail manager is certainly consistent with rail reactivation, as this case demonstrates. After all, BG & CM Railroad, as the railbanker/interim trail manager, actively seeks to reactivate service on the line; reactivation is not sought by Camas Prairie Railnet, although Camas Prairie Railnet supports BG & CM's effort. BG & CM Railroad, in anticipation of possibly seeking to reactivate, contracted to obtain all Camas Prairie's rights necessary to that end when it entered into its agreement with Camas Prairie RailNet.

There is no reason to preclude the railbanking agreement from transferring the right to reactivate. Indeed, if a purpose of 16 U.S.C. § 1247(d) is to preserve a line for possible future reactivation, it is to be expected that entities interested in reactivation will seek not only to acquire the underlying rail assets for interim trail use but also the right to reactivate service on the line as part of the transfer of assets. That indeed is what happened in this case.

Filing of an additional Notice of Exemption to acquire rights to operate is in such circumstances redundant, consuming STB and railroad resources. Moreover, it is expensive. The filing fee alone for a Notice is currently \$1300, and generally the party making the Notice must incur additional fees for

applicable State property law)...." Rail Abandonments -- Use of Rights of Way as Trails, 2 ICC2d 591, 599 (1986). The ICC stated expressly that trail use could occur whether the railroad "transfers or retains its interest in the right-of-way." Id.

attorneys or STB practitioners to prepare the requisite filings. Ironically, that is far more than the cost to apply for a CITU (or NITU), which is currently \$150. But since the transfer of a right to reactivate pursuant to a CITU (or NITU) will only occur for lines authorized for abandonment and on which service is discontinued, no further regulatory oversight is necessary, and certainly not the degree of oversight envisioned for a Notice under 49 U.S.C. § 1150.31, et seq., as in the docket to which this motion to dismiss is directed.

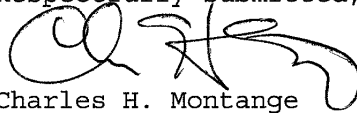
Under these circumstances, federal rail policy embodied in 49 U.S.C. § 10101(2), (7) and (15) is best served by precedent indicating that the parties to a CITU need not also file an additional Notice of Exemption to transfer rail assets and rights.

BG & CM Railroad filed a Notice of Exemption under 49 C.F.R. § 1150.31 in F.D. 34398 to ensure that it complied with whatever requirements are necessary to reactivate service, should its Petition for Exemption in F.D. 34399 be granted. However, BG & CM Railroad, joined by Camas Prairie RailNet, Inc., believes that this Board should clarify that -- in situations like this involving a CITU -- no such Notice is required, and accordingly, BG & CM Railroad moves to dismiss the pending Notice of Exemption as unnecessary.

If the Notice is dismissed, BG & CM Railroad respectfully requests a refund of the \$1300 filing fee associated with the Notice. BG & CM Railroad notes that service on the line in

question is marginal at best, and that it must hold down regulatory overheads in order to provide economical contract rail service for the grain rush.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'C. H. Montange', with a large, stylized flourish at the end.

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for BG & CM Railroad, Inc.

Service List

I hereby certify service of the foregoing petition upon the following representatives of parties to AB 564 by U.S. Mail, postage pre-paid, first class this 15th day of Sept., 2003:

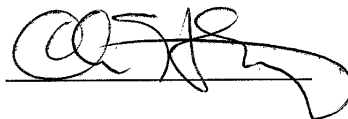
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A handwritten signature in black ink, appearing to be "C. J. R.", written over a horizontal line.