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17 July 2007
by express

Hon. Vernon Williams
Secretary
Surface Transportation Board
395 E Street, S.W..
Washington, D.C. 20024 (Fed X)

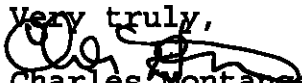
Re: YILA -- Abandonment Exemption --
Yakima County, WA, AB 600 (Sub-no 1X)

for filing: Motion to Correct

Dear Mr. Williams:

Enclosed please find a Motion to Correct, including copies, directed at footnote 2 in this Board's decision in this proceeding dated July 6. The footnote is not a correct characterization of the Board's policies or practices with 16 U.S.C. § 1247(d) to date, and would require amendment of its regulations if true.

Thank you for your assistance in this matter.

Very truly,

Charles Montange
for Yakima County, City of Yakima,
Town of Naches, and YILA

Encls.

cc. Counsel (per certificate of service) (w/encl.)

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BEFORE THE SURFACE TRANSPORTATION BOARD

Yakima Interurban Lines Association)
-- Abandonment Exemption -- in) AB 600 (sub-no. 1X)
Yakima County, WA)

MOTION TO CORRECT DECISION

Yakima County, City of Yakima, Town of Naches, and Yakima Interurban Lines Association (collectively referred to as "County") hereby move to correct footnote 2 of this Board's decision served July 6, 2007 in this proceeding. The footnote does not appear consistent with this Board's implementation of 16 U.S.C. § 1247(d) and is contrary to this Board's regulations and to industry practice.

Background. On June 28, 2007, County filed a letter notifying this Board that Yakima Interurban Lines Association had transferred all non-section 106 portions of the Naches Branch to Yakima County pursuant to the "Notice of Interim Trail Use" ("NITU") issued in this proceeding. The letter reiterated County's request for removal of the section 106 condition to allow transfer of the remaining parcels. The letter explained that in light of the railbanking agreement now consummated by a transfer of the property, it was County's understanding that railbanking (i.e., the NITU) automatically (i.e., without further need to seek extensions) continues to extend indefinitely (i.e., without termination at the end of 180 days or some other specified time from the service or effective date of the last NITU or extension order). The letter's precise statement was as follows:

"Yakima County and YILA understand that the Notice of Interim Trail Use (NITU) applicable to the Naches Branch in this proceeding now automatically extends indefinitely. If this understanding is in error, please advise me as soon as possible."

With respect, that is standard language found in letters notifying this Board of a railbanking. It conforms to this Board's policy statements, regulations, and industry practice.

By letter dated July 5 (a day before STB issued its decision), Kershaw Sunnyside Ranches (KSR) objected to the Board's addressing whether further extensions of the NITU period were required on the grounds (a) this was a request for an advisory opinion, and (b) the County allegedly had not began discussions about trail use.

The Board's footnote 2 has nothing to do with removal of the section 106 condition, but instead asserts that Yakima County and YILA are incorrect in their understanding that the NITU automatically extends indefinitely. After declaring that County is wrong that the NITU extends indefinitely, this Board in footnote 2 states as follows by way of explanation:

"The purpose of the NITU is to prevent the carrier seeking abandonment ... from consummating abandonment while the railroad negotiates an agreement with the rail banking proponent. When the agreement is signed, the NITU is typically no longer necessary because the agreement usually precludes the railroad from consummating the abandonment."

With respect, the footnote 2 "explanation" conflates several issues and misstates the Board's approach and regulations. Also, the Board has no factual basis or experience with actual agreements that supports the assertion or assumption in the last sentence quoted above, if it means railbanking agreements contain clauses specifically precluding consummation. The entire final sentence is confusing.

Grounds for correction. A "Certificate of Interim Trail Use or Abandonment" ("CITU") in regulated abandonments and a "Notice of Interim Trail Use or Abandonment" ("NITU") in exemption cases (like this one) are dual-purpose orders. In the first instance, both the CITU and NITU do three things: (a) permit trail use, (b) allow a railroad to cancel tariffs, discontinue service, and salvage track and ties, and (c) allow negotiation of a permanent trail use agreement for 180 days. In the second instance, if no trail use agreement is reached (and no extension of the negotiation period is authorized), then the railroad may consummate a full abandonment. But if a trail use agreement is reached, this second stage does not become effective, and the CITU or NITU automatically continues to apply to authorize trail use.

This is clear from the preamble to this Board's final regulations establishing 49 C.F.R. § 1152.29, which describe the effect of a CITU and NITU as paraphrased above. See Rail Abandonments -- Use of Rights-of-Way as Trails, Ex Parte No. 274 (Sub-no. 13), 1986 Lexis at *45-*46 (for CITU's) & *50-*51

(for NITU's), 2 ICC2d 591 (1986). The fact that the CITU or NITU extend automatically should a trails use arrangement be reached is the only way to make sense out of the Board's regulations implementing 16 U.S.C. § 1247(d). For example, 49 C.F.R. § 1129.29(d)(1) clearly anticipates that a NITU is necessary and applicable throughout the trail use period. That regulation clearly provides that should the interim trail manager (or user) wish to terminate trails use, he/she must provide a copy of the applicable NITU to STB and "request that it be vacated on a specific date." 49 C.F.R. § 1129.29(d)(2). The regulation further requires that the notice of the vacation be sent to the railroad originally requesting abandonment authority, the owner of the right of way, and the trail user. Id. As a matter of agency practice, STB's Office of Proceedings ("OP") generally requires that notice of a request for vacation be provided to the railroad originally requesting abandonment authority before OP will act on a request for vacation. In addition, the regulation itself requires vacation of the NITU prior to reactivation of rail service. 49 C.F.R. § 1129.29(d)(3). In the event one trails user intends to terminate trail use, but another person intends to become the trail user, the applicable regulation requires a joint filing leading to a reopening to terminate the first NITU and to "issue an appropriate replacement NITU ... to the new trail user." 49 C.F.R. § 1129.29(f). None of these requirements makes any sense at all if a NITU is "no longer necessary" when trails use

commences. This Board's predecessor (ICC) in its Policy Statement on Rails to Trails Conversions, Ex Parte 274 (Sub-no. 13B), 1990 ICC Lexis 34 at *9 (Jan. 29, 1990), further confirmed that

"Under the NITU or CITU, the parties have time to negotiate an interim trail use arrangement. During those negotiations, the railroad may discontinue service, cancel its tariffs, and salvage track and other equipment. If no trail use agreement is reached, the CITU or NITU automatically converts into authority for full abandonment. On the other hand, if a trail use agreement is reached, it is automatically authorized by the CITU or NITU. n 14."

Note 14 states (emphasis added):

"Upon termination of the trail use arrangement, if the railroad does not wish to reinstate service (or continue to retain the line for possible future use), it must file a petition to have the ICC reopen the abandonment proceeding and issue full abandonment authority."

Again, this indicates that should a trail use agreement be reached in the relevant negotiation period, then the CITU or NITU extends until terminated by this Board. The CITU or NITU do not become "unnecessary" to preserve the right of way because a trail use agreement is reached. They authorize the agreement, and the corridor remains preserved, as this Board's predecessor has indicated, until this Board terminates the CITU or NITU.

This Board in a footnote cannot overturn its regulations

and long held interpretations of the Trails Act. If the Board now wishes to change course, and in essence to rescind its regulations, it may only proceed to do so in a notice and comment rulemaking.

The proper construction of a NITU is especially germane here. A NITU (or CITU), as this Board's predecessor points out, serves to maintain a rail corridor intact which might otherwise "revert" in whole or in part to adjoining property owners under state law during the period of interim trail use. Indeed, that is a key aspect of 16 U.S.C. § 1247(d), as this Board's predecessor recognized, and sought to implement in its issuance of the regulations governing NITU's and CITU's. Policy Statement, supra, 1990 ICC Lexis at *4 and passim; Rail Abandonments -- Use of Rights of Way as Trails, supra, at *20-*21 and passim. Here, Kershaw Sunnyside Ranches claims a reversionary-type interest in the Naches Branch, and has unsuccessfully applied to this Board in STB docket AB 600 to determine that the line is adversely abandoned, so that KSR's can obtain a state court decree severing the railroad right of way. KSR has petitioned the Ninth Circuit for judicial review of the Board's decisions. The case has been briefed, and is awaiting oral argument. KSR nonetheless is belatedly filing papers upon papers in AB 600, and has also sought reconsideration of this Board's decision authorizing railbanking in AB 600 (Sub-no. 1X).

For this Board to issue an order which in a footnote seems

to deny that a CITU or NITU is relevant once a trails use agreement is reached seems principally to add confusion to the pending administrative and appellate litigation. That just loads up the system with more overhead expense, not simply for County but for the Board's Office of General Counsel as well.

To the extent the Board means merely to indicate that trails use is not full consummation of abandonment authority, no one (except possibly Kershaw) disputes that. But from the perspective of a railroad, this is relevant only in the event the railroad eventually seeks reactivation because it serves to keep the line within the Board's overall jurisdiction. Otherwise, if a railroad consents to issuance of a CITU or NITU, but determines during the initial 180 day negotiation period (or any extension thereof) that it is no longer interested in trail use, it can apply to the Board for an immediate termination of the CITU or NITU, or simply allow the CITU or NITU to lapse. In that sense, the CITU or NITU do not "bind" the railroad. In other words, during the negotiation period, the CITU or NITU does not require an agreement to be reached. If an agreement is reached, the parties by definition enter into a contract, usually for a sale of the property by the railroad to the interim trail user, but sometimes for a lease or other arrangement. Thus, up until an agreement is reached, the railroad has discretion over "trails use" or "railbanking." Once a contract duly authorized by this Board is reached, it becomes irrelevant to the railroad to fully consummate the

abandonment: it has voluntarily elected an alternative authorized by the Board.¹

As this Board and its predecessor, explained in the relevant regulatory preamble, its Policy Statement, supra, for Congress, and its precedent to date, this Board generally allows termination of CITU's and NITU's, once an agreement is reached, only in the event (a) the trail user does not discharge its statutory responsibilities (assume management, tort and tax liabilities), (b) rail service is reactivated, (c) a new CITU or NITU is issued for a substitute trail user, or (d) the interim trail user seeks termination and the abandoning railroad does not put forward an alternative railbanking arrangement. See, e.g., discussion in Union Pacific Railroad Co. -- Abandonment-- in Morgan County, CO, AB 33 (Sub-no. 86), served January 30, 1997 at 4 (confirming automatic nature of CITU, and some of means of termination); Chelsea Property Owners -- Abandonment-- Portion of Consolidated Rail Corporation's West 30th Street Secondary Track in NY, NY, AB 167 (Sub-no. 1094)A, served June 13, 2005, slip at p. 7 (conditions for involuntary termination of CITU).

¹ This process is much the same as most of the Board's orders authorizing transfer of rail lines. The orders (e.g., pursuant to 49 C.F.R. § 1150.31, et seq.) authorize acquisitions and operation after filing of an appropriate notice, but they do not require that transactions actually transferring the property for that purpose be consummated. If the transaction is consummated pursuant to the notice, then the new entity is charged with obligations as to a line, just as is the case if a railbanking/trails use agreement is reached under a NITU or CITU.

YILA and the County in their letter merely indicated that they understood the NITU and CITU were now automatically indefinitely applicable -- that no further NITU or CITU extensions of negotiation period were necessary -- because a railbanking/trails use agreement had been reached and indeed property transferred pursuant to same. They inquired if the Board had anything further for them to do. This Board's footnote in contradicting what the County and YILA recited as their understanding seems to invite further confusion and controversy by suggesting something more is required.

Trail users frequently ask if there is some kind of "certificate" or "order" they can get from the Board to confirm that they have railbanked a corridor. Under this Board's regulations, there is none. This Board treats its function under 16 U.S.C. § 1247(d) as ministerial (i.e., to authorize railbanking/trail use upon timely request and railroad consent). This Board leaves most matters to voluntary agreement between trail user and railroad. Under these circumstances, the best that a trail user's representative can do to allay concern, and to reduce the chance of litigation, is to ask the Board to advise if something more is required. That is all County's representative did here, as he has done in many cases in the past, and this is the first instance that what is common practice has resulted in so much confusion.

The footnote should be corrected, and the easiest correction would be to delete it. In any event, if the Board

has something more it thinks needs to be done for Yakima County and YILA to comply with 16 U.S.C. § 1247(d), then it should state that directly, rather than leave the parties casting about, especially since KSR already has a related proceeding against STB before the Ninth Circuit to which the issue is related. Moreover, some clarity is appropriate since rail transportation policy is supposed, among other things, to promote expeditious resolutions, to reduce barriers to entry and exit, and to encourage fair and expeditious regulatory decisions. 49 U.S.C. § 10101(2), (7) & (15).

Also, contrary to the intimation in the footnote, most railbanking agreements do not mention consummation of abandonment at all. Use of the word "consummation" in the context of abandonment itself is confusing. For federal rail regulatory purposes, "consummation" of abandonment generally means loss of this Board's jurisdiction, and allows a railroad to cease service and terminate tariffs. Under the Board's regulations, railroads are generally required to provide a letter consummating abandonment authority within one year of the effective date of an authorization or the authority lapses. For state law purposes, "consummation" of abandonment cannot occur until this Board's jurisdiction ceases. At that point, "abandonment" generally refers to easement extinction, and a state court looks to actions like termination of tariffs, cessation of service, salvage of track and sale of real estate to determine if abandonment has been consummated for state law

purposes Since this Board's implementing regulations for railbanking allow railroads to take actions otherwise associated with consummation of abandonment (termination of tariffs, cessation of service, salvage, and sale or transfer of the property) without effect on this Board's continued jurisdiction, and thus on whether an abandonment has occurred at state law, the term "consummation of abandonment" begins to lose meaning. But rather than engage in a dissertation on the subject, beyond what has already been presented, it is sufficient here to note that railbanking basically is an alternative to abandonment consummation and to continued common carrier operation.

For sake of completeness, we also observe that this Board's decisions indicate that railbanking creates a right of reactivation (a kind of future common carrier right),² which this Board's decisions indicate is held by the railroad which originally sought abandonment authority,³ but can be transferred to others pursuant to procedures in Part 1150,⁴ at least

² This unfortunately has been ignored by the Court of Appeals for the Federal Circuit, and may never have been understood by the Justice Department lawyers presenting takings cases there anyway.

³ Ferster, Rails to Trails Conversions: A Review of Legal Issues, 58 Planning and Env. Law at p. 6 (Sept. 2006, American Planning Association) (collects cases in footnote 29); BG & CM Railroad, Inc. -- Exemption from 49 U.S.C. Subtitle IV, F.D. 34399 (and related case), served Oct. 17, 2003, slip op. at p. 5.

⁴ See Georgia Southwestern Railroad -- Sale and Lease Exemption, F.D. 34133, served Jan. 18, 2002, slip op. at p. 1 (allowing an uncontested transfer of reactivation rights to a

sometimes.⁵ In short, while aspects of the Board's policy on railbanking may be vague or unclear, we do not believe that what footnote 2 addressed was vague or unclear, until called into question by footnote 2. It is inappropriate for the Board in a footnote in a decision lifting a section 106 condition to announce a construction of a NITU that so contradicts long-established regulations and policies.

KSR's objection in its July 5 letter to automatic continuation of the NITU is that the County has no trail plans at this time. This is not a legitimate objection to automatic continuation of the NITU. The Board leaves such issues as the nature of the trail use, and when to implement a trail, largely to local regulation. The Board certainly does not require any particular kind of trail on the premises (there are many simple trails on roadbeds after track and tie are removed), much less that a trail plan (or for that matter a rail reactivation plan) exist at the instant a County government acquires a line. See Policy Statement, supra. As the County and other commenters have indicated before with respect to this particular line, the County and Washington State Department of Transportation (WSDOT) will now determine whether the rail line can be rehabilitated

railbanked line from Albany to Sasser).

⁵ See City of Coeur d'Alene -- Acquisition and Operation Exemption, F.D. 34980, served March 30, 2007 (refusing to allow an uncontested transfer of the right to reactivate to a city government). This decision is confusing, in that it seems to imply that the Board itself holds the right of reactivation. However, that level of confusion is not the subject of footnote 2.

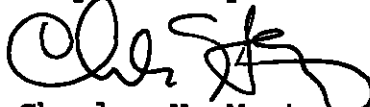
within a budget that the Department can support. If so, the County and WSDOT may undertake rehabilitation, and the County may contract with a rail operator to reinstitute service. Alternatively, the County may undertake "rail with trail," as has been done in Seattle in connection with the Ballard Terminal Railroad. And in the event neither rail nor rail with trail are implemented, the County will undertake a trail. All these possibilities are permissible outcomes at this point. The level of commitment to preserving this corridor is very high given all the money that WSDOT has invested to date, and the high costs imposed by KSR's warrantless opposition.

KSR's real and only objection to the efforts of YILA and the County in all KSR's filings to date is that the County declines to agree to severance of the line so it can no longer be used for rail or trail purposes. County is adamant in its efforts to keep the corridor intact for future rail and for trail purposes. The fact that County is doing all that it can is hardly grounds to oppose the NITU, although that is what KSR seems to be arguing. KSR's claims are incorrect and misleading, or mere posturing, and amount to no more than continuation of its effort to drive up legal bills faced by the County and YILA in keeping the corridor intact. That effort should not be rewarded by creation of confusion on the effect of a NITU. KSR has demonstrated that it needs no assistance in imagining things to litigate.

Conclusion

Footnote 2 to the Decision served on July 3, 2007, should be corrected by deletion. If the Board wishes to address the County's letter on the subject of the footnote, the Board should simply concur with the County that no further action is necessary for the applicable NITU and 16 U.S.C. § 1247(d) to continue to apply without any further order of this Board. If the Board intends this no longer to be the case, then the Board should initiate a notice and comment rulemaking to amend its regulations to conform to its new view, if it decides it should take such a view after receiving comment. KSR's objections continue to be meritless.

Respectfully submitted,



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Certificate of Service

By my signature below, I certify service on July 17, 2007, by U.S. Mail, postage pre-paid first class, of the foregoing upon the following counsel of record:

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