

SURFACE TRANSPORTATION BOARD¹

DECISION

Docket No. AB-6 (Sub-No. 299X)

BURLINGTON NORTHERN RAILROAD COMPANY—
ABANDONMENT EXEMPTION—IN SKAGIT COUNTY, WA

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Decided: September 19, 1997

On June 19, 1997, Randy Good, Ralph K. Clemons, and Travis Martinez (petitioners)² filed a petition under 49 CFR 1115.4 seeking to reopen these abandonment proceedings involving adjoining segments of Burlington Northern Railroad Company's (BN) line between Sedro Woolley and Concrete, in Skagit County, WA. Interim trail use/rail banking agreements have been negotiated for both segments under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act) and 49 CFR 1152.29. The Rails to Trails Conservancy (RTC) and Skagit County (County) replied to the petition.³ We will deny the petition.

BACKGROUND

In Docket No. AB-6 (Sub-No. 299X), BN filed a petition for exemption to abandon the 11.27-mile segment between Hamilton (milepost 33.42) and Concrete, WA (milepost 44.69). The ICC granted the exemption in a decision served October 25, 1988. Subsequently, the Washington State Parks and Recreation Commission (WSPRC) requested an interim trail use/rail banking condition and filed an appropriate statement of willingness to assume financial responsibility. BN consented to negotiate an interim trail use/rail banking agreement with WSPRC. On December 19, 1988, a Notice of Interim Trail Use or Abandonment (NITU) was issued under the Trails Act and

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision considers a request to reopen a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 16 U.S.C. 1247(d) and 49 U.S.C. 10903. Therefore, this decision applies the law in effect prior to the ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

² Petitioners claim that they are owners of land underlying the rail corridor with full possessory rights when the land is no longer used for railroad purposes.

³ On August 12, 1997, counsel for RTC submitted a statement in opposition to the petition to reopen on behalf of the Skagit County Citizen's Rail Trail Council (Council). On August 25, 1997, petitioners filed a motion to strike the Council submission on the grounds that Council is not a party of record with standing to submit a pleading on its own behalf, and that, if the pleading is filed as part of RTC's presentation, it is late. The motion to strike will be granted.

49 CFR 1152.29 giving the parties 180 days to negotiate an interim trail use/rail banking agreement.⁴

In Docket No. AB-6 (Sub-No. 341X), BN filed a petition for exemption to abandon the 11.42-mile segment between Sedro Woolley (milepost 22.00) and Hamilton, WA (milepost 33.42). The County requested an interim trail use/rail banking condition and filed a statement of willingness to assume financial responsibility under 49 CFR 1152.29. BN indicated its willingness to negotiate an agreement. The ICC served a decision and NITU on April 5, 1993, granting the abandonment exemption, subject to conditions, including a Trails Act condition giving the parties 180 days to negotiate an interim trail use/rail banking agreement.

Subsequently, in the Sub-No. 299X proceeding, the County and the RTC filed statements of willingness to assume financial responsibility in lieu of WSPRC, thereby permitting the County to acquire both segments of the line for interim trail use/rail banking.⁵ On October 25, 1993, RTC notified the ICC that an interim trail use/rail banking agreement had been executed with BN on August 23, 1993, with the County as assignee.

ARGUMENTS

Petitioners assert that these proceedings should be reopened because the County's statement of willingness to assume financial responsibility was void ab initio. According to petitioners, the County did not have the legal capacity to assume full responsibility to satisfy the requirements in 49 CFR 1152.29 for an interim trail use/rail banking agreement. Petitioners indicate that a Washington State statute requires that the County obtain the consent of a city or town where a proposed park or recreation area is to be located.⁶ Petitioners further say that, under state law, WSPRC and the County are also required to enter into an "interlocal agreement" with other public agencies.⁷ Petitioners have submitted letters and resolutions from the towns of Concrete, Hamilton, and Lyman, WA, and the City of Sedro Woolley, opposing the trail and indicating that interlocal agreements have not been presented for their approval.

Petitioners further claim that state statutes require that the County pay property owners just compensation for the property taken for interim trail use.⁸ The petitioners aver that the state requirement was ignored in these proceedings. They claim that the County has taken no action to compensate land owners as required by state law.

The petitioners also assert that Board/ICC jurisdiction over the line was terminated and not revived by the County's void statement of willingness to assume financial responsibility. They argue that the abandonment has been consummated because the sole purpose of the railroad line has vanished in that the line's only shipper ceased using the line in January 1987, and that BN was also permitted to salvage the line. Petitioners state that the line was in poor to very bad condition in 1987 and continued to deteriorate during trail use negotiations. Citing Fritsch v. ICC, 59 F.3d 249

⁴ In a decision served June 23, 1989, the ICC denied petitions from the National Association of Reversionary Property Owners (NARPO) and Mr. Truman Sparks, an abutting property owner, seeking to reopen and revoke the exemption. A decision served January 9, 1990, further extended the negotiating period for an interim trail use/rail banking agreement until April 9, 1990. A petition by Mr. Sparks seeking reconsideration of the January 9, 1990 decision was denied by a decision served February 27, 1990.

⁵ In Sub-No. 299X, the negotiating period was further extended to October 29, 1993, by decisions served April 22, 1993, and July 23, 1993. In a decision served October 19, 1993, the ICC denied petitions by NARPO for administrative review of the July 23 decision.

⁶ Wash Rev. Code §§36.68.410 (park and recreation areas proposed in unincorporated areas) and 36.68.610 (park and recreation areas proposed in incorporated municipalities).

⁷ Wash Rev Code §39.34.030.

⁸ Wash Rev. Code §64.04.180.

(D.C. Cir. 1995), they argue that, during the four and one-half years since BN's original expression of intent to abandon, abandonment has occurred and the Board's (ICC's) jurisdiction has terminated.

Petitioners further contend that Sub-No. 341X should be reopened to consider new evidence. Petitioners indicate that the ICC's environmental assessment (EA) was incomplete. Petitioners state that, in July 1994, after the record was closed in Sub-No. 341X, the U.S. Department of Agriculture Forest Service (Service) issued an environmental assessment on surface water use on the Skagit River. According to petitioners, the report indicates that recreational activity on the river could disturb eagles. Petitioners assert that the ICC's EA should be reconsidered in light of the Service's assessment.

RTC and the County reply that the petition to reopen this proceeding that was administratively final long ago has no merit and should be denied. RTC and the County contend that the state statutory provisions cited by petitioners are not new evidence and are not relevant to this proceeding. The County states that it is authorized by a different statute to create parks both "within and without" cities and without the consent of local municipalities.⁹ The County acknowledges that there may be unresolved issues with local municipalities, but, it contends, those issues are irrelevant to its authority to use the corridor for recreational purposes under state law. The County confirms that it has full responsibility for managing the corridor and is in full compliance with all local and state laws. The County and RTC add that the rail corridor is not being administered as a "recreation service area" by the County and thus does not require consent of the municipalities. Nor, RTC claims, are petitioners entitled to compensation under state law.

Responding to petitioners' assertions that the ICC and the Board lack jurisdiction over the right-of-way, RTC states that the ICC has previously determined that it continued to have jurisdiction over the line, particularly in its October 19, 1993 decision in Sub-No. 299X. RTC states that no request was filed for administrative reconsideration of that ICC decision, nor was it appealed. RTC contends that petitioners present nothing new to warrant reopening at this late date.

RTC and the County state further that the Service's environmental assessment is not new evidence or relevant. The County submitted a copy of the Service's assessment with its reply statement.

Finally, RTC and the County state that the BN right-of-way has been successfully rail banked. The right-of-way has been cleared, cleaned, and graded, and bollards have been installed to control motor vehicle traffic. Apparently, the County is maintaining the corridor and is preparing to develop bridges and further surfacing. The right-of-way is now designated "The Cascade Trail" and will link at Sedro Woolley with the "Centennial Trail," a major north-south trail in the Puget Sound area. RTC indicates that the trails will provide a new recreational and commuting access route to the northern Cascades. RTC maintains that the petition is an attempt to create confusion and delay for a project that had, and continues to have, support of the County and the vast majority of its residents.

DISCUSSION AND CONCLUSIONS

We will deny the petition to reopen. Under 49 CFR 1115.4, a petition to reopen must state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances. Petitioners have not shown that reopening these proceedings is warranted at this late date. See, e.g., Bowman Transp. Inc. v. Ark.-Best Freight System, 419 U.S. 281, 294-95 (1974).

Petitioners have not supported their claim that changed circumstances and new evidence make it appropriate that we consider whether the County had authority under state law to assume responsibility for the right-of-way under the interim trail use agreement. Apparently, the state statutes cited by petitioners were in effect when the County first indicated it was willing to assume

⁹ Wash Rev. Code §36.89.030.

financial responsibility for the lines. Thus, they are not new evidence. Moreover, this is not the kind of issue that we consider in determining whether a Trails Act condition is appropriate. Because interim trail use agreements are voluntary, and the agency has a limited, ministerial role, the agency's longstanding policy has been to impose a Trails Act condition whenever the user meets the statutory prerequisite by agreeing to indemnify the railroad for its financial and liability requirements for the line. See Goos v. ICC, 911 F.2d 1283, 1293-96 (8th Cir. 1990). For example, we have stated that persons entering into interim trail use agreements with carriers would not have to prove to us that they are financially responsible. Rather, this matter would be left to the parties. BN has agreed to enter into an interim trail use agreement with the County, confirming that it does not question the County's authority to invoke the Trails Act. What petitioners seek here is for us to make a determination that is inconsistent with the willingness of BN to enter into a negotiated agreement. Under these circumstances, petitioners have not justified reopening these proceedings because of changed circumstances, new evidence or material error.

We also reject petitioners' assertion that the proceedings should be reopened to provide for compensation for property allegedly taken for the trail under state law. The courts have made it clear that, if there is any taking of property interests by deprivation of, or deferral of, the right to reversion of the property, claims for compensation can be addressed to the United States Court of Federal Claims under the Tucker Act, 28 U.S.C. 1491. Preseault v. ICC, 494 U.S. 1, 17 (1990); Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996). Those claims are not within our jurisdiction.

We find no merit to petitioners' contention that the Board/ICC lacked jurisdiction to consider the Trails Act statements by WSPRC and the County. Even though BN was permitted to salvage the track and materials and cancel tariffs, there is nothing in the record to indicate that BN intended to abandon the line. From the very beginning of these proceedings, BN expressed a willingness to negotiate an interim trail use/rail banking agreement. As recognized in the October 19, 1993 decision in the Sub-No. 299X proceeding, BN continued to cooperate with various entities throughout the protracted negotiations so that the line could be rail banked with interim trail use. BN's actions show that it did not intend to abandon the line. We disagree with petitioners' contention that the court's decision in Fritsch is controlling here. In Fritsch, the court ruled that, because the railroad had effected abandonment before the ICC imposed an interim trail use condition,¹⁰ the ICC lacked jurisdiction to approve trail use. Unlike the situation in Fritsch, BN from the outset agreed to negotiate an interim trail use agreement under the Trails Act, and thus did not, and could not, abandon the line. See Birt v. STB, 90 F.3d 580, 588 (D.C. Cir 1996), reh'g denied, 98 F.3d 644 (D.C. Cir. 1996); Conrail v. STB 93 F.3d 793, 799 (D.C. Cir. 1996).

Finally, we agree with RTC and the County that the Service's assessment is not relevant to the EA served in Sub-No. 341X. The EA considered the environmental impacts of BN's abandonment of the line and noted concerns raised about potential impacts of abandonment on water resources. After considering comments from the Service and other agencies, the EA recommended conditions relating to salvage of the line. The ICC adopted the conditions recommended in the EA in its April 5, 1993 decision and NITU. In any event, it is well settled that the Board/ICC is not required to conduct an environmental analysis of possible future interim trail use in an abandonment proceeding. Goos, 911 F.2d at 1295-96.

Accordingly, there is no basis for reopening, and the petition to open will be denied.

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

It is ordered:

1. Petitioners' motion to strike the August 12, 1997 submission on behalf of the Skagit County Citizen's Rail Trail Council is granted and the pleading is stricken.

¹⁰ Such conditions stay the abandonment to permit negotiation concerning trail use.

2. The petition to reopen is denied.
3. This decision is effective on the date served.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary