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SERVICE DATE - SEPTEMBER 28, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-406 (Sub No. 14X)

CENTRAL KANSAS RAILWAY, L.L.C.–ABANDONMENT EXEMPTION–
IN SEDGWICK COUNTY, KS

Decided: September 26, 2001

In a decision served on April 10, 2001, the Board granted Central Kansas Railway, L.L.C. (CKR), an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a 16-mile line of railroad extending between milepost 19.5 near Garden Plain, KS, and milepost 3.5 southeast of the grade crossing at McCormick Avenue in Wichita, KS. The grant was subject to environmental, historic preservation, and employee protective conditions. In addition, to ensure that overhead traffic would continue to move in accordance with CKR's assurances, we imposed the condition that CKR not consummate abandonment until after it has: (1) requested dismissal of another abandonment proceeding involving a line segment between specified mileposts in Conway Springs, KS, and Kingman, KS;¹ and (2) certified that its relocation project near Kingman has been completed and that any necessary rehabilitation and maintenance has been performed such that CKR can operate between Wichita and Kingman via Conway Springs.

Also in our decision, to expedite the post-abandonment transfer of the right-of-way, we granted CKR exemptions from the financial assistance provisions of 49 U.S.C. 10904 and the public use provisions of 49 U.S.C. 10905. The railroad's exemption requests were supported by state and local governments.²

¹ Kansas Southwestern Railway, L.L.C.–Abandonment–In Sumner, Harper, Barber, Reno and Kingman Counties, KS, STB Docket No. AB-437 (Sub-No. 1) (STB served June 10, 1999, June 13, 2000, and Nov. 30, 2000).

² By decision served on May 30, 2001, the Board issued a notice of interim trail use (NITU) enabling Southwind Community Synergy, Inc., to negotiate with CKR for trail use on a portion of the line. In a decision served on June 15, 2001, the Board issued a NITU enabling the City of Wichita and Sedgwick County, KS, to negotiate with CKR for trail use on additional portions of the line. The portions total 15 of the line's 16 miles, the portion between mileposts 3.53 and 4.53 being excepted.

Subsequent to our granting the abandonment exemption, CKR, in connection with a sale of other lines to the Kansas & Oklahoma Railroad, Inc. (K&O),³ granted temporary overhead trackage rights over the subject line to K&O.⁴

Mr. Seth Hostetler, a resident of Wichita, filed a petition to reopen this proceeding on May 7, 2001.⁵ The City of Kingman (Kingman or the City) filed a petition to reopen on May 4, 2001. CKR has replied to both petitions. The petitions will be denied.

PRELIMINARY MATTERS

On June 7, 2001, Mr. Hostetler filed a motion to strike seven specified portions of CKR's reply to his petition. CKR, on June 28, 2001, moved to strike Mr. Hostetler's motion, to which the latter replied. Mr. Hostetler advances no legitimate grounds for striking any of the matters he assails. Rather, it appears that he simply disagrees with CKR's points and wants to argue them further. His motion is, as CKR contends, an impermissible reply to a reply, and it will be stricken. 49 CFR 1104.13(c).

CKR notes that, while Kingman submitted its petition to the Board on May 4, 2001, which would have been timely had the City simultaneously served CKR, Kingman did not serve the railroad until June 4, 2001. Accordingly, citing 49 CFR 1104.12, CKR argues that Kingman's petition is late-filed and should be rejected. Because of a lack of familiarity with our rules,

³ In a decision and notice in Kansas & Oklahoma Railroad, Inc.-Acquisition Exemption-Central Kansas Railway, L.L.C., STB Finance Docket No. 34030 (STB served June 12, 2001) (K&O Acquisition), the Board exempted under 49 CFR 1150.31 the acquisition and operation by K&O of approximately 903 miles of rail lines owned or leased by CKR in Kansas and Colorado, including lines involved in this proceeding.

⁴ In a decision and notice in Kansas & Oklahoma Railroad, Inc.-Trackage Rights Exemption-Central Kansas Railway, L.L.C., STB Finance Docket No. 34047 (STB served June 12, 2001), the Board exempted under 49 CFR 1180.2(d)(7) CKR's grant to K&O of temporary overhead trackage rights over the subject 16-mile line between Garden Plain and Wichita. The decision and notice reiterated the certification condition imposed in this CKR abandonment exemption proceeding. That decision indicated that the trackage rights would allow K&O to move traffic to and from Wichita until the relocation and rehabilitation projects have been completed. The decision and notice also advised that, in addition to the lines being acquired by K&O in K&O Acquisition, K&O would assume from CKR the ongoing work on the relocation project near Kingman and the rehabilitation of the rail line between Wichita and Kingman via Conway Springs.

⁵ On June 28, 2001, Mr. Hostetler filed an amendment to his original petition. CKR responded to the amended petition.

Kingman did not serve its petition on CKR until the Board instructed it to do so. CKR has had an opportunity to respond to the petition and will not be prejudiced by our considering it. Accordingly, we will do so.

CKR has also filed a motion to strike Mr. Hostetler's amended petition. Because CKR has had an opportunity to respond to that petition, the motion will be denied.

DISCUSSION AND CONCLUSIONS

Petitions to reopen abandonment proceedings must state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances. 49 CFR 1152.25 (e)(2) and (4). Together, petitioners present arguments under all three criteria.

Citing CKR's recent sale of most of its lines to K&O, Mr. Hostetler questions CKR's intentions and motives. He asserts that the Board should deny CKR's abandonment request and allow K&O to determine whether it wants to seek abandonment. We previously considered allegations of improper motives in this proceeding and rejected them as unsupported. We see nothing here to warrant a different conclusion. Our abandonment exemption remains subject to all of the conditions specified above, and K&O has assumed all of CKR's relevant contracts relating to relocation and rehabilitation of lines.

Mr. Hostetler also avers that he has learned of 56 carloads of grain recently moving from grain elevators at Garden Plain and Cheney, KS. Hostetler contends that this information renders incorrect the Board's conclusion that the effects on shippers west of milepost 19.5 would be minimal. Notably, however, no shippers have appeared here to present new evidence, and there is nothing on the record to show what volumes, if any, would be available in the future. Additionally, if any of this traffic ever materialized, it would be exclusively overhead in nature.⁶ Thus, our prior findings regarding effects on shippers located west of Garden Plain have not been shown to be erroneous.

Hostetler further asserts that the Board erred in failing to consider a statement submitted by Concrete Materials Company (CMC), of West Wichita, KS. In its statement, that company expressed an interest in having a lead track constructed so that it could receive carloads of cement and rock. However, because CMC failed to specify origins for the traffic or to exhibit a present need for any rail service,⁷ our failure to discuss such a speculative statement was not material error.

⁶ According to CKR, neither of these elevators is located on the line.

⁷ Indeed, we note CKR's statement that it solicited CMC's traffic in 1998, but was told that the latter was satisfied with its truck service and had no interest in using rail. CKR Reply to Petition to Reopen, p. 6.

Petitioners also repeat arguments regarding flood control and highway interchange projects in the Wichita area. The arguments are founded largely on Mr. Hostetler's erroneous belief that the Board's decision was based on a public need for the right-of-way. Our primary concern here, as it is in all abandonment proceedings, is whether operating the subject line is a burden on interstate commerce. We focus on the economic viability of the line and on the harm to shippers from a loss of rail service. We previously found this line to be unprofitable and that shippers would not be harmed by the abandonment proposal.⁸ Moreover, Mr. Hostetler's disagreements with the engineers representing Wichita and the Kansas Department of Transportation, as well as information that flood control measures and highway reconstruction are still in study and planning stages, do not provide a basis for finding material error in our prior decision.

Petitioners' remaining arguments, primarily focusing on efficiency and safety of operations, are misplaced. We previously considered and rejected such arguments. We advised that a railroad is free to reroute its traffic as a matter of managerial discretion without the involvement of the Board. We also reminded CKR that, while it is not a matter within the Board's province, the railroad should maintain all crossings so as to be safe. Decision at pp. 7-8.

In sum, petitioners have failed to demonstrate material error, new evidence, or substantially changed circumstances warranting reopening of this proceeding. Accordingly, we will deny their petitions for relief.

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

It is ordered:

1. The motion to strike filed June 25, 2001, by CKR is granted, and the motion to strike filed June 7, 2001, by Mr. Hostetler is stricken.
2. CKR's motion to reject Kingman's petition to reopen is denied.
3. CKR's motion to strike Mr. Hostetler's amended petition is denied.
4. The petitions to reopen are denied.

⁸ We found that little or no local traffic moves over the line, and that service for overhead traffic would continue to be provided until the alternate route become fully operational.

5. This decision is effective on its service date.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary