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SERVICE DATE - MAY 8, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-406 (Sub-No. 6X)

CENTRAL KANSAS RAILWAY, LIMITED LIABILITY
COMPANY — ABANDONMENT EXEMPTION — IN
MARION AND MCPHERSON COUNTIES, KS

Decided: May 3, 2001

This case concerns an out-of-service rail line between the towns of Marion and McPherson, Kansas, that was converted to interim trail use pursuant to section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act).

BACKGROUND

As explained in more detail in our prior decisions, in 1996, Central Kansas Railway (CKR) filed a notice of exemption under 49 CFR 1152.50 to abandon the line. However, that abandonment authority never took effect because a sponsor offered to rail bank the line and provide for interim trail use, and CKR agreed to negotiate for such an arrangement. Ultimately, the Central Kansas Conservancy (Conservancy) was substituted for the original trail sponsor and concluded a Trails Act agreement with CKR. In 1997, CKR conveyed the right-of-way to the Conservancy for rail banking/interim trail use under the Trails Act.

Shortly after CKR made the conveyance to the Conservancy, adjoining landowners asked the Board to reopen the decision permitting rail banking/interim trail use of this railroad right-of-way. They contended that, both prior to and after filing its notice to abandon the line under the class exemption at 49 CFR 1152.50, CKR had conveyed certain parcels of the right-of-way to others, allegedly rendering the right-of-way unsuitable for rail banking/interim trail use. Additionally, the landowners alleged that CKR's failure to disclose these land sales to the Board was a fatal defect that invalidated CKR's use of the class exemption, so that the Trails Act should not have been available. Furthermore, petitioners argued that CKR's conveyance of portions of the right-of-way, together with the lack of service over the line and the removal of rails, ties, and ballast, showed that CKR had consummated abandonment of the line, with the result that we no longer had jurisdiction over the line, making rail banking and interim trail use no longer possible (the land sales issue). Alternatively, the petitioners argued that the Conservancy would not be able to meet its financial obligations for the use of the property as a trail (the financial responsibility issue).

In 1998, we denied the request to reopen. We explained that the landowners had not shown that CKR's conveyance of certain lots along the right-of-way made future reactivation of

rail service impossible, nor had they shown that the Conservancy would not meet its financial obligations. In Jost v. STB, 194 F.3d 79 (D.C. Cir. 1999) (Jost), the court affirmed our decision not to reopen on the issue of financial responsibility, but remanded the decision for further explanation of our determination not to reopen the proceeding to consider the impact of the alleged right-of-way sales.

Following the court's decision in Jost, we issued a decision on the land sales issue, providing the further explanation sought by the court. December 1999 Decision.¹ In that decision, we explained (at pp. 3-6) that we must be notified of any land sales (whether pre- or post-filing) that affect the availability of the Trails Act by making rail banking on all or part of a line impossible, and that, if at any time it is shown that there have been full-width right-of-way sales (by a railroad or a trail sponsor) that preclude the restoration of rail service, we would reopen the proceeding to reexamine our authorization of interim trail use. However, we concluded that in this case neither CKR's eligibility to use the class exemption — nor the eligibility of the line for preservation under the Trails Act — was affected by the failure to include information regarding the pre-filing land sales, given CKR's undisputed evidence that it specifically reserved a sufficient width of right-of-way to allow either trail use or future rail service. December 1999 Decision at 4-6.

Turning to the sales that allegedly spanned the full width of the right-of-way, all of which took place after rail banking had commenced, we found that the landowners had failed to establish either that the right-of-way had been severed, or what the effect of any such severance might be on the continued availability of the remainder of the right-of-way for potential future rail service. Id. at 7 & n.12-13. Indeed, we determined that, on the issue of whether the line has been severed, the parties had presented conflicting evidence as to the intent of the parties to the deeds and documentary evidence that was inconclusive. Id. at 7. Accordingly, we could not “determine who actually holds title to the disputed property that CKR claims that it has reserved.” Id. As it is well settled that the interpretation of deeds and the determination of who owns good title to property are issues of state law that are outside of the expertise of the Board,² we explained that the most appropriate course of action at this point was to direct petitioners to state court to get the underlying property law issues resolved. Id. & n.14. We indicated that, should a state court determine that CKR had indeed severed the right-of-way, we remained available to consider whether all or part of the line had been abandoned as a result, or whether

¹ We refer to the decision served December 8, 1999.

² See Hayfield N. R.R. v. Chicago & N.W. Transp., 467 U.S. 622, 634 (1984); Preseault v. ICC, 494 U.S. 1, 8 (1990) (state law governs disposition of reversionary interests subject to the Board's jurisdiction to regulate abandonments); Kansas City Pub. Ser. Frgt. Operation – Exempt. – Aban., 7 I.C.C.2d 216, 225-26 (1990) (issues of real property rights are within exclusive jurisdiction of the State).

the eventual restoration of rail service had been rendered impossible, in which case the rail banking/interim trail use authority would be involuntarily revoked. Id. at 8.

On December 28, 1999, petitioners filed a petition to reconsider the December 1999 Decision, alleging material error and changed circumstances. Among other things, the landowners renewed the financial responsibility issue by arguing more specifically that the Conservancy was not meeting its financial responsibility to pay taxes on the right-of-way. We decided not to address the parties' other arguments prior to resolving the tax issue, because the land sales issue would be moot if the Conservancy were failing to meet its financial obligations. Therefore, in a June 2000 Decision,³ we directed the Conservancy (and/or CKR) to show that the Conservancy was meeting its financial obligations for the property, or risk involuntary revocation of the interim trail use authority.

The Conservancy responded to our order, and the landowners filed a response to the Conservancy. The parties' evidence indicated that the Conservancy had applied for an exemption from property taxes but the Kansas Board of Tax Appeals had not yet ruled on the application, and that, if the exemption were denied, the Conservancy would be liable for tax delinquencies as well as future taxes on the property. Because we had no assurance that the Conservancy had sufficient funds or would promptly pay both the delinquent and future taxes in that event, in the December 2000 Decision⁴ we gave the Conservancy a final opportunity to present evidence showing that it had the financial ability to pay, and promptly would pay, the taxes owed (if any) if its tax exemption request is denied.

In response, the Conservancy reiterates that, in its view, it is not subject to ad valorem taxes under Kansas law, and therefore it does not owe any taxes on this property. But to demonstrate its financial responsibility and that it has the necessary resources, the Conservancy also submits an affidavit of its treasurer stating that the organization has established a separate bank account in an amount greater than \$10,000, for which disbursements would be limited to payment of ad valorem taxes that may be finally determined to be due, if any. The Conservancy claims that the total amount of unpaid past due taxes for Marion County would be less than \$1,000 — and that the total taxes for the years 1998-2000 for McPherson County would be less than \$4,400.

The landowners assert that the amount of unpaid taxes (and interest) would be about twice the amount the Conservancy alleges it would owe if it should be found to be subject to

³ The decision was served on June 23, 2000.

⁴ The decision was served on December 20, 2000.

payment of these taxes.⁵ In addition, the landowners argue that the Conservancy is not complying with its trail management responsibilities under Kansas law. The landowners contend that the trail condition should be involuntarily revoked on both grounds.

The Conservancy has filed an additional reply explaining that its potential tax estimate is lower than the landowners' because it does not include penalties and interest.⁶ In addition, the Conservancy argues that the landowners' arguments regarding trail management are outside the purview of the December 2000 Decision and can best be decided by the Kansas courts under Kansas law.

DISCUSSION

1. Financial Responsibility And Trail Management.

We will credit the Conservancy's evidence as to the amount of potential "unpaid past due taxes" (but not penalties and interest) and the establishment of a separate \$10,000 bank account to pay these taxes, should the Conservancy ultimately be liable for them. The material provided by the landowners indicates that with penalties and interest the amount owed could exceed \$9,000. But even in that event, the Conservancy's \$10,000 account set aside for this purpose would be sufficient to pay the total amount projected in the landowners' evidence. Thus, the Conservancy has shown that it has the financial ability to pay the taxes owed on this right-of-way — including related penalties and interest should they be found to apply.⁷ In these circumstances, revocation of the interim trail use authority on grounds that the Conservancy does not have the necessary resources to meet the financial requirements of the statute is not warranted.

With regard to trail management, the landowners contend that the Conservancy has not met the following obligations under Kansas law: to control noxious weeds, dried vegetation and

⁵ For that reason, the landowners suggest that we should question the credibility of the Conservancy's affidavit attesting to the bank account dedicated to paying tax liabilities.

⁶ The Conservancy notes that its secretary (who apparently is also the McPherson County Treasurer) does not believe that the Conservancy would be liable for penalties and interest on unpaid taxes.

⁷ We see no reason to defer action until the State of Kansas determines the amount of tax owed (if any) and we know whether the Conservancy promptly pays the amount owed, as the Conservancy suggests. As discussed in our December 1999 Decision, we retain jurisdiction over the property throughout the period of rail banking/interim trail use. Thus, we are available to take appropriate action if at any time it is shown that the Conservancy has failed, or likely will fail, to pay taxes, meet past or potential liability claims, or adequately manage the trail.

litter; to post signs regarding safety, forbidding motorized vehicles, and prohibiting hunting or trapping; to provide for law enforcement; to grant easements to adjacent property owners to cross the trail; to maintain existing fencing and install new fencing between the trail and adjacent property; to maintain all bridges, culverts, roadway intersections, and crossings on the trail; to post a bond or proof of escrow account with the clerk of the counties that the trail traverses; and to submit an initial project plan to the appropriate counties. The landowners argue that the interim trail use authority must be revoked for failure to meet these trail management responsibilities.

As we have previously indicated,⁸ trail sponsors may not use a right-of-way in such a manner as to present a public nuisance under state and local laws, applied in a nondiscriminatory manner.⁹ But we are not expert at the interpretation of all of these nuisance statutes, which vary from jurisdiction to jurisdiction, and we have found that it would be inappropriate, if not impossible, for us to try to establish in the abstract a standard by which a trail sponsor could demonstrate its fitness to manage and maintain a particular trail. See Idaho Northern at 10. Thus, we agree with the Conservancy that we should leave to authorities of the State of Kansas the responsibility to interpret and enforce any state or local requirements applicable to this particular trail. Should a Kansas court determine that the Conservancy has, indeed, failed to manage the trail in a lawful manner, then we remain available to consider whether the interim trail use authority should be revoked. At this point, however, revocation of the authority on grounds that the Conservancy is an unfit trail sponsor has not been shown to be warranted.¹⁰

⁸ See Idaho N. & Pac. R.R. — Abandonment & Discontinuance Exemption — In Washington & Adams Counties, Idaho, STB Docket No. AB-433 (Sub-No. 2X) (STB served Apr. 1, 1998), at 9-10 (Idaho Northern).

⁹ Nothing in our Trails Act rules or procedures is intended to usurp the right of state or local entities to impose appropriate safety, land use, and zoning regulation on trails so long as they are not applied in a discriminatory manner or in such a manner as to preclude the interim trail use or the ability to reactivate rail service in the future.

¹⁰ The landowners have provided the affidavit of Angy Jost and photographs which, they claim, show that trail construction and maintenance as required by Kansas law are impossible, and that conversion of the land to “a useable trail” will be prohibitively expensive because of the condition of the corridor. But this documentary evidence is inconclusive. The landowners appear to assume that the Conservancy is under an affirmative duty to develop a trail for advanced recreational use. In fact, as the court noted in Jost, 194 F.3d at 90, the Trails Act does not require the trail to be “developed” in any particular way. There can be differing types or levels of trail use, and this agency has never become involved in determining the type or level of trail for a specific right-of-way. See Idaho Northern at 9 and the other cases cited there. Moreover, there is no time limit for how quickly a trail must be developed to its intended level of use. Id.

2. The Land Sales Issue.

As there is no basis to revoke this trail condition on financial responsibility and/or trail management grounds, we will turn to the petitioners' claims regarding the analysis of the land sales issue in our December 1999 Decision.

The landowners suggest that we have not complied with the court's remand in Jost because our December 1999 Decision merely reaffirmed and clarified the portions of the 1998 decision that were remanded in Jost. But as the December 1999 Decision states (at 3), the court in Jost found only that we had not adequately explained our 1998 decision not to reopen the proceeding to consider whether to revoke the authorization for interim trail use in light of the landowners' evidence of CKR's right-of-way sales. See 194 F.3d at 81, 88 & n.14, 90. Because the court could not fully discern our reasoning on the land sales issues, the court remanded the case to us to "address the material issues of fact which have been raised concerning the applicability of the Trails Act in whatever way the Board finds most consistent with the language and goals of the Act." Id. at 88 n.14. That is exactly what we did in the December 1999 Decision, which we reaffirm here.¹¹

As we explained in the December 1999 Decision at 4-6, CKR's failure to inform the agency of the land sales that took place prior to the filing of its notice of exemption does not mean that CKR's initial notice of exemption must be treated as void ab initio, or that this line was not eligible to be preserved under the Trails Act, given CKR's undisputed evidence that, in each of the pre-filing land sales, it specifically reserved a sufficient width of right-of-way to allow trail use or future rail service. For the same reason, it is clear that the partial width land sales do not show an intent to abandon or constitute a de facto abandonment of the line. Id. at 5 n.8.

Contrary to petitioners' claims, it is reasonable for us to conclude (December 1999 Decision at 6-7) that, once rail banking/interim trail use has commenced, the burden is on landowners or other interested persons to show that active rail service cannot be restored or that the trail sponsor has failed, or likely will fail, to pay taxes or adequately manage the trail. See

¹¹ Specifically, in Jost the court found that clarification by the Board was needed with respect to each of three issues raised by petitioners regarding the significance of these sales: (1) whether the railroad's failure to inform the agency of these sales constituted false and misleading information and, if so, the effect that would have on the abandonment proceeding; (2) whether rail banking and interim trail use could continue in the face of the sales that allegedly spanned the full width of the right-of-way; and (3) whether the right-of-way sales indicated that CKR had already abandoned the line prior to the issuance of the trail condition. 194 F.3d at 85-87. Each of these issues is addressed in the December 1999 Decision.

Jost, 194 F.3d at 89-90. Petitioners argue both that they have met that burden,¹² and that, even if they have not, we have failed to provide them with any reasonable mechanism to show that there have been full-width right-of-way sales that preclude the restoration of rail service. However, as we stated in the December 1999 Decision at 7-8, the landowners can seek a state court ruling on the underlying state property law issues. Because we are not able to determine on this record who has legal title to the parcels at issue, given the conflicting evidence as to the intent of the parties as to the deeds, we are not able to determine, based on the evidence now before us (including the photographs recently submitted by petitioners), if the line has been severed in such a way as to preclude the future restoration of rail service.¹³ Once a state court has ruled on the ownership disputes as to the parcels at issue, a party may submit the state court's ruling to us with a request for a determination of whether all or part of the line has been abandoned as a result and/or whether the future restoration of rail service has been rendered impossible so as to terminate our jurisdiction over the continuing rail banking/interim trail use. Absent such a state court ruling, we are unable to make a determination on the allegation that it would not be possible to restore rail service on this rail banked line.

Petitioners suggest that our December 1999 Decision ignores the court's suggestion (194 F.3d at 88 n.14) that we might stay our proceedings pending action by a state court. But, as we specifically noted in the December 1999 Decision at 7-8 n. 14, no one (including petitioners) has asked us for a stay. Nor is there indication that any party has brought an action in state court, notwithstanding the court's suggestion. Finally, as we explained (*id.*), a stay does not appear to be necessary here as there is nothing irreversible about rail banking/interim trail use, and we retain jurisdiction over the line throughout the period of the rail banking/interim trail use. Thus, we remain available to take appropriate action should an action be brought in state court and the state court determines that CKR had transferred property in such a way as might preclude the restoration of service on all or part of this line.

¹² Petitioners point to their photographs of the portion of the line showing the property in Galva allegedly purchased by Galva Lumber Company as evidence that they have met their burden. The photographs, however, do not show where the right-of-way starts and stops or the distance from the right-of-way of other activities or structures. Nor do the photographs show who has legal title to property. Thus, we cannot know from the photographs if the line has actually been severed by one or more of the disputed land sales in Galva, and what the effect of any severance on the rest of the line would be. That is the kind of information we would need to assess whether the statutory rail banking condition has been compromised.

¹³ Petitioners suggest that they would submit additional evidence on recent sales related to the line if we did not rule in their favor on the financial responsibility and trail management issues. Any such evidence, however, is best directed to a court capable of resolving such disputes under the applicable state property laws.

Finally, as we noted (December 1999 Decision at 7 & n.12-13), even if the right-of-way had been severed by one or more of the disputed land sales, petitioners still would have to establish what the effect of any such severance might be on the continued availability of the remainder of the right-of-way for potential future rail service. See Jost, 194 F.3d at 88. As we explained in the December 1999 Decision at 7 n.12, a severance of a portion of this right-of-way would not necessarily mean that the rest of the 33.4-mile line (which connects with other rail lines at both ends) could not continue to be available for potential rail service. Such sales also would not necessarily indicate an intent to consummate abandonment. As the courts have recognized, the desire to enter into or continue rail banking/interim trail use negotiations can be evidence that a railroad did not intend to abandon. Birt v. STB, 90 F.3d 580, 586-7 (D.C. Cir. 1996). While a railroad that has been authorized to abandon service is negotiating a trail use arrangement, it remains liable for management, torts, and payment of taxes. See Idaho Northern at 8-10. Thus, it would be anomalous to assume that a railroad would prolong its exposure to these substantial liabilities if the railroad's actual intent is to abandon.

In sum, for the reasons discussed above and in our December 1999 Decision, the landowners' requests for revocation of the trail condition and reconsideration of the December 1999 Decision are denied. Rather, we will discontinue this proceeding, without prejudice to a party submitting new evidence at any time on the financial responsibility, trail management, or land sales issues.

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

It is ordered:

1. The landowners' requests for revocation of the trail condition and reopening of the December 1999 Decision are denied.
2. This proceeding is discontinued, without prejudice to a party submitting new evidence on the financial responsibility, trail management, or land sales issues and requesting a further ruling from us on whether future restoration of rail service has been precluded by transfers of portions of the right-of-way.
3. This decision is effective on the date of service.

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

Vernon A. Williams
Secretary