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SERVICE DATE - DECEMBER 29, 2000

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-471 (Sub-No. 4X)

SOUTH KANSAS AND OKLAHOMA RAILROAD COMPANY--
ABANDONMENT EXEMPTION--IN CRAWFORD, WILSON, ELK AND GREENWOOD
COUNTIES, KS AND OSAGE AND TULSA COUNTIES, OK

Decided: December 22, 2000

South Kansas and Oklahoma Railroad Company (SKO) filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments to abandon: (1) a 35-mile line of railroad between milepost 153.0 near Tulsa and milepost 188.0 near Barnsdall, in Osage and Tulsa Counties, OK; (2) a 6-mile line of railroad between milepost 359.0 at Pittsburg and milepost 365.0 at Cherokee, in Crawford County, KS; and (3) a 23.5-mile line of railroad between milepost 438.5 at Severy and milepost 415.0 at Fredonia, in Wilson, Elk, and Greenwood Counties, KS. Notice of the exemption was served and published in the Federal Register on October 6, 2000 (65 FR 59891-92). On October 10, 2000, the Board received a notice of intent to file an offer of financial assistance (OFA) to purchase the 6-mile portion of the right-of-way between milepost 359.0 and milepost 365.0 in Crawford County, KS. While no OFA was ultimately filed, the effectiveness of the exemption was delayed until November 30, 2000, to permit the potential offeror to obtain needed information. On November 29, 2000, a decision and notice of interim trail use or abandonment (NITU) was served authorizing a 180-day period for SKO to negotiate a trail use agreement with: (1) the City of Pittsburg (City) for the 6-mile portion of the right-of-way between milepost 359.0 near Pittsburg and milepost 365.0 near Cherokee, in Crawford County, KS; and (2) the Trust for Public Land (TPL) for the 35-mile portion of the right-of-way between milepost 153.0 near Tulsa and milepost 188.0 near Barnsdall.¹

On December 7, 2000, American Trails Association (ATA) late-filed a request for issuance of a NITU, under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), for the 23.5-mile portion of the right-of-way between milepost 438.5 at Severy and milepost 415.0 at Fredonia, in Wilson, Elk and Greenwood Counties, KS.² ATA submitted a statement indicating

¹ The November 29 decision also imposed a 180-day public use condition that is scheduled to expire on May 29, 2001.

² The October 6 notice provided that trail use/rail banking requests had to be filed by October 16, 2000. However, in Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903, STB Ex Parte No. 537 (STB served Dec. 24, 1996, and (continued...))

its willingness to assume full financial responsibility for management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for payment of any and all taxes that may be levied against, the right-of-way, as required at 49 CFR 1152.29, and acknowledged that the use of the right-of-way for trail purposes is subject to future reactivation for rail service. By facsimile submitted on December 15, 2000, SKO has advised the Board that it has not consummated the abandonment of the 23.5-mile line and that it is willing to negotiate for trail use with ATA.

In a submission filed December 4, 2000, the Greenwood County Commissioners (County Commissioners) oppose trail use in southern Greenwood County, where part of the 23.5-mile line from Fredonia to Severy lies. The County Commissioners state that the abandoned rails and railroad right-of-way should revert back to the adjacent land owners of its county.³

Under the Trails Act and our implementing rules, if a prospective trail user requests a trail condition and the carrier indicates its willingness to negotiate a trail agreement, under the Trails Act the Board has a limited ministerial role. See Goos v. ICC, 911 F.2d 1283 (8th Cir. 1990) (Goos). To invoke the Trails Act, a prospective trail sponsor needs only to file a request accompanied by the necessary statement of willingness to assume liability and acknowledgment that interim trail use is subject to possible reinstatement of rail service. See National Ass'n of Reversionary Property Owners v. STB, 158 F.3d 135, 138 (D.C. Cir 1998); 49 CFR 1152.29(a) and (d). If the railroad indicates its willingness to negotiate, the Board must then issue a NITU. Goos, 911 F.2d at 1295.

Because ATA's request complies with the requirements of 49 CFR 1152.29 and SKO has not abandoned the line and is willing to negotiate for trail use, a NITU will be issued for the portion of the right-of-way between milepost 438.5 at Severy and milepost 415.0 at Fredonia in Wilson, Elk and Greenwood Counties, KS.

²(...continued)

June 27, 1997), the Board retained the policy of accepting filings after the due date when good cause is shown. Because there is no indication that the ATA's late-filed request will prejudice any party, it will be accepted. See Wheeling & Lake Erie Railway Company-- Abandonment Exemption--in Starke County, OH, STB Docket No. AB-227 (Sub-No. 10X), slip op. at 1 n.1 (STB served Nov. 7, 1997).

³ The County Commissioners' letter in opposition did not include a certificate of service, and thus there is no indication that it was served on SKO. Under 49 CFR 1104.12, every document filed with the Board should include a certificate of service showing simultaneous service upon all parties to the proceeding.

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

It is ordered:

1. This proceeding is reopened.
2. The County Commissioners' letter will be treated as correspondence and placed in the public docket.
3. Upon reconsideration, the exemption of the abandonment described above is subject to the SKO keep intact the right-of-way underlying the track, including bridges, trestles, culverts and tunnels (but not track or track materials) for the 23.5-mile portion of the right-of-way between milepost 438.5 at Severy and milepost 415.0 at Fredonia, in Wilson, Elk and Greenwood Counties, KS, for a period of 180 days from November 30, 2000 (until May 29, 2001).
4. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.
5. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.
6. If interim trail use is implemented, and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.
7. If an agreement for interim trail use/rail banking is reached by May 29, 2001, interim trail use may be implemented. If no agreement is reached by that time, SKO may fully abandon the line.
8. This decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary