

SERVICE DATE - JANUARY 31, 1997

SURFACE TRANSPORTATION BOARD¹

DECISION

Docket No. AB-33 (Sub-No. 89X)

UNION PACIFIC RAILROAD COMPANY--ABANDONMENT EXEMPTION--
IN MCPHERSON COUNTY, KS (McPherson Branch)

Decided: January 27, 1997

In a decision and notice of interim trail use or abandonment (NITU) served on September 28, 1995, both a 180-day public use condition under 49 U.S.C. 10906 and a 180-day trail use/rail banking condition under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), were imposed in connection with the proposed abandonment by Union Pacific Railroad Company (UP) of 12.6 miles of rail line, between milepost 518.0 near McPherson and milepost 530.6 near Lindsborg, in McPherson County, KS.² The trail use condition was imposed at the request of the city of Lindsborg, KS (Lindsborg), and was subsequently extended for 180 days to September 22, 1996, in a decision served on March 26, 1996.³

Kansas Horse Council (Kansas Horse),⁴ Friends of the Trail (Friends),⁵ and Rails to Trails Conservancy⁶ (collectively,

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and 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 relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 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 The notice of exemption, under 49 CFR 1152 subpart F--Exempt Abandonments, was served and published in the Federal Register on June 22, 1995 (60 FR 32710) and was to become effective on July 23, 1995.

³ In a letter filed on March 21, 1996, the city of McPherson, KS, expressed support for the extension and interest in a collective effort with Lindsborg.

⁴ Kansas Horse, a non-profit Kansas organization, is interim trail manager, through its affiliates, for over 100 miles of rail-banked lines in Kansas.

⁵ Friends, a group with more than 160 members in the McPherson-Lindsborg corridor, supports the preservation of the UP line for interim trail use/rail banking purposes.

⁶ Rails to Trails Conservancy, a nationwide non-profit organization with over 60,000 members, is devoted to preserving
(continued...)

petitioners), on September 18, 1996, filed a joint request for an additional 180-day extension to negotiate a trail use agreement. Petitioners state that UP has been negotiating with a consortium under Lindsborg's leadership to acquire the corridor, but that the line's multi-jurisdictional nature suggests that a single trail manager, separately organized for the purpose, would be best suited to accomplishing preservation. They state that the requested extension is necessary for a new trail manager to become established. Additionally, they state that the rail corridor remains intact, that UP consents to the extension, and that all parties continue to support preservation for current and future rail purposes, as well as for other compatible public purposes.

On September 23, 1996, Mr. David Moshier, on behalf of unnamed adjoining property owners, filed a letter in opposition to the extension request. He contends that Lindsborg no longer seeks, or intends to pursue, trail use and that petitioners neither represent Lindsborg nor have authority to request an extension on Lindsborg's behalf. Citing Birt v. STB, 90 F.3d 580 (D.C. Cir.) reh'g denied, 98 F.3d 644 (1996) (Birt), he notes that as this is the third 180-day extension to be requested and suggests that it should be denied as an abuse of the Board's trail use regulations.⁷ Finally, noting that the right-of-way has not been maintained and that the track and ties have been salvaged, he argues that UP has already consummated the abandonment.

Petitioners replied on October 9, 1996, and Mr. Moshier responded on October 17, 1996. In his response, Mr. Moshier dismisses a number of petitioners' procedural objections to his September 23 letter⁸ and asserts that the cities of Lindsborg and McPherson were unable to obtain funding for, and as a consequence are no longer involved in the request for, trail use. Additionally, he complains that UP salvaged the track and ties but

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for interim trail use/rail banking and other compatible public use purposes rail corridors that otherwise would be abandoned.

⁷ In fact, this is the second request for an extension and the third 180-day period sought to negotiate trail use.

⁸ Mr. Moshier clarifies that he represents approximately 90% of the adjoining property owners. He states that they are well known because they have contested the trail use proposal, verbally and in writing on numerous occasions, and appeared in mass at City Commission meetings in Lindsborg and McPherson. He offers to make their names and addresses available upon request. He also states that he was remiss in not serving copies of the September 23 letter on the petitioners but asserts that petitioners similarly failed to serve his clients with a copy of their application.

Under 49 CFR 1104.12, copies of all pleadings must be served on the parties of record and all pleadings must be accompanied by a certificate of service. Neither Mr. Moshier nor his clients were parties of record when the extension request was filed, and, as a result, they were not entitled to be served with a copy. However, parties of record are entitled to be served with copies of all letters and pleadings relating to the specific proceeding, and, if needed, a list of the parties and their addresses can be obtained from the Board's Office of the Secretary. Because the parties eventually obtained copies of Mr. Moshier's original letter and his subsequent reply was accompanied by a certificate of service, they will both be considered on their merits.

has failed to maintain the rail corridor. As a consequence, he asserts that the right-of-way is overgrown with weeds and is being used by off-road vehicles for fun and sport. Petitioners responded to Mr. Moshier's October 17 filing on October 21, 1996.

In their October 9 and 21 responses,⁹ petitioners note that 180-day extensions are normally requested and granted and assert that this practice does not unduly burden adjacent landowners because the rail carrier remains responsible for managing the corridor until a trail use agreement is reached and an interim trail manager assumes responsibility. They state that under a NITU, track and ties may be removed and that the removal does not constitute grounds to contest an extension request.

Additionally, petitioners respond that Kansas Horse, through its affiliate, Serenata Farms School of Equestrian Arts (Serenata), executed, filed, and served a statement of willingness to assume financial responsibility. They state that the requested extension will facilitate the preservation of the rail corridor and make future reactivation of rail service feasible. Further, they state that a trail use agreement may be finalized within the 6-month period of the extension request and seem to indicate that as of October 18, 1996, adequate funding had been arranged.

In a response filed on October 23, 1996, UP contends that it has continuously negotiated for a trail use agreement, that these negotiations demonstrate that the line has not been abandoned, and, as a consequence, that the Board retains jurisdiction. UP adds that if Mr. Moshier's allegation, that Lindsborg and McPherson were unable to obtain adequate financing, is correct, then the need for the trail use extension is confirmed. In this regard, it notes that a statement of willingness to assume financial responsibility was filed by Serenata.

Letters opposing the extension request were filed on October 22 and 28, 1996, respectively, by Mid Kansas Coop (MKC), a grain elevator located on railroad property along the right-of-way,¹⁰ and the Kansas Farm Bureau (KFB). In view of the lengthy prior extension, KFB asserts that it is unreasonable and unfair

⁹ Petitioners contend in their October 21 response that Mr. Moshier's October 17 reply should be stricken as a reply to a reply in violation of 49 CFR 1104.13(c). They also reiterate their contention that Mr. Moshier's submissions continue to be deficient because they fail to identify any person or entity with standing who is being represented. Petitioners' request to strike the October 17 reply will be denied in the interest of a complete record.

¹⁰ Essentially, MKC notes that the City Council of Lindsborg voted not to establish a trail along the abandoned right-of-way and states that trail use is not in the best interests of the community. MKC also fears that trail use will increase its cost of doing business because of trespassers and blames trail use for UP's failure to remove a potentially hazardous stock pile of rail ties that allegedly is endangering its facility. While MKC's concerns are cognizable under local law, they are not relevant to the statutory criteria applicable to trail use.

for petitioners to have waited to the last moment to request this further extension. Petitioners replied on October 31, 1996.¹¹

On November 7, 1996, Mr. Nels Ackerson, on behalf of Galen J. Swisher and Cheryl Swisher, reversionary landowners, submitted a statement expanding on a previous letter, filed on October 16, 1996, where he asserted, without further explanation, that the abandonment had been consummated and requested that the extension be denied. The November 7 submission cites Preseault v. ICC, 494 U.S. 1 (1990), and Fritsch v. ICC, 59 F.3d 248 (D.C. Cir. 1995), cert. denied sub nom. CSX Transp. Inc. v. Fritsch, 116 S. Ct. 1262 (1996), to support consummation, and Birt to argue that the requested extension would frustrate the purposes of the NITU process. He raises the same consummation criteria relied on by Mr. Moshier and also contends that the requisite intent to consummate was demonstrated when UP announced the abandonment on its Internet Home Page. Finally, Mr. Ackerson challenges the Board's authority to issue retroactive trail use extensions, contends that petitioners failed to submit a statement of willingness to assume financial responsibility,¹² and argues that, even if a statement of willingness had been filed, an extension cannot be granted because the request was not timely filed under 49 CFR 1104.7(b).

Petitioners and UP responded on November 15 and 19, 1996, respectively. Petitioners request that Mr. Ackerson's November 7 submission be dismissed as late-filed. They deny that the line has been abandoned and, instead, assert that throughout the proceeding UP has avoided using any terminology that would have indicated otherwise. They refer to two attached UP letters, dated September 6 and December 11, 1995, where UP stated that it was discontinuing service and argue that UP consistently and openly has maintained that service had been discontinued with the specific intent to preserve the rail corridor subject to the Board's trail use jurisdiction. Additionally, petitioners state that both Serenata and Friends served statements of willingness on UP and the Board and suggest that the original copy was misfiled. To allay any concerns in this regard, they state that a file copy was recently transmitted to the Board by telefax and that Serenata will resubmit an original copy to remove any questions. On November 27, 1996, Serenata submitted a complete statement of willingness and filing fee,¹³ and on December 4, 1996, Mr. Ackerson filed a letter responding to earlier motions, correcting a factual

¹¹ In their October 31 reply, petitioners state that Friends may have late-filed a public use request, along with a statement of willingness to assume financial responsibility, and they request leave to withdraw the former. Petitioners refer to the statement of willingness in a subsequent reply filed November 15, 1996. The Board's records do not show that such a filing was received, and, as a consequence, this decision does not rule on the withdrawal request.

¹² He contends that a thorough review of the Board's files and a check of the relevant pleadings list failed to turn up any reference to the filing of a statement of willingness to assume financial responsibility by Kansas Horse or Serenata.

¹³ An earlier statement was telefaxed and filed by Serenata on November 15, 1996, but it was not accompanied by the referenced map and did not include payment of the filing fee.

assertion in his November 7 submission, and clarifying the relationship between the landowners, Mr. Moshier, and himself.¹⁴

UP concurs in petitioners' November 15 response and argues, that under a NITU, service may be discontinued and the line may be salvaged without resulting in an abandonment consummation. Additionally, it disputes Mr. Ackerson's interpretation of its Internet listing. It contends that the Home Page, to which Mr. Ackerson refers, is a list of lines that have received abandonment authorization and not an official list of lines that have been fully abandoned and removed from regulatory jurisdiction.

The evidence of record demonstrates that the abandonment has not been fully consummated. UP agreed to negotiate trail use from the time the request was made, and it does not appear to have waived or transmitted contradictory signals at any time. UP has made it abundantly clear that it was only discontinuing service and that it was salvaging the line consistent with the Board's trail use jurisdiction.¹⁵ Nor is it disputed that UP has continued to negotiate trail use and that the right-of-way remains intact. Additionally, it is undisputed, that under the terms of the NITU and the extension, UP was precluded from abandoning the line prior to the expiration of the allotted negotiating period. Thus, UP could not have consummated the line's abandonment, as the trail use opponents allege, without first being relieved of its trail use obligation. Cf. Grantwood Village v. Missouri Pacific R.R. Co., 95 F.3d 654, 659 n.6 (8th Cir. 1996) (stating that ". . . the right-of-way could not have been abandoned during a period of interim use."). Accordingly, based on the evidence of record, UP's discontinuance and removal of the line's track and ties cannot be construed as the consummation of an abandonment; the Board continues to exercise jurisdiction over the right-of-way and, as a consequence, may grant or extend a NITU as appropriate.

Nor is an extension precluded because Lindsborg is not one of the petitioning parties. A trail use condition may be imposed or extended for petitioners' benefit because the Board has retained jurisdiction over the right-of-way, UP has consented, and a complete statement of willingness to assume financial responsibility was filed by one of the petitioners through its affiliate, Serenata.¹⁶ While the trail use opponents criticize the

¹⁴ Petitioners responded on December 17, 1996, contending that Mr. Ackerson's December 4 letter-reply should be stricken as a reply to a reply in violation of 49 CFR 1104.13(c). Their request will be denied.

¹⁵ In a letter to the ICC dated December 11, 1995, UP referred to an earlier letter, where it had advised that local service was being discontinued effective June 23, 1995, but that overhead use would continue until December 15, 1995, after which salvage would be conducted. UP specifically stated that the discontinuance and salvage were subject to the NITU and any subsequent extensions.

¹⁶ Petitioners, in their October 9 and November 15 replies, refer to the filing of a statement of willingness by Serenata. UP similarly refers to such a statement. According to the Board's records, Serenata did not file a complete statement of willingness to assume financial responsibility and filing fee until November 27, 1996, and there is no record of a similar filing by Friends, (continued...)

extension request as unreasonable and unfair, the record does not demonstrate that the Board's trail use procedures have been abused in any way or that petitioners are acting in less than good faith or unfairly prejudicing the interests of adjacent landowners by requesting an extension in place of Lindsborg.

This is only the second extension request, and, while both requests have been for 180-day periods, this is the time period most frequently requested, and it is generally granted when supported by evidence of good faith negotiations. Birt does not require otherwise, and there is nothing of record to suggest that this is a case of extension requests ad infinitum such as would frustrate the goals intended to be advanced by the Board's trail use procedures.

Finally, while both Mr. Moshier and Mr. Ackerson rely on Birt, they overlook the fact that the extension request at issue there was also filed prior to the expiration of the trail use condition.¹⁷ They also ignore that the court in Birt specifically ruled that NITUs may be extended, even if the extension is not issued prior to the expiration of the NITU negotiating period, as long as jurisdiction is retained over the railroad right-of-way. Moreover, as in Birt, the trail use opponents here have failed to identify why a retroactive extension would be unfair or unreasonable.

Because UP has agreed to the requested extension and the parties continue to engage in good faith negotiations, petitioners' extension request will be granted. Petitioners have shown that the additional time is necessary to complete negotiations. An extension of time to complete negotiations will promote the establishment of trails and rail banking consistent with the Trails Act.

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

It is ordered:

1. Petitioners' requests to strike the October 17, November 7, and December 4, 1996 submissions are denied.

2. Petitioners' request to extend the interim trail use negotiating period is granted; the negotiation period is extended for 180 days to March 21, 1997.

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as petitioners suggest. It is not clear why Serenata's statement was not filed with the Board in October, as petitioners and UP apparently believed, but there is nothing to suggest any abuse of the Board's trail use procedures. Notwithstanding that the statement and filing fee were received subsequent to the extension request and objections, it remains timely because the Board retains jurisdiction over the right-of-way until UP consummates the abandonment. See 49 CFR 1152.29(e) relating to late-filed trail use statements.

¹⁷ The 10-day requirement of 49 CFR 1104.7(b) to request extensions does not strictly apply to trail use because the Board retains jurisdiction to impose trail use conditions until such time as an abandonment is consummated.

3. This decision is effective on the date of service.

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

Vernon A. Williams
Secretary