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SERVICE DATE - DECEMBER 18, 1998

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: December 10, 1998

On September 25, 1997, Kevin Jost, Alvin Kroupa, Allen Schlehuber and the Citizens Association of Marion and McPherson Counties (Petitioners) filed a petition, under former 49 CFR 1152.25(e)(6) [now 49 CFR 1152.25(e)(4)], to reopen the proceeding to reexamine decisions that authorized and extended the trail use negotiating period under a notice of interim trail use (NITU) issued pursuant to the National Trails System Act [16 U.S.C. 1247(d)] (Trails Act).¹ Central Kansas Railway, Limited (CKR) filed a reply to the petition. Petitioners also filed a supplement to their petition. CKR moved to strike the supplement, but also filed a reply to the supplement in the event that the supplement is accepted. Petitioners subsequently filed in opposition to the motion to strike. All pleadings will be accepted in the interest of a complete record. The petition to reopen will be denied.

BACKGROUND

A notice of exemption was served and published in the Federal Register on March 13, 1996 (60 FR 10428-29), with respect to the abandonment by CKR under 49 CFR Subpart F--Exempt Abandonments of a 33.4-mile portion of its line of railroad known as the McPherson Subdivision from milepost 10 plus 2418 feet at or near Marion to milepost 43 plus 4505 feet at or near McPherson, in Marion and McPherson Counties, KS.² The exemption was scheduled to become effective on April 12, 1996.

A NITU was served on April 12, 1996, authorizing CKR and James D. Jennings, d/b/a Jennings & Co. (Jennings), to negotiate interim trail use/rail banking under section 8(d) of the Trails

¹ Petitioners state that the individual petitioners are land owners over whose property the railroad right-of-way that is the subject of the NITU issued in this proceeding is or has been located, and that the Citizens Association of Marion and McPherson Counties is an association whose members are similarly situated landowners in Marion and McPherson Counties, KS.

² By decision served April 10, 1996, pursuant to a recommendation by the Board's Section of Environmental Analysis, the exemption was made subject to the condition that, prior to commencing salvage operations, CKR shall consult with Kansas Department of Health and Environment regarding certification requirements.

Act and was subsequently extended.³ CKR and Jennings did not reach an agreement on interim trail use. On June 6, 1997, the date the extended negotiation period expired, the Central Kansas Conservancy, Inc. (CKC), filed a statement of willingness to assume financial responsibility for interim trail use and rail banking in compliance with 49 CFR 1152.29. In a pleading also filed on June 6, 1997, CKR indicated its willingness to negotiate with CKC over trail use/rail banking. Because CKR indicated its willingness to enter into negotiations, a NITU was issued and served June 16, 1997, modifying the April 12, 1996 decision to the extent necessary to permit CKR and CKC to negotiate an interim trail use/rail banking agreement and to provide a 180-day period for them to do so.⁴ The trail use request was accepted by the Board, as CKR expressed its willingness to continue negotiations for an interim trail use/rail banking agreement and had not consummated the abandonment.

Petitioners seek to have the prior decisions granting the NITU and its extension reopened based on allegedly inaccurate, incomplete and misleading information presented by CKR. Petitioners state that this proceeding should be reopened because: (1) several segments of the right-of-way allegedly were conveyed to landowners by quitclaim deed in September 1995, 5 months before CKR filed its notice of exemption; (2) CKR allegedly consummated the abandonment, removing rail, ties and ballast, before interim trail use negotiations could be authorized or extended under the Board's jurisdiction; and (3) CKC's ability to assume the financial responsibility for management of the right-of-way as required by the Trails Act is questionable.

In support of these contentions, Petitioners argue that CKR conveyed land that was part of the right-of-way that was the subject of the notice of exemption to several landowners who they say own the underlying fee and have a right to full possession of the right-of-way when the land ceases to be used for railroad purposes. Petitioners also state that the railroad corridor cannot be reactivated for railroad purposes because CKR has conveyed parcels of land along the right-of-way. Petitioners have submitted letters and a resolution from the cities of Canton, Hillsboro, and Leigh, KS, opposing trail use.⁵ Moreover, Petitioners maintain that CKC does not have the financial capability to meet its substantial obligation as a responsible trail manager.

By reply filed October 15, 1997, CKR contends that Petitioners have failed to establish grounds for reopening this proceeding. CKR maintains that Petitioners have not shown that interim

³ The 180-day period for Jennings to negotiate with CKR under the NITU expired on October 9, 1996, but was extended by decisions served October 21, 1996, and April 7, 1997. The decision served on April 7 extended the negotiation period through June 6, 1997.

⁴ CKC stated that it was aware that Jennings and CKR were in the process of negotiating for interim trail use on the same right-of-way. Jennings indicated that it supported the issuance of a NITU between CKC and CKR that would be concurrent with the existing NITU between itself and CKR.

⁵ The City of Canton also filed its letter with the Board opposing the NITU.

trail use and the reinstatement of rail service on this right-of-way would not be possible. CKR supports its contentions with the verified statement of Clark A. Robertson, Vice President of Real Estate of CKR Affiliate, OmniTRAX, stating that “a sufficient width of right-of-way was conveyed to CKC in all instances to permit trail use and to permit rail service to be reinstated for the entire length of the Marion-McPherson right-of-way should there be occasion for reestablishment of such rail service in the future.”

CKR objects to Petitioners’ contention that CKC is not a “qualified private organization” under 16 U.S.C. 1247(d). CKR asserts that CKC submitted the requisite statement of willingness and states that there are multiple sources of funding for trail development and operation. CKR adds that there is no requirement that a trail be developed in any particular way, nor is there any time limit for how quickly a trail must be developed to its intended use.

In their supplemental petition filed on November 4, 1997, Petitioners allege that CKR has attempted to negotiate new or revised transactions involving land that had previously been conveyed to landowners who are members of the Petitioner Citizens Association of Marion and McPherson Counties. Petitioners further claim that CKR unilaterally executed corrected quitclaim deeds when landowners declined to accept less land than what had previously been conveyed.

CKR subsequently filed a motion to strike Petitioners’ supplement to their petition to reopen or to accept CKR’s reply to the supplement. We will deny the motion to strike, but grant CKR’s alternative request and accept its reply to the supplement. CKR’s primary point in response is that, in issuing corrected quitclaim deeds, it was simply conforming those deeds to the intentions of the parties.

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. None of these criteria has been met in this case.

CKR’s discontinuance of service and removal of rails, ties and ballast at the same time as it was negotiating for trail use did not constitute consummation of the abandonment. See Birt v. STB, 90 F.3d 580, 585, reh’g. denied 98 F.3d 644 (D.C. Cir. 1996) (Birt); Conrail v. STB, 93 F.3d 793 (D.C. Cir. 1996). To the contrary, as the court in Birt explained, while discontinued rail service, track salvage, and tariff cancellations are actions often taken in connection with abandonment, they also are fully consistent with the lesser action of temporary cessation of rail operations or trail use. See 49 CFR 1152.29(d). Thus, they are entitled to little weight where, as here, the railroad’s actions demonstrate an intent not to abandon by its continued willingness to negotiate and its statement that it has indeed conveyed the line to CKC for interim trail use. Under the circumstances, abandonment was not consummated and the trail use negotiating period was properly extended. See Birt, 90 F.3d at 588-89; Grantwood Village v. Missouri Pac. R.R.Co., 95 F.3d 654, 659 (8th Cir. 1996), cert. denied, 117 S. Ct. 1082, ___ U.S. ___ (1997).

Petitioners have not supported their claim that changed circumstances and new evidence make it appropriate that we examine CKC's ability to assume financial responsibility for the right-of-way under the interim trail use agreement. Petitioners claim that several local governmental entities have opposed interim trail use and make general arguments that their opposition would inhibit CKC's ability to raise funds to meet its obligations with respect to a trail. However, CKR has responded that there are multiple potential sources of funding for trail development and operation and that there has been no demonstration that CKC was relying for funding on those local government organizations that oppose interim trail use. As required by the statute and our implementing regulations, CKC submitted a statement of willingness to assume financial responsibility in which it agreed to assume full responsibility for the management of and legal liability arising out of the transfer of the right-of-way, and acknowledged that the right-of-way is subject to restoration or reconstruction for railroad purposes. Moreover, CKR agreed to negotiate with CKC and reports that it has already conveyed the property to CKC for interim trail use.⁶

A railroad presumably would not agree to negotiate with a prospective trail sponsor unless that railroad believes the trail sponsor will be able to manage the right-of-way and assume legal liability and pay taxes. The function of a trail condition is to delay the railroad's right to consummate the abandonment for the period of any interim trail use. Pending an agreement with the proponent of any interim trail, or the consummation of the abandonment, the right-of-way remains the responsibility of the railroad. Thus, the carrier is the most appropriate party to determine whether any offer is likely to prove successful both in meeting the railroad's desires and in fulfilling the statutory and regulatory liability requirements of the Trails Act. See Idaho Northern Pacific Railroad Co.--Aband. And Discontinuance Exemption--In Washington and Adams Counties, ID, Docket No. AB-433 (Sub-No. 2X) (STB served Apr. 1, 1998) (Idaho Northern). Requiring the proponent of a trail to provide detailed financial information or to pass a fitness test whenever the Board issues a trail condition could deter or delay interim trail use, which would be contrary to Congress' intent to facilitate and encourage rail banking and interim trail use on lines that otherwise would be abandoned. Furthermore, the primary purpose of a fitness test would be to protect a railroad from wasting its time negotiating with an unfit trail sponsor. However, the railroad already has the ability to protect itself from that result merely by refusing to consent to the issuance of the trail condition. Accordingly, we have never required detailed financial or other information from potential trail sponsors and railroads in Trails Act cases. Given our limited, ministerial role in administering the statute, and the fact that the railroad is the real party in interest, we can be assured that the Trails Act has been properly invoked and that its requirements will be met where, as here, (1) the prospective trail sponsor files the required statement of willingness and (2) the railroad that otherwise would be entitled to fully abandon the line voluntarily agrees to negotiate a Trails Act arrangement. Idaho Northern.

In Idaho Northern and other cases, we indicated that, if it is shown that the trail sponsor does not have the ability to continue to meet the financial and liability conditions of the statute, the trail

⁶ The conveyance to CKC, effective September 19, 1997, was confirmed by a filing made in this proceeding on June 22, 1998.

condition would be involuntarily revoked. But there has been no specific showing here that the trail sponsor has not met, or likely will not be able to meet, its financial obligations regarding this trail. Petitioners' suggestions that the trail sponsor may not have adequate resources presumes that CKC is under an affirmative duty to develop a trail for advanced recreational use. In fact, as we have frequently stated, the Trails Act does not require a trail to be "developed" in any particular way. Moreover, there is no absolute time limit for how quickly a trail must be developed to its intended level of use.

Petitioners and CKR have made several rounds of filings addressed to the question of whether CKR's transfers by quitclaim deed of its property interests in certain parcels of land along the right-of-way have made interim trail use and rail banking impossible. However, CKR has refuted these allegations by submitting a verified statement specifically stating that a sufficient width of right-of-way was conveyed to CKC in all instances to permit trail use and to permit rail service to be reinstated for the entire length of right-of-way should there be an occasion for reestablishment of such rail service in the future. Moreover, while all of the parties' filings will be accepted into the record, we will not attempt to resolve all of the property issues that these filings raise. State courts appear to be the proper place for parties to resolve property disputes about the parties' expectations and how much property has been transferred and how much has been retained. Should any court action or other developments demonstrate that, notwithstanding its verified statement, CKR has transferred property in such a way as to preclude a railroad's access to property necessary for the eventual reinstatement of active rail service at some future time, we would revisit the issues.

Finally, if a landowner believes that trail use has resulted in a taking of his or her property, the landowner can seek compensation in the Court of Federal Claims under the Tucker Act, 28 U.S.C. 1491, which has a 6-year statute of limitations. Preseault v. ICC, 494 U.S. 1 (1990). Also, because trails must be maintained according to state and local land use plans, zoning ordinances, and public health and safety legislation, abutting property owners allegedly harmed by improperly maintained trails can present their complaints to the appropriate state, regional, and local entities. Burlington Northern Railroad Company - Abandonment Exemption In Skagit County, WA, Docket No. AB-6 (Sub-No. 299X) (ICC served Oct. 19, 1993).

In sum, no basis for reopening has been shown at this time, and the petition to reopen will be denied.

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

It is ordered:

1. The petition to reopen is denied.
2. All materials submitted are accepted into the record and the motion to strike is denied.

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

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary