

30644
EB

SERVICE DATE - DECEMBER 8, 1999

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 2, 1999

In Jost v. STB, No. 99-1054 (D.C. Cir. Oct. 22, 1999) (Jost), the court affirmed in part and remanded in part our decision served December 18, 1998 (1998 Decision), declining to reopen this case. Specifically, the court affirmed our determination not to scrutinize the financial fitness of the trail sponsor, but remanded for further explanation our determination not to reopen the proceeding to consider the impact of alleged right-of-way sales. After reexamining the land sale issues, we adhere to our prior decision and provide the further explanation sought by the court.

BACKGROUND

As explained in more detail in our 1998 Decision, in 1996 the Central Kansas Railway (CKR) filed a verified notice of exemption under 49 CFR 1152.50 to abandon a 33.4-mile "out-of-service" rail line between Marion and McPherson, KS. Before the exemption authority became effective, Jennings & Co. (Jennings) offered to "rail bank" the line and provide for interim trail use pursuant to the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act). CKR agreed to negotiate for such an arrangement. Accordingly, the Board issued a Notice of Interim Trail Use (NITU) and subsequently granted two requests to extend the time to permit continued trail use negotiations.

In June 1997, prior to the end of the negotiating period, another potential trail sponsor, the Central Kansas Conservancy Inc. (Conservancy), came forward and stated that it had reached an agreement with CKR and Jennings to purchase the right-of-way under the Trails Act. Accordingly, we modified and extended the NITU to accommodate the Conservancy's request. On September 19, 1997, CKR conveyed the entire right-of-way to the Conservancy for rail banking/interim trail use.

On September 25, 1997, adjoining landowners filed a petition to reopen on the grounds of material error and changed circumstances. Petitioners alleged that, both before and after filing its notice of exemption, CKR had conveyed portions of the right-of-way to others and had thereby rendered the line unsuitable for rail banking and interim trail use. Petitioners further argued that CKR's failure to disclose these sales to the Board was a fatal defect that invalidated the carrier's use of the class exemption for out-of-service lines, so that a NITU should not have been available. In addition, 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 have jurisdiction over the line, making rail banking and interim trail use no longer possible. Alternatively, petitioners alleged that, because several local governments had come to oppose rail banking/interim trail use of the rail line, the Conservancy would be unable to meet its financial obligations for trail management.

In response, CKR acknowledged that it had conveyed some right-of-way along the line to others, and that some of the deeds in question were facially ambiguous.¹ However, CKR claimed that it had only conveyed "excess right-of-way" and that it had retained sufficient right-of-way in all instances to allow an uninterrupted rail corridor for rail banking/interim trail use.² CKR also disputed petitioners' argument that the Conservancy would be unable to meet its financial obligations under the Trails Act.

In the 1998 Decision, we denied the petition to reopen. We first explained that CKR's discontinuance of service and removal of rails, ties, and ballast did not serve to consummate the abandonment, in light of CKR's concurrent negotiations for rail banking/interim trail use. We also found no need to reopen the proceeding to examine the Conservancy's financial capacity, because the petitioners had not made a specific showing that the Conservancy would be unable to meet its financial obligations. Finally, we concluded that petitioners had not proven that CKR's conveyance of certain lots along the right-of-way made reactivation of rail service impossible. We noted that the discrepancies in the deeds were matters for an appropriate State court to resolve and stated that, should a State court find that CKR had transferred property in such a way as to preclude the restoration of rail service, we would revisit the issues.

THE COURT'S DECISION

In Jost, the court expressly upheld our policy of applying a rebuttable presumption that a trail sponsor is financially qualified. (Slip op. 16-17.) Moreover, the court agreed that the

¹ Three of the deeds had numerical descriptions indicating that the entire width (and in one case even 25 feet more than the entire right-of-way) was conveyed, but pictorial descriptions indicating that CKR had reserved to itself 100 feet of right-of-way in each case. CKR asserted that "corrected deeds" had been drafted and recorded that accurately reflected the more limited conveyances intended by the parties. CKR submitted supporting verified statements from three CKR employees who had personal knowledge of the transactions.

² The pre-sale right-of-way width ranged from 100 to 300 feet. The post-sale right-of-way width, according to CKR, was from 50 to 230 feet. Right-of-way as little as 30-feet wide has been found to be sufficient for safe rail operations. See Boston & Maine Corp. & Springfield Terminal Ry. Corp. --Abandonment & Discontinuance of Service in Hartford County, CT in the Matter of a Request to Set Terms and Conditions, Docket No. AB-32 (Sub-No. 43) (ICC served Aug. 9, 1991). Thus, CKR contends it only sold "excess" right-of-way.

presumption of financial fitness in this case had not been rebutted because the petitioners had not presented "any real evidence" that the trail sponsor was failing to meet, or would fail to meet, its responsibilities.³ (Slip op. at 18.)

However, the court found that we had not adequately explained our decision not to reopen the proceeding to consider whether to revoke the authorization for interim trail use in light of petitioners' evidence of CKR's right-of-way sales. (Slip op. at 6-7, 10-15, 18.) The court found that clarification by the Board was needed with respect to each of the 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 NITU. The court made clear (*id.* at 14-15 & n.14) that it was not holding that we are required to resolve ourselves disputed issues of state property law, "or even that [we are] necessarily required to reopen the proceeding on the evidence presented by [petitioners]" (*id.* at 14 n.14). Furthermore, the court recognized (*id.* at 14) that "even if some full-width right-of-way was sold, it may be that the Act authorizes interim trail use over the remaining right-of-way." However, because it could not fully discern our reasoning on the land sale issues, the court remanded the case for 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 14 n.14, 18.)

DISCUSSION

The threshold issue is the extent to which a railroad filing a notice indicating that a line qualifies as "out-of-service" is required to disclose land sales that have taken place prior to seeking authority to abandon. To invoke the out-of-service class exemption, a railroad must file with the Board, at least 50 days prior to the proposed effective date, a verified notice of exemption in which the railroad certifies that the line meets certain eligibility requirements (i.e., has not originated or terminated any traffic in the past two years, has not carried any "overhead" traffic during that period that cannot be routed over any other lines, and has not produced any shipper complaints of a failure to receive service). 49 CFR 1152.50(d)(2). The railroad must also include information on any known restrictions on the title to the underlying property that "would affect the transfer of title or use of the property for other than rail purposes" (i.e., for roads or highways, other forms of mass transportation, conservation, energy production or transmission or recreation, pursuant to the public use provisions at 49 U.S.C. 10905 or the Trails Act). 49 CFR 1152.22(e)(4), 1152.50(d)(2).

³ In this regard, the court saw "nothing in the Trails Act that requires the Board to license petitioners to engage in discovery of the financial fitness of potential trail sponsors." (Slip op. at 17 n.15.)

Accordingly, CKR should have informed the agency of the land sales that took place prior to the filing of its notice of exemption. As the court noted in Jost (slip op. at 11 & n.11), there is no allegation here that any "full-width" right-of-way was sold prior to the filing of the notice of exemption.⁴ But even the conveyance of "excess" right-of-way to others could affect the transfer of title or use of property for other than rail purposes.⁵ Thus, 49 CFR 1152.22(e)(4) applies, and we admonish CKR and other railroads to disclose any land sales of the underlying property (even if the sales are of "excess" right-of-way) in future cases.

CKR's failure to disclose these sales, however, does not mean that CKR's initial notice of exemption must be treated as void ab initio, as petitioners have claimed. Petitioners rely on 49 CFR 1152.50(d)(3), which provides that "if [a] notice of exemption contains false or misleading information, the use of the exemption is void ab initio." But information must be material to the transaction in order for its omission or misstatement to render a verified notice void. Berkshire Scenic Ry. Museum v. ICC, 52 F.3d 378, 381 (1st Cir. 1995) (Berkshire); CSX Transp., Inc. — Exemption — Abandonment — In Fannin & Gilmer Counties, Ga., ICC Docket No. AB-55 (Sub-No. 209X) (ICC served Jan. 8, 1988) at 3 (even if railroad submitted false and misleading information, exemption was not void where railroad moved no traffic over the line and no complaints were filed in preceding two years). In the context of the class exemption for abandonment of out-of-service lines, an omission would be material to the transaction only if the information affects the eligibility of the line for the class exemption. Berkshire, 52 F.3d at 381.

Here, the information omitted from CKR's notice of exemption — the sale of certain "excess" right-of-way — had nothing to do with whether any traffic had originated or terminated on the line within the past two years, whether any shippers had filed complaints for lack of service, or whether CKR could reroute any overhead traffic. Therefore, CKR's eligibility to use the class exemption was not affected by the failure to include information regarding these sales in its initial filing. As a result, revocation of the exemption at this time is neither required nor warranted.⁶

⁴ CKR sold nine lots along the 33.4-mile right-of-way: five prior to the filing of the notice of exemption and four after. Petitioners do not dispute that CKR successfully retained from 50 to 230 feet of the right-of-way in all five pre-filing sales and the first post-filing sale. As noted above, a right-of-way consisting of as little as 30 feet in width can be sufficient for rail service.

⁵ If sufficient width of right-of-way to permit safe railroad operations is not retained, the sale of lots adjacent to a right-of-way could preclude the eventual restoration of rail service on the property, in which case a line would not be available for interim trail use under section 1247(d). Moreover, even sales of clearly "excess" right-of-way could affect the suitability of future use of the property "for [other] public purposes, including highways, other forms of mass transportation, conservation, energy production or transmission, or recreation" under the public use provisions of 49 U.S.C. 10905.

⁶ Cf. Buffalo Crushed Stone, Inc. v. STB, No. 98-1505 (D.C. Cir. Oct. 29, 1999) (affirming (continued...))

CKR's failure to provide information about the pre-filing land sales also had no effect on the outcome of the Trails Act aspects of this proceeding. CKR has provided evidence (which petitioners have not disputed) that in each of the pre-filing land sales it specifically reserved a sufficient width of right-of-way to allow either trail use or future rail service. Thus, the line was eligible to be preserved under the Trails Act,⁷ and CKR's failure to disclose the pre-filing sales did not cause us to issue a NITU erroneously.⁸

Nor did CKR's failure to disclose sales (whether pre- or post-filing) of "excess" land have any other harmful consequences in this case. No offers to acquire the line were filed under 49 U.S.C. 10904 and no request for a public-use condition was made under 49 U.S.C. 10905. Thus, the sale of "excess" right-of-way would have been significant, if at all, only to the proposals under the Trails Act. However, interim trail use/rail banking arrangements are purely voluntary on the part of the railroad. E.g., National Wildlife Fed'n v. ICC, 850 F.2d 694, 696 (D.C. Cir. 1988)

⁶(...continued)

the Board's determination not to revoke the sale of a rail line under the offer-of-financial assistance provisions of 49 U.S.C. 10904 some 18 months later when it was discovered that the line had been technically ineligible for the abandonment exemption for "out-of-service" lines).

⁷ The Board's role under the Trails Act is largely ministerial. Goos v. ICC, 911 F.2d 1283, 1295 (8th Cir. 1990) (Goos). To invoke the Trails Act, a prospective trail sponsor need only file a request accompanied by the necessary statement of willingness to assume liability and an acknowledgment that interim trail use is subject to rail banking. See National Ass'n of Reversionary Property Owners v. STB, 158 F.3d 135, 138 (D.C. Cir. 1998); 49 CFR 1152.29(a), (d). If the railroad indicates its willingness to negotiate, the Board must then issue a NITU. Goos, 911 F.2d at 1295.

⁸ Given CKR's undisputed evidence that in each of these pre-filing land sales, it specifically reserved a sufficient width of right-of-way to allow either trail use or future rail service, it also is clear that the partial width land sales do not show an intent to abandon or constitute a de facto abandonment of the line. Cf. RLTD Ry. Corp. v. STB, 166 F.3d 808, 812 (6th Cir. 1999) (upholding Board's conclusion that a de facto abandonment had occurred because the line was no longer linked to and part of the interstate rail system). It is well settled that the mere sale of property along the right-of-way does not compel the conclusion that a railroad has abandoned a line. Rather, we have long found that "it is consistent with the common carrier obligation of a railroad . . . to sell underlying assets of rail line while retaining an easement that is sufficient for carrying out rail operations." Georgia Great S. Div., S.C. Cent. R.R. — Abandonment & Discontinuance Exemption — Between Albany & Dawson, in Terrell, Lee & Dougherty Counties, GA, STB Docket No. AB-389 (Sub-No. 1X) (STB served Apr. 16, 1999) at 6, citing Maine, DOT-Acq. Exemption, Me. Central. R. Co., 8 I.C.C.2d 835, 837 (1991) (railroad's transfer of underlying real property and track to State while retaining sufficient rights to access, maintain, operate, and renew the line in no way impairs ability to meet common carrier obligation).

(National Wildlife).⁹ Thus, CKR could not be compelled to negotiate concerning, or enter into, an interim trail use agreement for the portions of "excess" right-of-way that it had decided to convey to others outside the Trails Act process. In these circumstances, we need take no action at this point to remedy CKR's failure to inform the agency of sales of "excess" right-of-way.

We turn our attention now to the three sales that allegedly spanned the full width of the right-of-way, all of which took place after rail banking had commenced. We agree with the court (Jost, slip op. at 12) that an allegation that a railroad has made full-width right-of-way sales is material evidence to be considered in deciding both whether we have jurisdiction to impose a trail condition and whether a railroad has consummated abandonment.¹⁰ Indeed, our chief concern, once a trail condition has been imposed, is whether the statutory rail banking condition has been compromised, precluding a railroad's ability to reassert control over the right-of-way at some future time to revive rail service. 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), slip op. at 9 (Idaho Northern). Therefore, we must be notified of any land sale that affects the availability of the Trails Act by making rail banking on all or part of a line impossible. See 49 CFR 1152.29(d)(2), (3), (f) (requiring notice to the Board, to permit vacation or appropriate modification of a NITU, in the event a trail sponsor intends to terminate trail use, another person will be substituted as a trail sponsor, or there is a request to restore active rail service on the line).

Moreover, 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.¹¹ See 49 CFR 1152.29(a)(3); Idaho Northern, slip op. at 8; T & P Ry. -- Abandonment Exemption -- In Shawnee, Jefferson & Atchison Counties, Kan., STB Docket No. AB-381 (Sub-No. 1X) (STB served Feb. 7, 1997), at 5 (T & P). However, once interim trail use/rail banking has commenced, the burden is on the landowners or other interested persons seeking to disrupt an established rail banking/interim trail use arrangement to show that active rail service cannot be restored or that the trail sponsor has failed, or likely will

⁹ See also Connecticut Trust for Historic Preservation v. ICC, 841 F.2d 479, 482 (2d Cir. 1988); Washington State Dep't of Game v. ICC, 829 F.2d 877, 881-82 (9th Cir. 1987).

¹⁰ If it turns out that one or more of the three disputed sales served to sever the right-of-way, the most that could be said on the present record is that the railroad intended to abandon those three tracts. This would not necessarily indicate that CKR had intended to abandon the remainder of the line or render the remainder unavailable for interim trail use/rail banking.

¹¹ We retain jurisdiction over a line throughout the Trails Act negotiating period, any period of implemented rail banking/interim trail use, and any period during which rail service is restored. It is only upon a railroad's lawful consummation of abandonment authority that our jurisdiction over the line ends. Hayfield N. R.R. v. Chicago & N.W. Transp., 467 U.S. 622, 633 (1984) (Hayfield Northern).

fail, to pay taxes, meet past or potential liability claims, or adequately manage the trail. See Idaho Northern; T & P. This approach is consistent with our limited responsibilities under the Trails Act and ensures that we further, not hinder, Congress' intent that we "preserve for possible future railroad use rights-of-way not currently in service and to allow interim use of the land as recreational trails." Preseault, v. ICC, 494 U.S. 1, 6 (1990).

Here, the landowners have 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.¹² Indeed, on the issue of whether the line has been severed,¹³ the parties have presented conflicting evidence as to the intent of the parties to the deeds, and the documentary evidence is inconclusive (see n.1, supra). Accordingly, we cannot determine who actually holds title to the disputed property that CKR claims that it has reserved.

It is well settled that the interpretation of deeds and the determination of who owns good title are issues of State law that are outside the expertise of this Board. See Hayfield Northern, 467 U.S. at 634; Preseault 494 U.S. at 8. (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). Under these circumstances, we continue to believe that the most appropriate course of action for us at this point is to direct petitioners to State court to get the underlying State property law issues resolved.¹⁴

¹² We note that, even if the right-of-way had been severed by one or more of the three disputed land sales (which were in the town of Galva and evidently involved neighboring lots, separated only by one street each), this does not necessarily mean that the rest of the 33.4-mile line (which connects with other rail lines at both ends) would not continue to be available for future rail service. See Jost, slip op. at 14 (recognizing that "even if some full-width right-of-way was sold, it may be that the Act authorizes interim trail use over the remaining right-of-way"). 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 is 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 under a NITU, it remains liable for management, torts, and payment of taxes. See Idaho Northern, at 8-10. 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.

¹³ Petitioners have failed to even address the issue of the effect of any severance on the ability to restore service to the remainder of the line.

¹⁴ The court in Jost suggested (slip op. at 14 n.14) that we might stay our proceedings pending action by a State court. However, no one has asked us for a stay. Moreover, a stay does not appear to be necessary because there is nothing irreversible about interim trail use/rail banking.
(continued...)

Should a State court determine that CKR has indeed severed the right-of-way, then we remain available to consider whether all or part of the line has been abandoned as a result and/or whether eventual restoration of rail service has been rendered impossible so as to terminate our jurisdiction over the continuing rail banking/interim trail use. In the meantime, however, we do not believe that it would be appropriate for us to reopen or to revoke the NITU, until it has been clearly established that the line can no longer be rail banked, given our limited role and responsibilities under the Trails Act and the purpose of the statute to facilitate and encourage rail banking and interim trail use on lines that would otherwise be abandoned.¹⁵ See 16 U.S.C. 1247(d); National Wildlife, 850 F.2d at 700 (Board required to issue NITU and allow rail banking where trail sponsor is willing to assume responsibility for line and railroad agrees to negotiate); Goos, 911 F.2d at 1295 (same).

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

It is ordered:

1. Our prior decision is reaffirmed and clarified as set forth above.
2. This decision is effective on its service date.

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

Vernon A. Williams
Secretary

¹⁴(...continued)

As we have stated, we retain jurisdiction over the line throughout the period of rail banking/interim trail use, e.g., Hayfield Northern, 467 U.S. at 633; Idaho Northern, and we remain available to take appropriate action should a State court determine that CKR had transferred property in such a way as to preclude the restoration of rail service on all or part of this line. See also Busboom Grain Co. v. ICC, 830 F.2d 74, 75 (7th Cir. 1987)(stay of ICC abandonment decision pending judicial review not required because the action permitted by the agency's order is not irreversible).

¹⁵ Congress clearly intended to preserve as many rail corridors as possible under section 1247(d). See Preseault, 494 U.S. at 19.