

STATE OF MISSOURI TRANSPORTATION BOARD
WASHINGTON DC

224725

Docket No AB-102 (Sub-No 13)

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
-- ABANDONMENT --
IN ST CHARLES, WARREN, MONTGOMERY, CALLAWAY,
BOONE, HOWARD, COOPER AND PLETTERS COUNTIES, MO

REPLY
OF
STATE OF MISSOURI versus MISSOURI ATTORNEY GENERAL

Union Pacific Railroad Company ("UP") successor in interest to the Missouri-Kansas-Texas Railroad Company ("MKT"), at page 4 of its Reply served March 16, 2009, improperly portrays what transpired back in 1986, in an effort akin to placing the cart before the horse. Contrary to UP's representation, the Interstate Commerce Commission ("ICC") did not require the Missouri Department of Natural Resources ("MDNR") to assume full responsibility and liability for operating the MKT's abandoned right-of-way. Rather, MDNR volunteered to do so, consistently with the provisions of 49 C.F.R. 1152.29.

On September 17, 1986, following the filing by MKT of its application to abandon its 199.92-mile line of railroad between Milepost 26.92 at Machens, MO, and Milepost 226.84 at Sedalia, MO, MDNR requested the imposition of a trail use/rail banking condition if the abandonment application were approved. MDNR sought the

entire 199.92-mile right-of-way and, pursuant to 49 C.F.R. 1152.29 MDNR specifically stated, "[MDNR] is willing to assume full responsibility for the management of, and to the extent permitted by Missouri law and is agreed to between [MDNR and MK I] for any legal liability arising out of the transfer or use of, and for the payment of any and all taxes that may be levied or assessed against the right-of-way."

By its Decision, served March 16, 1987, the ICC approved MK I's abandonment application. The ICC noted that MDNR sought to acquire interim use of the entire right-of-way as a trail under the Trails Act, and that "MK I has stated it is already presently negotiating an agreement with [MDNR] for interim trail use of the entire right-of-way." Whereupon, on April 27, 1987, the ICC issued its CITU covering the entire right-of-way. The CITU stated, "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 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 the payment of any and all taxes that may be levied or assessed against the right-of-way."

MDNR and MK I reached their trails use/rail banking agreement not two months later, on June 25, 1987. The agreement dealt with the right-of-way in a single document though in two different ways. The agreement took the form of conveyance by quitclaim deed of MK I's entire 192.92-mile right-of-way to MDNR, with the exception of the Boonville lift bridge. But with respect to the Boonville lift bridge, the trails use/rail banking agreement said, "MK I agrees that said bridge shall be kept available for transportation purposes in accordance with ICC decision ex parte No. 274 (Sub-No. 13).

and that MDNR upon execution of waivers of liability acceptable to MKF may utilize the bridge for trail purposes, provided however that MKF reserves the right to modify the bridge structure as may be required to improve rail transportation so long as [MDNR's] right to utilize the premises for interim trail use is not adversely affected thereby "

The paragraph permits of no doubt that the Boonville lift bridge was intended to be preserved to become a part of the Katy Trail. The decision in Ex Parte No. 274 (Sub-No. 13) referred to in the paragraph of the agreement dealing with the bridge was the ICC's Decision in Rail Abandonments--Use of Rights-of-Way as Trails, 21 C.C.2d 591. There the ICC announced that "trail use can occur whether the involved railroad transfers or retains its interest in the right-of-way." 21 C.C.2d at 599. Under that rule the fact that ownership of the Boonville lift bridge was retained by MKF was immaterial to whether the bridge or any other part of the right-of-way was held for trail use.

Ignoring that rule, UP contends at page 8 of its Reply that "MDNR did not meet the statutory requirements that the trail user assume full responsibility and liability." Of course, MDNR met the statutory requirement in its submission to the ICC of September 17, 1986. Indeed, the CITU would not, indeed could not, have been issued by the ICC if the MDNR had not done so.

When a segment of the right-of-way of the abandoning railroad no longer was to be utilized for the trails use rail banking, 49 C.F.R. 1152.29 (e) contemplated that a copy of the CITU was to be sent to the ICC with a request that it be vacated on a specified date. The CITU of April 27, 1987 never was surrendered, and pursuant to section 204 of the ICC Termination Act of 1995 it remains in effect to this day.

MKT in fact did not abandon the Boonville lift bridge. That was demonstrated pertinent to the Motion for Enforcement recently filed in this matter by various entities by the manner in which the railroad and the ICC dealt with historic preservation issues.

The ICC's Decision, served March 16, 1987, discussed the determination of its Section of Energy and Environment that two bridges, presumably one of them being the Boonville lift bridge, were eligible for listing in the National Register of Historic Places. Accordingly, the Decision held that, if an abandonment were to be effected, MKT was to comply with the procedures in section 106 of the National Historic Preservation Act.

UP does not, of course, assert that section-106 compliance was completed in 1987. Rather, at page 9 of its Reply, UP contends that compliance with the section-106 provisions was not required in advance of consummation of the abandonment, citing a precedent dated ten years later, the Board's Decision in SIBEX Parte No. 537

Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903, served June 27, 1997, at page 5. But all the Board said there was that the requirement it was adopting that the Board receive written notification of the consummation of an abandonment would not be given retroactive application. It said nothing to suggest that environmental and historic conditions did not need to be met before an authorized abandonment could be consummated. It said nothing that changed the requirements that existed when the MKT and MDNR reached their agreement in 1987.

As an alternative to the argument that the ICC's section-106 compliance requirement was eliminated by the Board, UP implicitly suggests that the Board deemed the abandonment to have been completed because another agency, the United States Coast

Guard is now -- 22 years after the ICC acted -- undertaking a section-106 review of the Booneville lift bridge. Reply at 10. How that review, which is still incomplete, could retroactively validate the abandonment in light of the ICC requirement is entirely unexplained. But the reference highlights U P's determination to prevent the Board from acting as the successor to the ICC and ought to act. That history demonstrates that the Board should be the lead agency. It appears, however, that the Board is not taking an active role, and indeed may not even be a consultant. U P would have the Board entirely ignore the process, claiming again that the bridge was long-since abandoned and thus that the Board has no role.

Of course, U P can't make up its mind when the Booneville lift bridge was abandoned. At pages 8 and 9 of its Reply, U P alleges that the bridge was abandoned in 1987. In its letter to the Board dated May 25, 2005, however, U P contends that the bridge was being abandoned as of that date. In fact, the Booneville lift bridge never has been abandoned.

Nor has it remained a part of an active line of railroad. In its letter to MDNR dated October 24, 2004, U P said the Booneville lift bridge hadn't been used for 17 years. And when MKT cancelled its tariff rates applicable to the 192.92-mile line on which it was discontinuing service pursuant to the ICC's decision of March 16, 1987, MKT did not exclude the Booneville lift bridge.

The MKT's 1986 application to abandon in 1986 cited three possible results: continued rail use, abandonment or trail use. Not having been abandoned and not remaining a part of an active line of railroad, it is evident that the Booneville lift bridge

was intended to be a part of the 92.92-mile rail banked line and to be available for trail use.

At pages 4 and 5 of its Reply, UP seeks to make much of the State court litigation State of Missouri, ex rel Jeremiah W. (Jay) Nixon, Attorney General v. Doyle &holders Director, Missouri Department of Natural Resources, the Missouri Department of Natural Resources, and Union Pacific Railroad Co. attaching the several decisions as Exhibit 2. The litigation, however, merely established that MDNR did not have a property interest in the Booneville lift bridge. The Missouri Court of Appeals, Western Division, however, recognized that MDNR "can obtain rights to use the bridge for trail purposes if waivers of liability are accepted by MKT."

Accordingly, the Booneville lift bridge remains available for MDNR's trail use, and UP's purported consummation of its abandonment is null and void.

Respectfully submitted,

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Dated: March 23, 2009