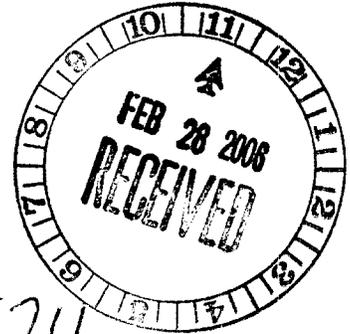


CHARLES H. MONTANGE
ATTORNEY AT LAW
426 NW 162ND STREET
SEATTLE, WASHINGTON 98177
(206) 546-1936
FAX: (206) 546-3739



215874

27 February 2006
by express

Hon. Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20036

Re: Nebkota Railway, Inc. --
Abandonment Exemption --
in Sheridan and Cherry
Counties, NE, AB 988X

ENTERED
Office of Proceedings

FEB 28 2006

Part of
Public Record

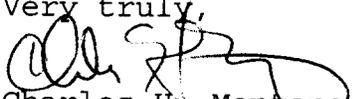
response to inquiry from staff

Dear Mr. Secretary:

Enclosed for filing please find the original and ten copies of a memorandum stating the Position of Nebraska Game and Parks Commission and Rails to Trails Conservancy in response to an inquiry from Staff. We are stating this Position now that NEBKOTA filed a letter clarifying what it intends to do, as set forth in a letter its counsel filed on 24 February in this proceeding.

We request that this Position be circulated expeditiously, as this Board has indicated that it intends to act in this proceeding by March 21.

Thank you for your assistance in this matter.

Very truly,

Charles H. Montange
for NGPC

Encls.

cc. Mr. Kahn
NGPC
RTC (all w/encl.)

215874

BEFORE THE SURFACE TRANSPORTATION BOARD

NEBKOTA RAILWAY, INC. --)
ABANDONMENT EXEMPTION --) AB 988X
IN SHERIDAN AND CHERRY)
COUNTIES, NE)

Office of Public Affairs
FEB 28 2008
Public Affairs



POSITION OF NEBRASKA
and
RAILS TO TRAILS CONSERVANCY

This Board earlier requested the position of the Nebraska Game and Parks Commission (NGPC or "Nebraska") and Rails to Trails Conservancy ("RTC") concerning whether the letter submitted by NEBKOTA's attorney (Mr. Kahn) dated January 26 resolves the dispute between RTC and NGPC on the one hand and NEBKOTA on the other. Nebraska and RTC now are in a position to respond to this Board's request: the January 26 letter does not resolve the dispute.

Background. The underlying problem in this proceeding is that NEBKOTA is contractually obligated to convey all interests in real estate involved in the rail line in this proceeding to Nebraska for \$10, pursuant to a Notice of Interim Trail Use (NITU). This contract was a careful resolution [see ICC decision in AB 1 (Sub-no. 249X), served June 2, 1994] of a long-standing dispute between Chicago and Northwestern Transportation Company (CNW) and the State of Nebraska over CNW's proposed abandonment of a 320 mile line across north central Nebraska. See filings in ICC docket AB 1 (Sub-no. 230). Subject to ICC authorization, the contract provided that the line from Norfolk to Merriman would immediately become a railbanked trail, but the last roughly 83 miles from Merriman to Chadron would be

transferred to a shortline railroad (NEBKOTA) for continued rail use. ICC's June 2, 1994 decision essentially authorized and adopted the settlement embodied in the contract. A portion of that settlement was prospective: in particular, should NEBKOTA ever seek abandonment for any portion of the 83 miles of Cowboy Line corridor transferred to it, the contract provided that NEBKOTA must railbank that portion under 16 U.S.C. § 1247(d) at the request of the RTC (or its assign, Nebraska), and also transfer it to RTC (or its assign, Nebraska) for \$10. In addition, the contract provided that should NEBKOTA seek abandonment within the first ten years, NEBKOTA also had to transfer the value of the rail salvage to CNW.¹

In early correspondence with Nebraska and RTC, NEBKOTA indicated that it intended to breach and to dishonor its contractual obligations in respect to transfer of the real estate to the State. In particular, NEBKOTA indicated that it took the position that it need not consent to issuance of a NITU (application of 16 U.S.C. § 1247(d)), nor to transfer of the property for \$10.

Because of NEBKOTA's threat to repudiate the contract and settlement, Nebraska and RTC filed objections and requests for relief in this proceeding on or about the due date of January 10.

Nebkota letter of January 26 and NGPC/RTC Status Report.

¹ NEBKOTA paid nothing for its rights under the contract. RTC furnished the entire purchase price.

In response to those objections and requests for relief, NEBKOTA filed its ambiguous letter of January 26, 2005, in which it seemed to indicate that the Board could issue a NITU. That ambiguous letter prompted the Board to ask Nebraska and RTC for their position.

Nebraska and RTC responded with a Status Report on February 17 indicating they had faxed NEBKOTA's counsel a letter dated February 6 seeking clarifications, but had received no response. In our Status Report, Nebraska and RTC stated that

"If NEBKOTA will clarify that it consents to the issuance of a NITU by this Board, that it will convey pursuant to that NITU the property for \$10 as provided under the contract, and that the contract requires such conveyance (as indicated in the attached exhibits), then NGPC and RTC will be pleased to withdraw all objections and requests for conditions which they have filed in this proceeding."

Nebraska and RTC attached two verified statements to their Status Report, in which former CNW Associate General Counsel Stuart Gassner and former Nebraska Governor Nelson's (now Senator Nelson's) relevant project manager (Martha Gadberry) attest to a construction of the contract as advocated by Nebraska and by RTC.

Nebkota's Feb. 24 response. On February 24, 2006, NEBKOTA fax-filed a two page letter responding to the Status Report. Although NEBKOTA states that it will consent to the issuance of a NITU, NEBKOTA declines to indicate that it will transfer the

real estate interests to Nebraska for \$10 as provided by the contract, and avoids any indication of agreement on the requirements of the contract. NEBKOTA instead says that whether the contract requires such a transfer "is not a matter which should be determined by the Board. The Board ordinarily does not construe contracts, deferring to the courts matters of contract interpretation." Letter, F. Kahn (NEBKOTA) to V. Williams, Feb. 24, 2006, p.2. NEBKOTA claims that in light of its agreement to the issuance of a NITU, not even a public use condition needs to be issued.

NGPC and RTC Statement of Position. Although Nebraska and RTC of course regret being forced into court to enforce the contract against NEBKOTA, Nebraska and RTC are fully prepared to do so. Again, so the record is clear, Nebraska and RTC will sue in a court of competent jurisdiction for a declaration of their rights, to prevent NEBKOTA's repudiation of the contract, to obtain specific performance of NEBKOTA's duty to transfer the real estate, and for other relief that is deemed appropriate. NEBKOTA in the end must deed the property (including bridges, culverts, roadbed and similar structures, but excluding rail, ties and other track material) to Nebraska Game and Parks Commission for \$10 pursuant to 16 U.S.C. § 1247(d).

Nonetheless, in order to preserve the remedy of specific performance (i.e., to acquire the property intact) and in order to prevent contract repudiation, Nebraska and RTC must ensure that STB takes appropriate steps so that a court construing the

contract can order NEBKOTA to transfer the property for \$10 pursuant to a NITU as the contract provides.

The problem flows from the nature of a NITU and jurisdictional limits. Only this Board has authority to issue a NITU. Under 49 C.F.R. § 1152.29, this Board ordinarily issues a NITU only for 180 days. Although this period may be extended, this Board ordinarily only does so at the request of the railroad. If the railroad does not consent, the NITU lapses. If the NITU lapses, then in Nebraska, the railroad's title automatically extinguishes in respect to any parcels held by the railroad only in the form of railroad easements. Moreover, a NITU does not require the railroad to keep a corridor intact; the railroad may sell the corridor off piecemeal and abandon it. Thus although NEBKOTA is consenting to issuance of a NITU, that hardly protects the interest of Nebraska and RTC in this particular dispute. In particular, if NEBKOTA wants to destroy Nebraska's rights under the contract, all NEBKOTA has to do is let the NITU lapse, or otherwise disavow or disable it. There is nothing a court can do to restore the property once NEBKOTA sells some of it out from under the NITU, or causes the NITU to lapse.

Civil litigation involving a contract may take two or more years to final judgment, not counting delays due to appeals. The corridor must be kept intact for the entire period of the litigation, including appeals. Any action by this Board must be consistent with this objective. Unless this Board prevents

corridor collapse during the period of litigation, the State would be deprived of a key consideration when it entered into the settlement embodied in the ICC decision in AB 1 (Sub-no. 249X), served June 2, 1994; namely, preservation of the rail corridor forever across the State.

While this Board does not ordinarily engage in contract interpretation, this Board also attempts to adopt a neutral position, so that its processes are not abused to allow breach of a lawful contract, or to prevent a lawful contract from being enforced. We have supplied this Board with three verified statements² indicating that the contract requires transfer of the property for \$10 to Nebraska pursuant to 16 U.S.C. § 1247(d) as requested by the State. This Board should not allow NEBKOTA to employ this Board's procedures to allow NEBKOTA to breach a contract which was negotiated and adopted to resolve a lengthy dispute before this agency.

Comment on public use condition. Finally, Nebraska and RTC note that NEBKOTA argues that no public use condition ("PUC") under 49 U.S.C. § 10905 is necessary because NEBKOTA has consented to a NITU. As already noted, a NITU in and of itself is discretionary on the part of the railroad, and does not require the railroad to hold anything intact. In contrast, a PUC can require the railroad to hold property intact for up to

² The original objections filed by Nebraska and RTC on January 10 were verified in this respect, and we attached verified statements from Mr. Gassner and Ms. Gadberry to the subsequent Status Report.

180 days. NEBKOTA has now made perfectly clear that -- in violation of its contractual obligations -- it does not recognize an obligation to transfer any real estate, bridges, culverts, roadbed, or similar structures to either RTC or Nebraska. This is a perfect example of a case where a PUC should be imposed barring any disposition for 180 days.

Unfortunately, a PUC alone is insufficient to protect the interests of Nebraska in preserving its specific performance remedy in court. The chief problem is a "PUC" expires in 180 days, and this does not afford sufficient time to litigate a contract in a court. This Board accordingly must issue further relief in order to protect Nebraska's interests.

Revised request for relief. In light of the clarification provided in NEBKOTA's February 24 letter, and the considerations set forth above, Nebraska and RTC request the following relief:

1. That this Board issue an order holding in abeyance NEBKOTA's petition for abandonment authorization for thirty days from the date of decision (currently indicated to be by March 21, 2006) to afford Nebraska time to bring a civil action for anticipatory breach against NEBKOTA in a court of competent jurisdiction. Should such an action be instituted, then the order holding the proceeding in abeyance should automatically extend until the action, including any appeals, is finally

resolved.³

2. In the alternative, that this Board issue a Notice of Interim Trail Use covering the entire line at issue in this proceeding, which NITU will terminate only if Nebraska and RTC do not obtain a final judgment (taking into account all appeals) in litigation initiated in a court of competent seeking to enforce the contract against NEBKOTA. This Board should also issue an order preventing NEBKOTA from transferring or alienating any interest in the real estate, bridges, culverts, roadbed or similar structures, other than to Nebraska, except in accordance with such final judgment (taking into account all appeals).⁴

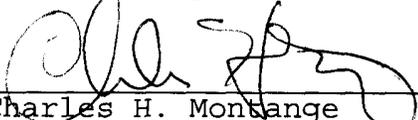
Conclusion. The settlement which this Board's predecessor approved in the ICC decision reported in AB 1 (Sub-no. 249X), served June 2, 1994, represented an equitable resolution of a lengthy dispute between CNW and the State of Nebraska. The key consideration received by the State in that settlement was the assurance that, without further expenditures (aside from a nominal \$10 fee), any portion of the Cowboy Line proposed for abandonment would be preserved under 16 U.S.C. § 1247(d) at the

³ We do not object to a discontinuance authorization; we do object to an abandonment authorization. Under a discontinuance authorization, the corridor will remain intact under this Board's jurisdiction while the parties litigate the contract issues.

⁴ Since this alternative relief goes beyond what STB customarily construes its authority to be to keep corridors intact post-abandonment, we believe the relief advocated in paragraph 1 above is more appropriate.

State's request. NEBKOTA is now seeking to repudiate what the State obtained. This Board should not allow NEBKOTA to maneuver out of its clear obligations as to property it obtained for free. This Board should now allow NEBKOTA to undermine and to destroy a settlement of a dispute before its predecessor agency.

Respectfully submitted,



Charles H. Montange
Counsel for Rails to Trails
Conservancy and Nebraska Game and
Parks Commission
426 N.W. 162d St.
Seattle, Washington 98177
(206) 546-1936
(206) 546-3739

Of counsel for Rails to Trails
Conservancy:

Andrea Ferster, Esq.
General Counsel
Rails to Trails Conservancy
1100--17th St., N.W., 10th Floor
Washington, D.C. 20036

cc. Rex Amack,
Director, NGPC
2200 N. 33d St.
Lincoln, NE 68503-0370

Certificate of Service

The undersigned hereby certifies service of the foregoing by express service, next business day delivery, this 27th day of February 2006 upon Fritz R. Kahn, Esq., 1920 N Street, N.W., Washington, D.C. 20036-1601.

