

January 27, 2020

By Electronic Filing

Re: STB Financial Docket No. 35982, Sub. No.1, Jackson County, Missouri - Acquisition and Operation Exemption - Union Pacific Railroad

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket is the Reply of Jackson County to Landowners' Motion for Declaratory and Injunctive Relief.

If you have any questions, please contact me.

Respectfully submitted,



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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35982 (SUB NO. 1)

**JACKSON COUNTY, MISSOURI
– ACQUISITION AND OPERATION EXEMPTION –
UNION PACIFIC RAILROAD COMPANY**

**VERIFIED NOTICE OF EXEMPTION
PURSUANT TO 49 C.F.R. § 1150.31, *Et. Seq.***

**REPLY TO LANDOWNERS' MOTION FOR
DECLARATORY AND INJUNCTIVE RELIEF**

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Dated January 27, 2020

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**JACKSON COUNTY, MISSOURI
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**REPLY TO LANDOWNERS' MOTION FOR
DECLARATORY AND INJUNCTIVE RELIEF**

Jackson County, Missouri ("Jackson County") through undersigned counsel hereby replies in opposition to the Motion for Declaratory and Injunctive Relief (the "Motion") filed in this proceeding on January 6, 2020 by Jon Kenyon *et al.* ("Landowners").¹

Landowners seek declaratory judgment stating that the Line Sale Agreement between Union Pacific Railroad Company ("UPRR") and Jackson County is null and void, that Jackson County had no right to grant any rights to the Kansas City Area Transportation Authority ("KCATA"), and that the Surface Transportation Board ("STB" or the "Board") does not have jurisdiction over purported rights that Jackson County granted to KCATA. Landowners also seek an injunction to prevent KCATA from doing any "planning, design, development, operation, or management of a future shared commuter rail system or alternative commuter-based transit system" on the subject line, a 17.7 mile rail line in Jackson County, Missouri (the

¹ Landowners include: Jon Kenyon, Dave Haake, Elaine Haake, David Hardinger, Deborah S. Groh, DJJHS Enterprises, LLC, JHB & MEB Enterprises, LLC, David W. Wells, Dawn R. Wells, Current Property Investments, LLC, Nephrite Fund 1, LLC, Douglas Morris, Brenda Morris, Tapan Chaudhuri, and the Estate of William Tomblinson. Jackson County notes that seven of the landowners (Deborah S. Groh, DJJHS Enterprises, LLC, JHB & MEB Enterprises, LLC, David Wells, Dawn Wells, Current Properties Investments, LLC, and Nephrite Fund 1, LLC) were parties to a previous agreement not to oppose the abandonment of the Line.

“Line”). Motion at 4. For the reasons stated below, the Landowners’ Motion for Declaratory and Injunctive Relief should be denied.

Relevant Factual Background

On December 31, 2015, UPRR and Jackson County signed an agreement whereby UPRR agreed to sell and Jackson County agreed to buy the Line (the “Line Sale Agreement”). Jackson County obtaining STB authority for the transaction was a condition precedent to the sale closing, and Jackson County had no rights to possess or occupy the Line prior to closing except for the purpose of conducting pre-closing due diligence.² Jackson County received an exemption from the Board effective on February 4, 2016 (“Exemption Decision”), and the Line Sale Agreement transaction closed on May 2, 2016.

The sale of the Line was effectuated by a quitclaim deed, which is common practice in the sale of rail lines due to the often complex nature of a railroad’s title to property underlying rail lines. Pursuant to the quitclaim deed, UPRR conveyed to Jackson County all of UPRR’s interest in the Line without identifying the nature of that interest.³ This is a common practice in such conveyances. Jackson County agreed to the terms of the Line Sale Agreement with full knowledge that UPRR may or may not possess fee title to the property underlying the Rail Line.⁴

Jackson County also agreed to cooperate with KCATA on future development of the Line. On January 5, 2016, Jackson County and KCATA entered into an agreement to develop a bicycle/pedestrian trail and a public transportation system on the Line after Jackson County’s

² Line Sale Agreement § 5(f).

³ Line Sale Agreement, §7(a), §9.

⁴ Line Sale Agreement, §1.

acquisition (hereinafter “Cooperative Agreement”).⁵ On February 22, 2017, Jackson County and KCATA entered into a “Maintenance and Management Program Agreement” that provided that Jackson County would manage the construction and operation of bicycle/pedestrian trail on the right-of-way and KCATA would manage the public transit system on the right-of-way.⁶

Argument

Landowners make a number of arguments in their Motion for Declaratory and Injunctive Relief, many of which are questions of state property and contract law, which the STB has said on many occasions are for the courts to decide. The remaining arguments – that STB did not authorize the transaction between UPRR and Jackson County, that a conspiracy existed to ignore STB regulations, and that Landowners are entitled to an STB injunction against future planning and development by KCATA – have no factual support or legal merit and should be dismissed by the Board.

1. Landowners’ State Property And Contract Law Claims Are Issues for State Courts to Decide

Landowners make a number of claims that depend on state property or contract law. STB has said that state property and contract law issues are for state courts to decide.⁷ Therefore these claims are not a valid basis for the STB declaratory or injunctive relief sought by Landowners.

⁵ See Cooperative Agreement, at 2. The full name of the Cooperative Agreement is the “Cooperative Agreement for Right-of-Way Acquisition for Construction of a Trail System and Future Rail Line for Commuter Service and Other Public Transportation Systems.”

⁶ At least some of the Landowners and Landowners’ counsel have been aware of the existence of the Cooperative Agreement and the Maintenance and Management Agreement since at least October/November of 2018, see Landowners’ Petition for Revocation, Exhibits 9-11 (Oct. 22, 2018) and Jackson County’s Reply, Exhibit A (November 13, 2018), yet waited well over a year to file the present Motion.

⁷ STB consistently abstains from deciding questions of property ownership or contract interpretation that implicate state law because they are “the type of issue best left to the courts.” Holland Park Owner, LLC – Petition for Declaratory Order, FD 36308, slip op. at 3 (STB served Jan. 6, 2020) (regarding the scope of an easement). See also City of Peoria—Adverse Discontinuance—Pioneer Indus. Ry., AB 878, slip op. at 6 (STB served Aug. 10, 2005) (“the Board does not undertake to interpret or enforce operating agreements or contracts. . .”).

Landowners argue that UPRR did not own the right-of-way in fee and therefore could not sell the property to Jackson County. Motion at 3, 9-10, 18-20. The nature of UPRR's interest in the property was described in the sale documents. Any dispute as to the nature of that interest or the propriety of Jackson County acquiring that interest is an issue of state law for court determination. Relatedly, Landowners also allege that Jackson County, with UPRR's assistance "knowingly and intentionally misrepresented various title issues to avoid application of state property laws." Motion at 4-5. Title issues are also questions of state law for state courts to decide.

Landowners assert that because UPRR did not own in the Line in fee, it could not sell the Line to Jackson County, and Jackson County therefore had no rights to transfer to KCATA. Motion at 3-4, 5-9. This line of reasoning depends on the same state contract law issues, and STB does not construe contracts, so there is not a valid basis for STB to grant the requested declaratory relief.⁸

2. Landowners' Claim That The Line Sale Was Not Authorized Is Without Merit

Landowners assert that because the Line Sale Agreement was signed before the exemption became effective, the Line Sale Agreement and the sale of the Line are null and void and the sale of the Line was an abuse of the Board's process. Motion at 2-3. These assertions lack merit. The execution date of the Line Sale Agreement is not relevant. The sale was expressly conditioned on Jackson County obtaining an STB exemption and UPRR and Jackson County consummated the sale after the effective date of the Notice of Exemption.⁹

⁸ Inconsistently, Landowners argue that STB does not have jurisdiction over the agreements between Jackson County and KCATA. Motion at 4-5, 20-23.

⁹ See Line Sale Agreement § 5(f).

3. Landowners' Assertion That There Was a Conspiracy to Ignore The Regulatory Process Is Unfounded

Landowners repeatedly assert that Jackson County conspired with UPRR and KCATA to ignore the STB regulatory process, see Motion at 4-5, 8-9, 13-18, but this assertion is baseless. The STB found that Jackson County's trail construction activities were not consistent with its common carrier obligation and revoked its acquisition exemption. However, Jackson County had STB authority to acquire the Line when it acquired the Line and nothing in the agreements with KCATA is inconsistent with Jackson County's common carrier obligation. Jackson County included its common carrier responsibilities and obligations in the Line Sale Agreement with UPRR as well as the Maintenance and Management Program Agreement with KCATA.¹⁰

4. The Burden for Granting Injunctive Relief to Prevent Future Planning and Development by KCATA Has Not Been Met

Landowners requested that STB issue an injunction preventing KCATA from further "any planning, design, development, operation, or management activities" on the Line pursuant to the Cooperation Agreement and Maintenance Agreement. Injunctions may be granted when: (1) movant is likely to prevail on the merits of any challenge to the action sought to be preliminarily enjoined; (2) movant will be irreparably harmed in the absence of the requested relief; (3) issuance of the injunction will not substantially harm other parties; and (4) granting the injunction is in the public interest. See, e.g., Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

The motion for injunction fails to meet the burden of any element required for injunctive relief. Landowners' claims are all questions for state courts to decide or otherwise lack evidence or legal merit, and therefore Landowners are not likely to prevail on the merits.

¹⁰ See Line Sale Agreement §5 (f) and Recitals section of Maintenance and Management Agreement.

Landowners state that they will be irreparably harmed without a stay “because a property interest will be taken from them without compensation...” Motion at 12. Landowners’ alleged damages are money so there is no alleged irreparable harm.¹¹ Additionally, it is in the public interest for the agreements between KCATA to be implemented to facilitate recreation and transit in the region pursuant to the agreements, and those served by the agreements would be substantially harmed by an injunction.

¹¹ The Board has consistently held that monetary or economic loss does not constitute irreparable harm. See, e.g. Union Pacific Railroad—Petition for Declaratory Order and Preliminary Injunction, FD 36197 (STB served June 29, 2018); Kessler—Pet. for Injunctive Relief, FD 35206, slip op. at 5 (STB served June 12, 2009).

Conclusion

For the reasons stated above, the Landowners' motion for injunctive and declaratory relief should be denied.

Respectfully submitted,



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Dated: January 27, 2020

Certificate of Service

I, Carolyn Kraska, hereby certify that on January 27, 2020, a true and correct copy of Jackson County's Reply to Landowners' Motion for Declaratory and Injunctive Relief was sent via electronic mail to the parties listed on the Service List for FD 35982:

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A handwritten signature in cursive script, reading "CG Kraska", is written over a horizontal line.

Carolyn G. Kraska