

ENTERED
Office of Proceedings
February 3, 2020
Part of
Public Record

**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 48 C.F.R. § 1150.31, *Et. Seq.***

**LANDOWNERS' MOTION FOR PERMISSION TO FILE
A SUR-REPLY IN FURTHER SUPPORT OF THE LANDOWNERS'
MOTION FOR DECLARATORY AND INJUNCTIVE RELIEF**

**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 PROPERTIES INVESTMENTS, LLC
NEPHRITE FUND 1, LLC
DOUGLAS MORRIS
BRENDA MORRIS
TAPAN CHAUDHURI
ESTATE OF WILLIAM TOMBLINSON**

Stewart, Wald & McCulley, LLC
Elizabeth A. McCulley
Thomas S. Stewart
2100 Central St., Suite 22
Kansas City, MO 64108
Tel: (816) 303-1500
Fax: (816) 527-8068
mcculley@swm.legal
stewart@swm.legal
Counsel for Landowners

Dated: February 3, 2020

**LANDOWNERS' MOTION FOR PERMISSION TO FILE A SUR-REPLY
IN FURTHER SUPPORT OF THE LANDOWNERS' MOTION
FOR DECLARATORY AND INJUNCTIVE RELIEF**

The Landowners are Plaintiffs in the case of *Kenyon, et al. v. United States*, which is a Rails-to-Trails case pending before the Court of Federal Claims. The Landowners filed their Motion for Declaratory and Injunctive Relief on January 6, 2020. Jackson County and Union Pacific filed their Replies to the Landowners' Motion for Declaratory and Injunctive Relief on January 27, 2020.

Although 49 C.F.R. § 1104.13(c) does not ordinarily allow a Sur-Reply by the Landowners to the Replies filed by Jackson County and Union Pacific, the actual Replies filed by Jackson County and Union Pacific contain a number of purported statements of fact and law that are patently false. As a result, the Landowners request that they be allowed to file a Sur-Reply to Jackson County and Union Pacific's Replies. A copy of the Landowners' Sur-Reply to Jackson County and Union Pacific Replies is attached hereto as Exhibit A for the Board's consideration.

Stewart, Wald & McCulley, LLC

By: /s/ Elizabeth A. McCulley

Elizabeth A. McCulley
Thomas S. Stewart
2100 Central St., Suite 22
Kansas City, MO 64108
Tel: (816) 303-1500
Fax: (816) 527-8068
mcculley@swm.legal
stewart@swm.legal

COUNSEL FOR PETITIONERS/LANDOWNERS

CERTIFICATE OF SERVICE

I certify that I have this day served copies of this document upon all parties of record in this proceeding, by U.S. Mail this 3rd day of February, 2020.

Kevin M. Sheys
Carolyn G. Kraska
Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street NW
Washington, DC 20004

JoAnn Sandifer
Husch Blackwell LLP
190 Carondelet Plaza, Suite 600
St. Louis, MO 63105

Michael J. Kelly
Christina M. Pyle
Husch Blackwell LLP
4801 Main Street, Suite 1000
Kansas City, MO 64112
ATTORNEYS FOR JACKSON COUNTY, MISSOURI

Jerry D. Riffel
Elizabeth Hatting
Lathrop Gage LLP
2345 Grand Blvd., Suite 2200
Kansas City, MO 64108-2618
ATTORNEYS FOR KANSAS CITY AREA TRANSPORTATION AUTHORITY

Richard Welsh
227 Bellevue Way NE, PMB 719
Bellevue, WA 98004

Frank J. Abbott
1006 Grand Boulevard, Apt. # 511
Kansas City, MO 64106
COMMUNITY OVERSIGHT PARTNER

Jeremy Berman
1400 Douglas Street, Stop 1580
Omaha, NE 68179
ATTORNEY FOR UNION PACIFIC RAILROAD COMPANY

/s/ Elizabeth A. McCulley

**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 48 C.F.R. § 1150.31, *Et. Seq.***

**LANDOWNERS' SUR-REPLY IN FURTHER SUPPORT
OF THE LANDOWNERS' MOTION FOR DECLARATORY
AND INJUNCTIVE RELIEF**

**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 PROPERTIES INVESTMENTS, LLC
NEPHRITE FUND 1, LLC
DOUGLAS MORRIS
BRENDA MORRIS
TAPAN CHAUDHURI
ESTATE OF WILLIAM TOMBLINSON**

Stewart, Wald & McCulley, LLC
Elizabeth A. McCulley
Thomas S. Stewart
2100 Central St., Suite 22
Kansas City, MO 64108
Tel: (816) 303-1500
Fax: (816) 527-8068
mcculley@swm.legal
stewart@swm.legal
Counsel for Landowners

Dated: February 3, 2020

I. INTRODUCTION

The Landowners' Motion for Declaratory and Injunctive Relief was filed on January 6, 2020. Both Jackson County and Union Pacific filed Replies on January 27, 2020. Unfortunately, since the Replies filed by Jackson County and Union Pacific contain several misleading and irrelevant statements and completely ignore the pertinent issues presented in the Landowners' Motion for Declaratory and Injunctive Relief, this sur-reply is necessary.

II. THE VARIOUS ARGUMENTS ADVANCED BY JACKSON COUNTY ACTUALLY CONFIRM THEIR SCHEME TO AVOID THE BOARD'S PLENARY AND EXCLUSIVE JURISDICTION OVER ABANDONMENTS

Jackson County's Reply to the Landowners' Motion for Declaratory and Injunctive Relief was 5 pages in length and Union Pacific submitted a 2-page letter. Jackson County and Union Pacific basically attempted to present 3 arguments in response: (1) that the Line Sale Agreement was contingent on the transfer exemption process and therefore was a legitimate transaction under the Board's policies and procedures; (2) the sale of the Line was effectuated by a quit claim deed, which somehow legitimizes the sale transaction; and (3) a number of state law issues remain (and the Landowners agree) so the Board should not be concerned with the federal regulatory issues that fall directly and squarely under the Board's plenary and exclusive jurisdiction over abandonments. Frankly, neither response, and none of the arguments, are responsive to the Landowners' motion—it is patently obvious that the entire scheme was specifically designed to manipulate all aspects of the Board's jurisdiction to effectuate a sale without approval, to act as if the sale without approval is legitimate because the sale was contingent on closing the transfer of the Line without telling the Board about the sale, by utilizing the process for the transfer exemption to avoid both the Board's processes and procedures for a sale transaction and the Board's processes

and procedures for railbanking, and to make a mockery of all of the Board's rules and regulations pertaining to the Board's plenary and exclusive jurisdiction over railroad abandonments.

A. The Argument Advanced by Both Jackson County and Union Pacific, That the Line Sale Agreement Was Contingent Upon the Board's Approval of the Transfer of the Common Carrier Obligation, Totally Misses the Point

Jackson County's Reply sets forth the argument that the Line Sale Agreement contained a provision that it was contingent upon "obtaining STB authority for the transaction"¹ and, since the Line Sale Agreement transaction closed after Jackson County received the exemption from the Board, the transaction as structured was purportedly completely appropriate. Similarly, Union Pacific's Reply argues that "the Landowners misrepresent the facts relating to Union Pacific's sale of the Line to Jackson County"² and that the Board had knowledge of the transaction and actually approved the transaction because the Line Sale Agreement "expressly made Board approval a condition precedent to the sale."³ The argument advanced by Jackson County and Union Pacific is completely circular.

The argument boldly but incorrectly attempts to conflate the Board's knowledge and approval of the transfer of Union Pacific's common carrier obligation through the exemption process with the Board's lack of knowledge and approval of the sale of the Line while specifically, purposefully, and intentionally avoiding the Board's plenary and exclusive jurisdiction over abandonments. Although the Board obviously possessed the knowledge of the transfer of the common carrier obligation, the Board was never informed about the Line Sale Agreement and, in fact, neither Jackson County or Union Pacific ever mentioned it to the Board or filed it with the Board. The Board's procedures were misused in several ways—Jackson County and Union Pacific

¹ See Jackson County's Reply at 3.

² See Union Pacific's Reply at 1.

³ *Id.*

teamed to make their true intentions by utilizing the transfer exemption process without ever informing the Board about the Line Sale Agreement and attempted to avoid the Board's rules and regulations pertaining to abandonment and railbanking when it was always their intention to construct a hiking and biking trail instead of continuing the fiction of operating as a common carrier.

The entire point of the Landowners' motion is that the scheme was intentionally developed to avoid the Board's plenary and exclusive jurisdiction over abandonments. Simply put, the Board approved the transfer of Union Pacific's common carrier obligation to Jackson County, based on Jackson County's misrepresentations concerning their intentions, and did not approve the sale of the corridor to Jackson County for either railbanking or light rail.⁴ The entire scheme was to avoid the Board's plenary and exclusive jurisdiction over abandonments, which is why the Board was never informed of the Line Sale Agreement itself.

The scheme effectuated by Jackson County and Union Pacific actually makes a mockery of the Board's plenary and exclusive jurisdiction over railroad abandonments on several levels. In essence, the scheme utilized the Board's processes and procedures over transfers to avoid the processes and procedures established by railbanking, which is what they really wanted, without even informing the Board of the Line Sale Agreement, which also required approval by the Board. This is what Jackson County and Union Pacific really did—Union Pacific transferred their common carrier obligation to a non-railroad for over \$50,000,000 so the non-railroad could act like a railroad in order to avoid the abandonment regulations that exist under the plenary and

⁴ Jackson County's Reply curiously notes that 7 of the Landowners were parties to a previous agreement not to oppose the abandonment of the line. See Jackson County's Reply at 1, fn. 1. This statement, although false, actually demonstrates the entire problem—Jackson County conflates their scheme relating to the transfer of the common carrier obligation as perfectly legitimate even though it was their obvious intent to avoid the Board's policies and procedures with respect to abandonment. The Landowners have always told Jackson County that the correct procedure was to follow the Board's regulations pertaining to railbanking, which they have now finally done when they got caught and their scheme started to unravel.

exclusive jurisdiction of the Board. If allowed to stand, Jackson County and Union Pacific are making a mockery of the Board's rules and regulations pertaining to transfers, railbanking, and sales of railroad lines.

B. Jackson County's Attempted Reliance on the Ultimate Quit Claim Deed is a Sham

Jackson County's second argument relates to the fact that the ultimate sale of the Line, which they did not tell the Board about, was effectuated by a quit claim deed, which made everything okay because the issuance of a quit claim deed is a common practice:

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. 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.

See Jackson County's Reply at 3 (footnotes omitted).

This entire argument by Jackson County demonstrates the wrongful conflation of several issues and is circular in nature. First, Jackson County states that the "sale of the Line was effectuated by a quit claim deed" when Jackson County never informed the Board that the Line was being sold. Second, Jackson County states that it is a common practice to utilize quit claim deeds because the railroad's title to property underlying rail lines is often complex in nature—quit claim deeds are always used in the railbanking process so the ultimate trail operator knows that the railroad is not representing the nature of the property interest. Third, remarkably, Jackson County candidly admits that Union Pacific "may or may not possess fee title to the property," which is critical in the abandonment process or when the railbanking process is correctly utilized. This entire argument advanced by Jackson County further demonstrates the conflation of a sale

transaction with a transfer transaction and a sale transaction with a railbanking transaction. Simply put, Jackson County has now candidly admitted that Union Pacific did not own all of the corridor in fee, which is critical in a railbanking transaction, while they tried to “acquire” the fee and acted as if they acquired the fee without even telling the Board that they were acquiring the corridor through a sale, and represented to the outside world that they did “acquire” the Line in fee in an attempt to blatantly ignore or actually destroy the Landowners’ property rights.

Jackson County also attempts to completely gloss over their inappropriate agreements with KCATA as if they actually did “acquire” the Line by and through the quit claim deed with Union Pacific. Jackson County shamelessly acknowledges that they “agreed to cooperate with KCATA on future development of the Line”⁵ and entered into the “Cooperative Agreement” and the “Maintenance and Management Program Agreement” without ever addressing their purported legal right to do so. In other words, Jackson County continues the conflation process by acting as if they actually “acquired” the Line through the Line Sale Agreement, which was not approved by the Board, and then entered in to agreements with KCATA that the Board was not informed about and has no jurisdiction over in any event.⁶

C. Jackson County’s Attempt to Label the Landowners’ Motion as a State Property Law Issue is Misguided at Best

Jackson County attempts to recast issues related to the Board’s plenary and exclusive jurisdiction over abandonments as merely state property law or contract law issues that are issues

⁵ See Jackson County’s Reply at 3-4.

⁶ Jackson County again makes the curious argument that “at least some of the Landowners and Landowners’ counsel have been aware of the existence of the Cooperative Agreement and the Maintenance and Management Program Agreement since at least October/November of 2018. See Jackson County’s Reply at 4, fn. 6. So what? It took 3 years to get the exemption revoked, it then took a year for Jackson County to actually follow the law with respect to railbanking, which the Landowners’ counsel has been telling Jackson County for 4 years, and it might take a while longer to correct Jackson County’s scheme to avoid making a mockery of the Board’s processes, procedures, and regulations.

for state courts to decide.⁷ It is ironic at best for Jackson County to make any arguments in this regard because they have argued for at least 2 years that the Landowners could not maintain any viable causes of action in state court because the entire issue of abandonment is preempted because the Board has plenary and exclusive authority over abandonments.

Now, after losing in both state court and federal court, Jackson County admits that the Landowners have viable state law causes of action against Jackson County, but Jackson County is attempting to avoid all of the arguments made by the Landowners that Jackson County has abused the Board's jurisdiction over abandonments, which is the federal regulatory law issue, by claiming that all of the issues raised by the Landowners belong in state court. The Landowners firmly and strongly acknowledge that they have state law causes of action against Jackson County, but they also know the difference between those state law causes of action and the motion for declaratory and injunctive relief now pending before the Board based on the Board's plenary and exclusive jurisdiction over abandonments.

The first misguided argument by Jackson County pertains to the conflation of "title" issues involved with the purported sale of the Line from Union Pacific to Jackson County. Jackson County states that the "Landowners argue that UPRR did not own the right-of-way in fee and therefore could not sell the property to Jackson County."⁸ In this context, Jackson County is blatantly conflating the state law property issues with the purported sale of the property to Jackson County, which was not approved by the Board, and then states that the "Landowners also allege that Jackson County, with UPRR's assistance 'knowingly and intentionally misrepresented various title issues to avoid application of state property laws.'"⁹ The state law property issues that Jackson

⁷ See Jackson County's Reply at 4-6.

⁸ *Id.* at 5.

⁹ *Id.*

County purportedly acquired in the sale from UPRR are definitely state law property issues, which federal courts interpret all the time in the context of railbanking, but the misrepresentations and scheme relating to the transfer of the common carrier obligation, the failure to even notify the Board of the sale, and the avoidance of the abandonment process and railbanking under the Trails Act are unquestionably issues for the Board's determination.

The most incredible statement and argument made by Jackson County is that the "Landowners' claim that the Line Sale was not authorized is without merit."¹⁰ This entire argument by Jackson County, and Union Pacific too, totally misses the point. In fact, Jackson County's statement that "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," actually proves Jackson County's attempt to make a mockery of the Board's processes and procedures. This is no different than Jackson County saying their exemption should not be revoked solely because the Board was aware of their plans to construct a hiking and biking trail. Jackson County has basically admitted that the sale, which was never brought to the Board's attention, was expressly conditioned on the receipt of the transfer of Union Pacific's common carrier obligation, which was approved in place of telling the Board about the Line Sale Agreement, and the entire scheme was developed to avoid the abandonment process so that the Line could properly be railbanked under the Board's regulations. Jackson County's purported common carrier obligation received through the exemption process was revoked due to the fact that Jackson County misrepresented key facts to the Board and the Line Sale Agreement, which was never brought to the Board's attention and was never approved, and the side agreements with KCATA, must be revoked for exactly the same reasons.

¹⁰ *Id.*

Finally, Jackson County states that the “Landowners’ assertion that there was a conspiracy to ignore the regulatory process is unfounded.”¹¹ The exact opposite is actually true. Once again, Jackson County states that the Board authorized Jackson County “to acquire the Line”¹² when, in actuality, Jackson County merely acquired Union Pacific’s common carrier obligation under the transfer procedures. Jackson County’s attempt to expand what actually happened to what they wanted to happen, the actual sale of the Line, was never brought to the Board’s attention and certainly was not approved by the Board. Jackson County merely utilized the Board’s processes and procedures to acquire Union Pacific’s common carrier obligation, but that approval by the Board is not interchangeable with the requirement that an actual sale of the Line must be approved by the Board. It is open and obvious that Jackson County attempted an end run around all of the Board’s procedures by utilizing the transfer exemption instead of an actual sale on the front end and by utilizing the transfer exemption to avoid the railbanking process on the back end. The fact that Jackson County is now properly pursuing the railbanking provisions under the Trails Act¹³ does not change anything with respect to the fact that the Board never authorized the sale of the Line either before, during, or after the exemption process.

III. CONCLUSION

For the reasons stated, the Landowners Motion for Declaratory and Injunctive Relief should be granted.

Stewart, Wald & McCulley, LLC

By: /s/ Elizabeth A. McCulley
Elizabeth A. McCulley
Thomas S. Stewart
2100 Central St., Suite 22
Kansas City, MO 64108

¹¹ *Id.* at 6.

¹² *Id.*

¹³ The Board issued its Decision and Notice of Interim Trail Use on January 21, 2020.

Tel: (816) 303-1500
Fax: (816) 527-8068
mcculley@swm.legal
stewart@swm.legal
COUNSEL FOR PETITIONERS/LANDOWNERS

CERTIFICATE OF SERVICE

I certify that I have this day served copies of this document upon all parties of record in this proceeding, by U.S. Mail this 3rd day of February, 2020.

Kevin M. Sheys
Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street NW
Washington, DC 20004

JoAnn Sandifer
Husch Blackwell LLP
190 Carondelet Plaza, Suite 600
St. Louis, MO 63105

Michael J. Kelly
Christina M. Pyle
HUSCH BLACKWELL LLP
4801 Main Street, Suite 1000
Kansas City, MO 64112
ATTORNEYS FOR JACKSON COUNTY, MISSOURI

Jerry D. Riffel
Elizabeth Hatting
Lathrop Gage LLP
2345 Grand Blvd., Suite 2200
Kansas City, MO 64108-2618
ATTORNEYS FOR KANSAS CITY AREA TRANSPORTATION AUTHORITY

Richard Welsh
227 Bellevue Way NE
PMB 719
Bellevue, WA 98004

Frank J. Abbott
1006 Grand Boulevard, Apt. # 511
Kansas City, MO 64106
COMMUNITY OVERSIGHT PARTNER

Jeremy Berman
1400 Douglas Street, Stop 1580
Omaha, NE 68179
ATTORNEY FOR UNION PACIFIC RAILROAD COMPANY

/s/ Elizabeth A. McCulley