

SURFACE TRANSPORTATION BOARD

DECISION

LANDOWNERS—MOTION FOR DECLARATORY ORDER AND INJUNCTIVE RELIEF

Docket No. FD 35982 (Sub-No. 1)

Digest:¹ This decision denies a request by certain landowners that the Board declare null and void several agreements concerning a 17.7-mile rail line in Jackson County, Mo., as well as a request to prohibit activities implementing two of the agreements related to potential future public transportation projects on the line.

Decided: April 23, 2020

On January 6, 2020, 12 landowners (Landowners)² jointly filed a motion for declaratory and injunctive relief concerning a 17.7-mile rail line in Jackson County, Mo. (the Line). The Landowners, who state that they all own land adjacent to and underlying the right-of-way, ask the Board to declare null and void a 2015 agreement for the sale of the Line (the Line Sale Agreement) between Union Pacific Railroad Company (UP) and Jackson County (the County). They also ask the Board to declare null and void two agreements between the County and the Kansas City Area Transportation Authority (KCATA) concerning development of a recreational trail and commuter rail or other transit system on the Line's right-of-way (the KCATA Agreements), and to enjoin any activities in furtherance of the KCATA Agreements. As discussed below, the Landowners' requests will be denied.

BACKGROUND

In 2016, the County received authority through the Board's class exemption process at 49 C.F.R. § 1150.31 to acquire the Line from UP and operate it. See Jackson Cty., Mo.—Acquis. & Operation Exemption—Union Pac. R.R., FD 35982 (STB served Feb. 4, 2016). At that time, the County indicated that it planned to construct a recreational trail along the right-of-

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² The Landowners are Jon Kenyon, David and Elaine Haake, David Hardinger, Deborah S. Groh, DJJHS Enterprises, LLC, JHB & MEB Enterprises, LLC, David W. and Dawn R. Wells, Current Properties Investments, LLC, Nephrite Fund 1, LLC, Douglas and Brenda Morris, Tapan Chaudhuri, and the Estate of William Tomblinson. They claim to own a fee interest underlying the right-of-way as well as adjacent property. (Mot. for Dec. Order and Inj. 4, n.7.)

way but asserted that the trail would not be inconsistent with the provision of freight rail service, that numerous recreational trails run adjacent to active rail lines, and that the County had no plans to remove track for the trail. County Reply 4, 8-9, Jan. 19, 2016, Jackson Cty., Mo.—Acquis. & Operation Exemption—Union Pac. R.R., FD 35982.

In 2018, a subset of the Landowners filed a petition to revoke the County's acquisition and operation exemption. The Board granted the petition to revoke in July 2019, finding that the County's subsequent removal of track from the Line and construction of the trail directly on portions of the railbed itself were not consistent with the acquisition exemption at § 1150.31 it had invoked to acquire and operate the Line. Jackson Cty., Mo.—Acquis. & Operation Exemption—Union Pac. R.R. (July 2019 Decision), FD 35982, slip op. at 6 (STB served July 31, 2019).

On August 12, 2019, the same subset of the Landowners filed a motion in Docket No. FD 35982 asserting that the County was continuing trail construction in the right-of-way and asking the Board to enjoin that construction as inconsistent with the July 2019 Decision. Subsequently, the Board directed the County to cease immediately all trail construction activity within the right-of-way, finding that unless and until the Board authorized the Line's abandonment, a trail condition was imposed, and the Board was notified that an interim trail use/rail banking agreement had been reached, trail construction activities were unlawful. See Jackson Cty., Mo.—Acquis. & Operation Exemption—Union Pac. R.R. (November 2019 Decision), FD 35982, slip op. at 2-3 (STB served Nov. 7, 2019).

Prior to issuance of the November 2019 Decision, on October 4, 2019, the County and UP jointly filed a petition in Docket No. AB 33 (Sub-No. 342X) seeking an exemption under 49 U.S.C. § 10502 to abandon the Line. On November 13, 2019, the County submitted a request for issuance of a notice of interim trail use or abandonment (NITU) providing time to negotiate an agreement for interim trail use/rail banking, and UP later responded that it agreed to negotiate for interim trail use with the County. The Board granted the abandonment exemption, subject to environmental and standard employee protective conditions, and issued the requested NITU. See Union Pac. R.R.—Aban. Exemption—in Jackson Cty., Mo., AB 33 (Sub-No. 342X) (STB served Jan. 21, 2020). On February 20, 2020, UP and the County notified the Board that they had reached an agreement to railbank the Line.

Against this backdrop, the Landowners filed their motion for declaratory order and injunctive relief in this sub-docket on January 6, 2020. Among other things, the Landowners claim that the 2015 Line Sale Agreement is invalid because it was part of a plan to transfer the Line only to convert it into a trail or use it for commuter rail purposes while avoiding the Board's abandonment and interim trail use processes. (Mot. for Dec. Order and Inj. 2-3, 5.) The Landowners further question the validity of the Line Sale Agreement on grounds that the parties entered into it before the County received authority from the Board in 2016 to acquire the Line and operate it, and that they hid the agreement from the Board. (Id.) The Landowners therefore ask the Board to declare the Line Sale Agreement null and void.

The Landowners also seek nullification of the KCATA Agreements (entered into in 2016 and 2017) on grounds that they too were part of the plan to avoid the proper Board processes

(id. at 8-9), and that they improperly fail to recognize the Landowners’ fee interest underlying the right-of-way (id. at 3). The Landowners ask the Board to enjoin the County and KCATA from any “planning, design, development, operation, or management of a future shared commuter rail system or alternative commuter-based transit system on the right-of-way” pursuant to the KCATA Agreements. (Id. at 11.)

UP and the County filed separate responses on January 27, 2020, both opposing the relief sought by the Landowners. The Landowners filed a surreply on February 3, 2020; UP filed a response to the surreply on February 6, 2020, and the County filed a response to the surreply on February 13, 2020.³

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C.2d 675, 675 (1989). The Board will deny the Landowners’ request for a declaratory order voiding the Line Sale Agreement and the KCATA Agreements, as well as their request for injunctive relief, for the reasons given below.

The Line Sale Agreement

The Landowners question the Line Sale Agreement because UP agreed to convey the Line to the County before the County received acquisition authority from the Board.⁴ (Mot. for Dec. Order and Inj. 2.) On reply, both UP and the County note that the Line Sale Agreement made Board approval a condition precedent to the sale closing. (See UP Reply 1, Jan. 27, 2020; County Reply 3, Jan. 27, 2020; see also Mot. for Dec. Order and Inj. Ex. A at 5-6.) It is common for parties, in anticipation of seeking Board authority for a transaction, to enter into an agreement that is contingent upon Board authorization of the conveyance.⁵ Doing so here did not violate 49 U.S.C. § 10901 because the acquisition itself—that is, the closing of the sale transaction—occurred only after the exemption was granted. (County Reply 5, Jan. 27, 2020; Mot. for Dec.

³ While the Board’s regulations do not permit “replies to replies,” 49 C.F.R. § 1104.13(c), in the interest of having a more complete record, the Board will accept these submissions into the record.

⁴ In its verified notice of exemption to acquire and operate the Line, the County stated that it and UP were in the process of finalizing a line sale agreement. County Verified Notice 3, December 23, 2015, Jackson Cty., Mo.—Acquis. & Operation Exemption—Union Pac. R.R., FD 35982. The Landowners’ claim that the County hid the agreement is therefore groundless.

⁵ See, e.g., WRL, LLC—Acquis. & Operation Exemption—City of Tacoma, FD 36341, slip op. at 1 (STB served Sept. 20, 2019) (“WRL states that it has reached an agreement with Tacoma Rail to acquire and operate the Line upon the exemption’s effective date.”).

Order and Inj. Ex. A at 10 (“[T]itle to the Property shall be and remain vested in Seller until Closing.”).)

The Landowners also argue that the Board’s findings in the July 2019 Decision and the November 2019 Decision—that the County misused the Board’s processes and that the County’s 2016 acquisition and operation exemption should be revoked—warrant voiding the Line Sale Agreement. (Mot. for Dec. Order and Inj. 6, 13-14.) The Board did find the County’s ongoing ownership of the Line unlawful following revocation of the 2016 acquisition and operation exemption. November 2019 Decision, FD 35982, slip op. at 2. But, as the Board noted in the July 2019 Decision, “the appropriate path” to convert the Line to a trail is by receiving abandonment authority and a NITU, and then negotiating an interim trail use/railbanking agreement. July 2019 Decision, FD 35982, slip op. at 6. Indeed, the National Trails System Act (Trails Act) specifically authorizes “transfer” or “sale” of railroad rights-of-way for interim trail use. 16 U.S.C. § 1247(d).⁶ And the County and UP have since followed the appropriate process by obtaining abandonment authority and reaching an interim trail use/railbanking agreement pursuant to a NITU.

The Board’s prior decisions in the Land Conservancy case are instructive. There, the Board revoked an exemption permitting the acquisition and operation of a rail line under § 1150.31 where a party (Land Conservancy) had sought to use those procedures to circumvent the Board’s abandonment and Trails Act processes. See Land Conservancy of Seattle & King Cty.—Acquis. & Operation Exemption—Burlington N. & Santa Fe Ry., 2 S.T.B. 673, 677 (1997). At the same time, the Board ordered Land Conservancy to reconvey the rail line to the carrier. Id. On reconsideration, however, and to further both “the public interest as it relate[d] to the future use of the subject line” and “the intent of the parties to the transaction” (Land Conservancy and the carrier), the Board held its reconveyance order in abeyance because it had also authorized the carrier to abandon the line and imposed a deadline by which Land Conservancy or any other party could request a NITU to pursue interim trail use/railbanking under the proper process. See Land Conservancy of Seattle & King Cty.—Acquis. & Operation Exemption—Burlington N. & Santa Fe Ry. (Land Conservancy II), FD 33389 et al., slip op. at 11-13 & n.16, 15 (STB served May 13, 1998) (finding that “reconveyance of the line would not appear to be necessary” depending upon the final disposition of the rail line). The parties ultimately entered into an interim trail use agreement and railbanked the line. See Burlington N. & Santa Fe Ry.—Aban. Exemption—in King Cty., Wash., AB 6 (Sub-No. 380X), slip op. at 1 n.2 (STB served Apr. 5, 2000).

Here, the Board has authorized abandonment and interim trail use negotiations; UP and the County have now railbanked the Line; and the process is consistent with the Trails Act and the Board’s Trails Act procedures, which specifically authorize the transfer or sale of rail lines. Thus, the County and UP now have followed the appropriate processes, and further Board action on the Line Sale Agreement is not necessary. See Land Conservancy II, FD 33389 et al., slip op. at 11-13 & n.16, 15.

⁶ See also 49 C.F.R. § 1152.29(a); Rail Abans.—Use of Rights-of-Way as Trails, 5 I.C.C.2d 370, 372-73 (1989) (explaining that the Trails Act permits a trail operator to “acquire the right-of-way” for interim trail use, including through “an agreement to purchase it”).

The KCATA Agreements

Nor is the propriety of the KCATA Agreements now a matter of concern. It is well settled that use of a railbanked line both for interim trail use and for mass transportation is not inconsistent with the Trails Act. See Union Pac. R.R.—Aban.—in Harris, Fort Bend, Austin, Wharton, & Colo. Ctys., Tex., AB 33 (Sub-No. 156) et al., slip op. at 8 (STB served Jan. 8, 2016) (affirming the Board’s authority to issue trail conditions where right-of-way would be used to support “light rail” and recreational trail use); Balt. & Ohio R.R.—Aban. & Discontinuance of Serv.—in Montgomery Cty., Md., & D.C., AB 19 (Sub-No. 112), slip op. at 2 (ICC served Mar. 2, 1990). The Landowners here have not demonstrated that any commuter rail system developed by the County and KCATA on the Line in the future would be “incompatible” with interim trail use or the potential restoration of freight rail service in the future. See Balt. & Ohio R.R., AB 19 (Sub-No. 112), slip op. at 2; see also CSX Transp., Inc.—Aban. Exemption—in Monroe & Owen Ctys., Ind., AB 55 (Sub-No. 514X), slip op. at 2 (STB served Sept. 30, 1997).

To the extent the Landowners contend that the County lacked sufficient property interests in the right-of-way to enter into the KCATA Agreements, it bears emphasizing that the Board generally does not have jurisdiction over commuter rail operations, including those contemplated by the KCATA Agreements. See 49 U.S.C. § 10501(c)(2)(A); see also Peninsula Corridor Joint Powers Bd.—Pet. for Declaratory Order, FD 35929, slip op. at 2 (STB served July 2, 2015) (“Under 49 U.S.C. § 10501(c)(2)(A) . . . the Board does not have jurisdiction over ‘mass transportation provided by a local government authority,’ a term that includes commuter services.”) (citing N.J. Ass’n of R.R. Passengers—Pet. for Declaratory Order—Princeton Branch, FD 35745 (STB served July 25, 2014)). Thus, even apart from the Board’s historical practice of deferring to courts regarding contract and property issues,⁷ there is no basis on which the Board need address these issues.

Because the Landowners have not demonstrated a basis for challenging the KCATA Agreements, their request for an injunction against the County and KCATA necessarily fails as well. See, e.g., Am. Chemistry Council v. Ala. Gulf Coast Ry., NOR 42129, slip op. at 4 (STB served May 4, 2012) (explaining that a party seeking a preliminary injunction must demonstrate a likelihood of success on the merits).

For the reasons discussed above, the Landowners’ motion for declaratory and injunctive relief will be denied.

⁷ See, e.g., Ingredion Inc.—Pet. for Declaratory Order, FD 36014, slip op. at 4 (STB served Sept. 30, 2016); V&S Ry.—Pet. for Declaratory Order—R.R. Operations in Hutchinson, Kan., FD 35459, slip op. at 7 (STB served July 12, 2012); Allegheny Valley R.R.—Pet. for Declaratory Order—William Fiore, FD 35388, slip op. at 3-4 (STB served Apr. 25, 2011).

It is ordered:

1. The Landowners' submission filed February 3, 2020, UP's submission filed February 6, 2020, and the County's submission filed February 13, 2020, are accepted into the record.
2. The Landowners' motion for a declaratory order and injunctive relief is denied.
3. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.