

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 870X

BUTLER COUNTY, KANSAS—ABANDONMENT EXEMPTION—IN BUTLER
COUNTY, KAN.

Decided: December 6, 2022

In 2004, Butler County, Kansas (County), filed a notice of exemption under 49 C.F.R. part 1152 subpart F—Exempt Abandonments to abandon its entire 10.6-mile rail line between milepost 483.62, at Augusta, and milepost 494.22, near Andover, in Butler County, Kan. (the Line). Notice of the exemption was served and published in the Federal Register on July 2, 2004 (69 Fed. Reg. 40,472). The exemption became effective on August 4, 2004.¹

By decision and notice of interim trail use or abandonment (NITU) served on June 2, 2005, the proceeding was reopened and Butler County Economic Development (BCED) was authorized to negotiate an interim trail use/rail banking agreement with the County for the Line pursuant to § 8(d) of the National Trails System Act, 16 U.S.C. § 1247(d) (Trails Act), and 49 C.F.R. § 1152.29. Because BCED was part of the County, this negotiation necessarily amounted to the County seeking to rail bank its own line. By letter filed on June 3, 2005, BCED notified the Board that BCED and the County had consummated an interim trail use/rail banking agreement for the Line.

By a series of decisions, the Board modified and partly vacated the original NITU served on June 2, 2005, subject to any environmental conditions that remained in effect. First, by decision served on November 5, 2009, the Board issued a replacement NITU substituting the City of Augusta, Kan. (Augusta), as the interim trail sponsor in place of BCED with respect to a 1.58-mile segment of the Line between milepost 483.62 and milepost 485.2. Next, by decision served on April 5, 2010, the Board issued a replacement NITU substituting the City of Andover, Kan. (Andover) as the interim trail sponsor in place of BCED with respect to a three-mile segment of the Line between milepost 491.22 and milepost 494.22. Lastly, by decision served on June 6, 2016, the Board issued a replacement NITU substituting Andover as the interim trail sponsor in place of BCED with respect to a 2.87-mile segment of the Line between milepost 488.35 and milepost 491.22.

On February 22, 2022, BCED and Augusta filed a joint petition requesting that the Board reopen this proceeding, vacate in part the existing NITU, and issue a replacement NITU

¹ By decision served on August 2, 2004, the proceeding was reopened and the exemption was made subject to a salvage-related environmental condition that remains in effect.

substituting Augusta as the interim trail sponsor in place of BCED for the remaining 3.15-mile segment of the Line between milepost 485.2 near Augusta, and milepost 488.35 near Andover. The joint petition is supported by the County.

Pursuant to 49 C.F.R. § 1152.29, Augusta has submitted a statement indicating its willingness to assume full responsibility for: (i) management of the right-of-way; (ii) any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability); and (iii) the payment of any and all taxes that may be levied or assessed against the right-of-way. Augusta also acknowledges that the use of the right-of-way for trail purposes is subject to future reconstruction and reactivation of the right-of-way for rail service.

On March 14, 2022, HMA Properties, LLC (HMA), a property owner in Butler County, filed a reply in opposition to the joint petition. HMA argues that the Board should deny the request to substitute Augusta as the trail sponsor and revoke the NITUs issued for this segment and other segments of the Line.² HMA first argues that Augusta's statement of willingness is defective because it does not comply with 49 C.F.R. § 1152.29(a)(3) in that it does not reference the original abandonment proceeding in the text and does not include a map depicting the right-of-way subject to the NITU. (HMA Reply 4-5, Mar. 14, 2022.) Second, HMA asserts that BCED and the County materially misrepresented the existence of an interim trail use agreement, as HMA argues that BCED and the County did not execute a written agreement establishing trail use/rail banking. (*Id.* at 5.) HMA argues that this error brings the original NITU into question as well as the subsequent substitution of trail sponsors. (*Id.* at 6.) Lastly, HMA argues that various changes to the right-of-way, including the removal of two rail bridges and construction of a flood control levee on the right-of-way, have severed the Line from the national rail system and impede the ability to reactivate rail service. (*Id.* at 7-8.)

On April 4, 2022, Andover, the interim trail sponsor for the adjoining 5.87-mile segment of the Line from milepost 488.35 to milepost 494.22, filed a reply to HMA. Andover asserts that there was no misrepresentation or error regarding the agreement for interim trail use. According to Andover, BCED is a department of the Butler County government, and the trail use agreement was essentially "an agreement with itself." (Andover Reply 3.) Andover also asserts that it is questionable whether HMA has standing to complain about the joint petition because the properties it owns are not adjacent to the 3.15-mile segment of the Line at issue. (*Id.* at 4.) Lastly, Andover argues that while two rail bridges were removed and a flood levee was installed, the right-of-way has not been severed and remains available for future use. (*Id.* at 5.)

On October 11, 2022, Augusta filed a supplement to the joint petition, attaching a new statement of willingness to assume financial responsibility, as well as accompanying maps.

² HMA states that it and other plaintiffs had brought suit in Kansas state court alleging that the County had violated the Kansas Recreational Trails Act (KRTA). (HMA Reply 3.) The Kansas state court found, however, that the plaintiffs failed to establish that the County and Andover (which intervened as an additional defendant) had violated the KRTA and also found that the court lacked subject matter jurisdiction to determine whether the County had met the Board's rail banking requirements or allowed the railroad right-of-way to be severed from the national rail system. (*Id.*, Ex. B at 9-11, 14.)

(Augusta Suppl., Ex. A.) Augusta also states that the Governor of Kansas announced that Augusta was selected to receive federal funds to construct a bridge over U.S. Highway 54/400, where a rail bridge had previously been removed on the western end of the right-of-way. (Augusta Suppl., Ex. B.)

On October 26, 2022, HMA replied to Augusta's supplement, acknowledging that Augusta's revised statement of willingness "substantially complies" with the Board's regulations but arguing that the funding award does not address whether Augusta could cover its share of funding or if the project contemplates replacement of a bridge that could support rail service. (HMA Surreply 1-2, Oct. 26, 2022.) HMA also reiterates arguments raised in its March 14, 2022 reply, including alleging certain physical gaps or obstacles along the Line that HMA describes as examples of "severance" that would prevent the reactivation of rail service. (*Id.* at 2.)³

DISCUSSION AND CONCLUSIONS

The Trails Act permits a railroad to "preserve established railroad rights-of-way for future reactivation of rail service" while allowing the right-of-way to be transferred to a third party sponsor for interim use as a trail. 16 U.S.C. § 1247(d); *see Birt v. STB*, 90 F.3d 580, 583 (D.C. Cir. 1996). The statute expressly provides that "such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. § 1247(d); *see Preseault v. ICC*, 494 U.S. 1, 6 (1990). The Board's role under the Trails Act is ministerial. *See Citizens Against Rails-to-Trails v. STB*, 267 F.3d 1144, 1151-52 (D.C. Cir. 2001); *Goos v. ICC*, 911 F.2d 1283, 1295 (8th Cir. 1990). In administering the Trails Act, the Board need only be assured that the Trails Act has been properly invoked and that the statutory requirements regarding interim trail use/rail banking and the trail sponsor's assumption of financial and managerial responsibility are met. *See Jost v. STB*, 194 F.3d 79, 89 (D.C. Cir. 1999); *Goos*, 911 F.2d at 1295; *Ga. Great S. Div.—Aban. & Discontinuance Exemption—Between Albany & Dawson, in Terrell, Lee, & Dougherty Cntys., Ga.*, AB 389 (Sub-No. 1X), slip op. at 3 (STB served Apr. 16, 1999).

Moreover, the Board's primary concern once parties reach an agreement for interim trail use/rail banking is that the statutory conditions under the Trails Act not be compromised and that nothing occur that would preclude a railroad's right to reassert control over the right-of-way at some future time to reactivate rail service. *Sunflower Rails-Trails Conservancy, Inc.—Pet. for Declaratory Ord.—Sale of Railbanked Right-of-Way*, FD 36034, slip op. at 4 (STB served Feb. 23, 2017) (citing *Idaho N. & Pac. R.R.—Aban. & Discontinuance Exemption—in Washington & Adams Cntys., Idaho*, 3 S.T.B. 50 (1998)).

Here, HMA has provided no basis for denying the request to substitute Augusta for BCED as the interim trail sponsor for the portion of the Line between milepost 485.2 and milepost 488.35 or for revoking the other NITUs on the Line.

³ In the interest of compiling a complete record, Andover's reply and HMA's October 26, 2022 reply will be accepted. *See City of Alexandria, Va.—Pet. for Declaratory Ord.*, FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing a reply to a reply "[i]n the interest of compiling a full record").

First, the revised statement of willingness included in Augusta's October 11, 2022 supplement complies with the requirements of 49 C.F.R. § 1152.29, as HMA itself concedes.

Further, the Board finds no misrepresentation regarding the agreement establishing trail use between BCED and the County. In its June 2, 2005 decision, the Board acknowledged that the County sought to rail bank its own line.⁴ As the Board recently explained, the negotiations and procedures that normally take place to establish interim trail use as contemplated under 49 C.F.R. § 1152.29 (such as reaching an agreement) may not be needed when the owner of the line is itself the trail sponsor, provided that the entity notifies the Board that it is implementing interim trail use and includes all information otherwise required under 49 C.F.R. § 1152.29(h). See Great Redwood Trail Agency—Aban. Exemption—in Mendocino, Trinity, & Humboldt Cntys., Cal., AB 1305X, slip op. at 6 (STB served Oct. 24, 2022). Here, the County notified the Board on June 3, 2005, that it had entered into a trail use agreement with BCED, as a department of the Butler County government. Moreover, the requirements of § 1152.29(h), including that the parties provide a map, a description of the line, and a certification, did not come into effect until 2012. Nat'l Trails Sys. Act & R.R. Rights-of-Way, EP 702, slip op. at 12 (STB served Apr. 30, 2012). Therefore, that information did not need to be included with the County's notification at the time it was filed, although in fact, much of that information had already been provided to the Board by BCED and the County in its previous filings (which included a map, a description of the line, and a statement of willingness). Thus, HMA has not shown that the Trails Act was improperly invoked or that the statutory or regulatory requirements have not been met.

Lastly, while HMA argues that the removal of two rail bridges and the construction of a flood control levee preclude reactivation of the right-of-way for rail service, HMA has failed to show that the Line has been severed from the national rail network. The Board has previously found that the physical alteration of a right-of-way, such as the removal of tracks or rail structures, including bridges, does not sever the Line from the national rail network for purposes of Board jurisdiction, nor does it preclude the reactivation of a rail banked line. See Wheeler—Pet. for Declaratory Order—Rail Line in Erie Cnty., Pa., FD 35082 et al., slip op. at 7-8 (STB served Aug. 27, 2008); see also Zorzi—Pet. for Declaratory Order, FD 36016, slip op. at 6 (STB served Jan. 31, 2017) (“Removal of tracks alone does not mean that a line is severed from the national rail network.”); Honey Creek R.R.—Pet. for Declaratory Ord., FD 34869 et al., slip op. at 6-7 (STB served June 4, 2008). Because the Line has been rail banked, it is inactive but legally still exists and remains within the Board's jurisdiction, even if there have been physical alterations to the right-of-way. As the Board has explained, “de facto” abandonments are not allowed—in order for a rail line to be abandoned, Board authority for the abandonment must be obtained and the abandonment thereafter consummated. Zorzi, FD 36016, slip op. at 5. Moreover, the record here does not establish that the various changes to the Line would “make the reinstatement of rail service physically impossible.” Chelsea Prop. Owners—Aban.—

⁴ See Butler Cnty., Kan.—Aban. Exemption—in Butler Cnty., Kan., AB 870X, slip op. at 1 & n.3 (STB served June 2, 2005) (noting that a railroad is permitted to rail bank its own line where the railroad represents that the property is suitable for interim trail use and that it will assume financial responsibility for the line) (citation omitted).

Portion of the Consol. Rail Corp.'s W. 30th St. Secondary Track in N.Y., N.Y., AB 167 (Sub-No. 1094A), slip op. at 9 (STB served June 13, 2005). Indeed, while HMA asserts that a flood control levee has been constructed that severs the Line from the national rail system, it also acknowledges that “stoplogs” or gates could be constructed to allow rail service across a flood control levee. (HMA Reply 7, Mar. 14, 2022.) As the Board has previously explained, if reactivation of the Line is actually sought in the future, the interim trail user may need to take “whatever corrective actions are necessary to permit the reinstitution of freight service.” Chelsea Prop. Owners, AB 167 (Sub-No. 1094A), slip op. at 9 (citing Balt. & Ohio R.R.—Aban. & Discontinuance of Serv.—in Montgomery Cnty., Md., & D.C., AB 19 (Sub-No. 112) (ICC served Mar. 2, 1990)). Ultimately, because no party is seeking reactivation of rail service at this time, there is no need to address what restoration may need to be done on the Line.

Because Augusta’s request, as supplemented, complies with the requirements of 49 C.F.R. § 1152.29, a replacement NITU will be issued to substitute Augusta as the trail sponsor for the segment of Line between milepost 485.2 near Augusta and milepost 488.35 near Andover.

It is ordered:

1. This proceeding is reopened.
2. The NITU served on June 2, 2005, is modified to vacate from that NITU the segment of the right-of-way between milepost 485.2 near Augusta and milepost 488.35 near Andover.
3. A replacement NITU applicable to Augusta as interim trail sponsor is issued for the segment of the right-of-way between milepost 485.2 and milepost 488.35, effective on the service date of this decision and notice.
4. The new trail sponsor is required to assume, for the term of the agreement, full responsibility for (i) management of the right-of-way; (ii) any legal liability arising out of the transfer or use of the right-of-way (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability); and (iii) the payment of any and all taxes that may be levied or assessed against the right-of-way.
5. Interim trail use/rail banking is subject to the future restoration of rail service and to the new sponsor’s continuing to meet the financial obligations for the right-of-way.
6. If the trail sponsor intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.
7. HMA’s request to deny the substitution of interim trail sponsor is denied.
8. This decision and notice is effective on its service date.

By the Board, Mai T. Dinh, Director, Office of Proceedings.