

BEFORE THE SURFACE AND TRANSPORTATION BOARD

STB DOCKET NO. AB ~~1032 X~~

1032 (Sub-No. 2)

**NEBRASKA, KANSAS & COLORADO RAILWAY, LLC—IN DECATUR, NORTON
AND PHILLIPS COUNTIES, KANSAS AND HARLAN COUNTY, NEBRASKA**

**LANDOWNERS' MOTION FOR PERMISSION TO FILE A SUR-REPLY
IN FURTHER SUPPORT OF THE LANDOWNERS' MOTION 248192
FOR DECLARATORY AND INJUNCTIVE RELIEF**

ENTERED
Office of Proceedings
July 15, 2019
Part of
Public Record

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Dated: July 15, 2019

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

The Landowners are Plaintiffs in the cases of *Flying S. Land Co. v. United States*, and *Dawson v. United States*, which are Rails-to-Trails cases pending before the Court of Federal Claims. The Landowners filed their Motion for Declaratory and Injunctive Relief on June 7, 2019. The railroad, Nebraska, Kansas & Colorado Railway ("NKCR"), filed their Reply to the Landowners' Motion for Declaratory and Injunctive Relief on July 1, 2019.

Although 49 C.F.R. § 1104.13(c) does not ordinarily allow a Sur-Reply by the Landowners to NKCR's Reply, the actual Reply filed by NKCR contains 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 NKCR's Reply. A copy of the Landowners' Sur-Reply to NKCR's Reply is attached hereto as Exhibit A for the Board's consideration.

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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 15th day of July, 2019.

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

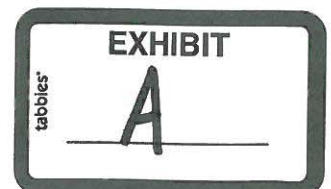
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REPLY AND IN FURTHER SUPPORT OF THE LANDOWNERS'
MOTION FOR DECLARATORY AND INJUNCTIVE RELIEF**

The Landowners are Plaintiffs in the cases of *Flying S. Land Co. v. United States*, Case No. 15-1253L, and *Dawson v. United States*, Case No. 15-1268, which are Rails-to-Trails cases pending in the Court of Federal Claims before the Honorable Marian Blank Horn. The Landowners filed their Motion for Declaratory and Injunctive Relief before the Board on June 7, 2019. The railroad, Nebraska, Kansas & Colorado Railway ("NKCR"), filed its Reply to the Landowners' Motion for Declaratory and Injunctive Relief on July 1, 2019. This Sur-Reply to NKCR's Reply to the Landowners' Motion for Declaratory and Injunctive Relief is necessary because NKCR's Reply contains numerous misstatements of fact and law.

A. INTRODUCTION

The Landowners' Motion for Declaratory and Injunctive Relief contained all of the pertinent information regarding the procedural history and present posture of NKCR's abandonment of the right-of-way at issue and contained actual allegations, with accompanying exhibits, that demonstrate how NKCR is attempting to transfer the right-of-way to LI RR LLC without seeking approval from the Board. Specifically, as set forth in the Landowners' Exhibit D, it is evident that (1) NKCR's scheme consisted of the recruitment of several individuals who formed an entity called LI RR LLC; (2) LI RR LLC already acquired a quit claim deed from NKCR pertaining to the right-of-way; (3) LI RR LLC was acting as NKCR's broker to coerce Landowners into signing contracts whereby the Landowners purchased their own land back from LI RR LLC in return for NKCR's promise to abandon the right-of-way; (4) once the Landowners paid LI RR LLC, they would receive a quit claim deed from LI RR LLC for the portion of their property within NKCR's abandoned right-of-way; and (5) the money received from the Landowners by LI RR

LLC was then to be transmitted back to NKCR by LI RR LLC.¹ NKCR's Reply either attempts to avoid the underlying facts completely or grossly misstates these facts.

**B. NKCR HAS ALREADY SOUGHT AND OBTAINED ABANDONMENT
AUTHORITY FROM THE BOARD**

The first misstatement made by NKCR alleges that "NKCR is in the process of seeking to abandon a number of rail lines and to then transfer the right-of-way to LI RR LLC."² This statement is grossly misleading in at least three ways. First, NKCR is not "in the process of seeking to abandon" the line and then transfer whatever interest it owns; but, instead, it has already sought and received permission to abandon the line from this Board, which issued a Notice of Interim Trail Use or Abandonment on October 22, 2015—rather, NKCR is **waiting** to consummate the abandonment until its scheme with LI RR LLC is complete. Second, NKCR's statement insinuates that NKCR will formally consummate abandonment of the line before it transfers its interest in the line to LI RR LLC—that statement is false because NKCR has apparently already transferred its interest in the line to LI RR LLC. Third, NKCR cannot transfer any portion of the right-of-way to LI RR LLC without the Board's approval.

Further, NKCR's statements to the effect that it is only attempting to transfer what it owns in fee are contrary to the quit claim deed it has already issued to LI RR LLC. The fact that NKCR has now lied to the Board about the transfer to LI RR LLC is evidenced by the fact that all of the original source conveyances to the railroad were adjudicated in *Flying S* and *Dawson* and Judge Horn has already ruled that NKCR now only possesses an easement for railroad purposes and not the fee estate. In fact, the Department of Justice stipulated that NKCR only held limited easement rights in the portions of the right-of-way traversing these Plaintiffs-Landowners' property.

¹ See Landowners' Mot. at 7-9; see also Exhibit D at 1-2, 7-9.

² See NKCR's Rep. at 3.

C. NKCR HAS ALREADY ISSUED A QUIT CLAIM DEED CONVEYING ITS INTEREST IN THE RIGHT-OF-WAY TO A NON-RAILROAD ENTITY

The second misstatement by NKCR is that “NKCR has under consideration the opportunity to transfer whatever interests it has in the right-of-way to LI RR LLC” and that “NKCR will do so only in a lawful manner.”³ This statement is false for several reasons. First, NKCR acts as if the transaction is only “under consideration” when, in fact, the quit claim deed from NKCR has already been issued to LI RR LLC and the transaction is almost completed. Second, although NKCR’s statement that it is only planning to transfer “whatever interest it has” is true with respect to the quit claim deed that has already been issued (as a matter of law), it is inconsistent with their later statement that it is only going to transfer that portion of the right-of-way in which it owns the fee estate in the land. Third, NKCR’s statement that it will transfer whatever interest it possesses “only in a lawful manner” is false because it has already transferred whatever interest it possesses by and through the quit claim deed to LI RR LLC without properly or lawfully seeking and receiving authority from the Board.

D. NKCR’S TRANSFER OF ALL OF ITS INTEREST IN ITS RIGHT-OF-WAY TO LI RR LLC REQUIRES BOARD APPROVAL

The third misstatement by NKCR is that the transfer from NKCR to LI RR LLC does not require Board approval under 49 C.F.R. § 1150.31 because 49 C.F.R. § 1150.31 “would be applicable only if NKCR transferred an **active** right-of-way to LI RR LLC and not the transfer of NKCR’s interest in the right-of-way after the abandonment is consummated.”⁴ This statement by NKCR is a gross misstatement of the facts and gross misstatement of the law. First, the transfer from NKCR to LI RR LLC has already occurred, so § 1150.31 is applicable because NKCR is attempting to transfer the right-of-way **before** consummating abandonment. Second, NKCR’s

³ *Id.* at 4.

⁴ *Id.* (emphasis added).

transfer of the right-of-way to LI RR LLC is, by definition, an attempt to transfer an **active** right-of-way because NKCR has not yet consummated abandonment of the right-of-way. Third, although NKCR could transfer whatever interest it possesses in the right-of-way after the abandonment is consummated, here, NKCR is attempting to transfer easement rights that it will not even possess **after** abandonment. Fourth, if NKCR's plan is to transfer whatever remaining rights in the land it owns after abandonment is consummated, then NKCR would have no reason to oppose the Landowners' motion for declaratory and injunctive relief—the Landowners' motion is asking for an injunction prohibiting the purported sale of their property **before** abandonment is consummated.

E. CONCLUSION

The Landowners respectfully reiterate their request for an order from the Board enjoining NKCR from quit claiming the right-of-way to LI RR LLC because NKCR and LI RR LLC have not followed the rules and regulations of the Board as set forth in 49 C.F.R. § 1150.31. Neither NKCR or LI RR LLC have any legal right to transfer the right-of-way without following the rules and regulations of the Board and NKCR does not have the right to transfer the corridor to LI RR LLC, or anyone else, because it cannot transfer what it does not own. All of the grossly misleading statements made by NKCR in its Reply should be ignored or stricken and, in fact, the Board should immediately enter an Order under 49 C.F.R. § 1152.29(e)(2) placing a condition on NKCR's abandonment authority that NKCR may not transfer or sell -- or attempt to transfer or sell -- the line prior to exercising their permissive abandonment authority. Alternatively, the Board should issue an Order directing NKCR to immediately consummate abandonment pursuant to 49 C.F.R. § 1152.29(e)(2) to confirm NKCR's stated intent to formally consummate abandonment of the line before it transfers its remaining interest in the right-of-way to LI RR LLC.

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