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SERVICE DATE – SEPTEMBER 13, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 853 (Sub-No. 1X)

KANSAS & OKLAHOMA RAILROAD, INC.—ABANDONMENT EXEMPTION—IN
HODGEMAN, COMANCHE, KIOWA, AND PRATT COUNTIES, KS

Decided: September 12, 2019

Kansas & Oklahoma Railroad, Inc. (K&O), filed a verified notice of exemption under 49 C.F.R. § 1152 Subpart F—Exempt Abandonments to abandon two rail line segments: (1) a 10.7-mile rail line between milepost 36.3 at Hanston and milepost 47.0 at Jetmore, in Hodgeman County, Kan.; and (2) a 46.8-mile rail line between milepost 589.2 at Coats and milepost 636.0 at Protection, in Comanche, Kiowa, and Pratt Counties, Kan. (collectively, the right-of-way). Notice of the exemption was served and published in the Federal Register on August 27, 2003 (68 Fed. Reg. 51,637), and by decision served on September 29, 2003, an environmental condition was imposed.

Between 2003 and 2009, several notices of interim trail use or abandonment (NITUs) under the National Trails System Act, 16 U.S.C. § 1247(d), and 49 C.F.R. § 1152.29 were issued, providing time for various entities to negotiate with K&O for interim trail use/railbanking of either the entire right-of-way or portions of it. A NITU issued on November 25, 2003, permitted the American Trails Association, Inc. (ATA), to negotiate with K&O for interim trail use/railbanking on both segments of the right-of-way; that NITU was vacated at ATA's request on November 13, 2007. On February 4, 2008, a NITU was issued to allow Sunflower Recreational Trails, Inc. (SRT), to negotiate with K&O for interim trail use/railbanking on the 46.8-mile segment until August 2, 2008. A NITU was issued on March 7, 2008, to allow Hodgeman County Economic Development (the County) to negotiate with K&O for interim trail use/railbanking on the 10.7-mile segment until September 3, 2008. Finally, on December 29, 2008, a NITU was issued permitting SRT to negotiate with K&O for interim trail use/railbanking on the 10.7-mile segment until June 7, 2009. With respect to the latter three NITUs involving SRT and the County, no Board decisions were issued extending the NITUs beyond their original 180-day terms.

On May 29, 2019, landowner Marc Elster (Elster) filed a petition to reopen the Board's December 29, 2008 decision. According to Elster, a portion of his land is encumbered by the "physically" abandoned right-of-way. (Pet. 2-3.) Thus, Elster requests that the Board declare the rail line officially abandoned and issue a certificate of abandonment so that the portion of the right-of-way that traverses his property may revert to him, pursuant to Kansas law. (Id. at 2, 9.) Elster also asks that the Board quash any stagnant claims by former trail operators asserting that the right-of-way is railbanked. (Id. at 1.) To support his argument, Elster argues that K&O

discontinued any use of the right-of-way more than 20 years ago; all railroad assets were removed more than a decade ago; neither K&O nor any other railroad has made use of the right-of-way since then; and all issued NITUs have been vacated or expired without an interim trail use/railbanking agreement having been finalized. (*Id.* at 3.) According to Elster, he has confirmed with K&O's attorney that the railroad has no record of any interim trail use/railbanking agreement with SRT or any other trails operator being consummated. (*Id.* at 7.) Elster, thus, argues that K&O has no legitimate railroad interest in the right-of-way, and, as such, there could be no possible burden of the requested abandonment on K&O. (*Id.* at 8-9.)

On June 4, 2019, Sunflower Rail-Trails Conservancy, Inc. (SRTC, formerly SRT), filed a reply to Elster's petition, arguing that the 46.8-mile segment was "successfully railbanked" prior to the end of the NITU negotiating period on August 2, 2008.¹ (SRTC Comment 2.) SRTC asserts that, while a copy of the Interim Trail Use Agreement (Donative Line Contract) cannot be located, a copy of the Donative Quitclaim Deed recorded in the Register of Deeds' office in Kiowa County should suffice as conclusive evidence of a successful donation of the property to the trail group for interim trail use/rail banking. (*Id.* at 1-2.) With its reply, SRTC also submitted a copy of the Donative Bill of Sale and Assignment, which mentions the July 15, 2008 Donative Line Contract. According to SRTC, the Donative Bill of Sale and Assignment, coupled with the Donative Quitclaim Deed, show that the 46.8-mile segment was successfully railbanked.² (*Id.* at 2.) SRTC further argues that the Board has repeatedly ruled that there is no deadline for development of a trail on what SRTC calls a "federally railbanked right-of-way." (*Id.* (citing Cent. Kan. Ry.—Aban. Exemption—in Marion & McPherson Ctys., Kan., AB 406 (Sub-No. 6X) (STB served Dec. 18, 1998)).)

Given the issues raised by Elster and the ambiguity regarding whether an interim trail use/railbanking agreement has been reached on the right-of-way, the parties, as well as K&O, will be directed to file supplemental information in order to assist the Board in determining the status of the right-of-way. Specifically, the parties will be directed to submit the following information, in a verified statement and with supporting documentation: (1) any and all information regarding the status of the right-of-way (which includes both the 10.7-mile segment

¹ The requirement that a railroad and trail sponsor jointly file a notice with the Board when an interim trail use agreement had been reached was implemented in 2012, and thus was not applicable here. Nat'l Trails Sys. Act & R.R. Rights-of-Way, EP 702, slip op. at 5 (STB served Apr. 30, 2012).

² In response to SRTC's reply, Elster filed a rebuttal asserting that the status of the right-of-way has been fully litigated and proven contrary to SRTC's position in Farmers Co-op Co. v. U.S., 100 Fed. Cl. 579 (2011). There, landowners brought an action against the United States alleging a Fifth Amendment taking of their property, which included portions of the railroad right-of-way at issue in this proceeding. (*Id.* at 580.) Among other things, the Claims Court stated that the "taking extended from the issuance of the first NITU in 2003, through the stewardship of the corridors under the aegis of ATA and continued beyond the vacation of that trail use agreement when the STB issued the various additional NITUs." (*Id.* at 583.) The court also stated that those NITUs expired with no trail use agreements having been reached. (*Id.*)

and the 46.8-mile segment); and (2) any and all evidence which indicates that an interim trail/railbanking use agreement was reached for any portion of the two line segments (including, but not limited to, any actual interim trail use/railbanking agreement(s) and property tax information). This additional information will assist the Board in making a determination on the issues raised and ensure a record that is as accurate and complete as possible regarding the status of the right-of-way.

The Board will, therefore, direct the parties to provide the information described above by October 3, 2019. Replies will be due by October 23, 2019.

It is ordered:

1. SRTC, the County, and K&O are directed to provide the information described above by October 3, 2019. Other interested parties may also respond by October 3, 2019.

2. Replies are due by October 23, 2019.

3. This decision is effective on its date of service.

By the Board, Allison C. Davis, Director, Office of Proceedings.