

SERVICE DATE – JULY 13, 2010

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 102 (Sub-No. 13)

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY—ABANDONMENT—IN
ST. CHARLES, WARREN, MONTGOMERY, CALLAWAY, BOONE, HOWARD,
COOPER AND PETTIS COUNTIES, MO.—PETITION
FOR DECLARATORY ORDER

Decided: July 12, 2010

On February 12, 2009,¹ the State of Missouri represented by its Attorney General (Missouri) filed a petition for a declaratory order to clarify the status of the Boonville Lift Bridge near the City of Boonville in Cooper County, Mo. Missouri contends that Union Pacific Railroad Company (UP), as successor to Missouri-Kansas-Texas Railroad Company (MKT), did not have Board authorization to abandon the Bridge and that UP's purported abandonment consummation is therefore null and void.

On January 29, 2009, Great Rivers Environmental Law Center (Great Rivers) filed a comment in support of the declaratory order request. On March 12, 2009, Rails to Trails Conservancy, Save the Katy Bridge Coalition, and Missouri Parks Association (Commenters) jointly moved that § 106 of the National Historic Preservation Act, 16 U.S.C. § 470 et seq. (NHPA), be complied with in connection with the proposed Bridge abandonment, and that the Board direct UP to cease and desist from further bridge demolition, salvage, or removal activities pending compliance with the § 106 process.² UP filed a single reply to Missouri and Great Rivers on March 16, 2009,³ and a reply to Commenters on March 25, 2009. As discussed below, we are issuing this declaratory order finding UP's attempted abandonment consummation

¹ Missouri initially submitted the petition and a request for waiver of the filing fee on January 12, 2009, but the petition was not docketed until February 12, 2009, when the Board granted Missouri's waiver request. Because the Board could not accept the petition for filing until it ruled on Missouri's waiver request, February 12, 2009, is the official filing date.

² Letters in support of Commenters' motions were filed by the Missouri Department of Natural Resources on April 2, 2009, and Boonville on April 17, 2009. UP filed a reply to Boonville's letter on May 1, 2009.

³ Missouri filed a petition for leave to reply and a reply to UP's reply on March 23, 2009. UP filed a reply in opposition to Missouri's petition and a reply to Missouri's reply, on April 1, 2009. In the interest of a more complete record, we will grant Missouri's petition for leave and will accept both its and UP's reply into the record.

premature and not valid. We are granting Commenters' motion to compel compliance with § 106 of NHPA and denying their motion to issue a cease and desist order as unsupported.

BACKGROUND

The Bridge crosses the Missouri River at milepost 191 of a 199.92-mile line that extends between milepost 26.92 at or near Machens, in St. Charles County, and milepost 226.84 at or near Sedalia, in Pettis County, Mo. The Board's predecessor, the Interstate Commerce Commission (ICC), authorized MKT's abandonment of the line in a decision served on March 16, 1987 (MKT Aban.).

In that decision, the ICC noted that MKT was "presently negotiating an agreement with [the Missouri Department of Natural Resources (MDNR)] for interim trail use of the entire right-of-way," pursuant to § 8(d) of the National Trails System Act, 16 U.S.C. § 1247(d), and said that it "will proceed to issue a [Certificate of Interim Trail Use or Abandonment (CITU)] for the entire Line" in the absence of a successful offer of financial assistance for continued rail service.⁴ See MKT Aban., slip op. at 7; 49 C.F.R. § 1152.29(c). The ICC also imposed two conditions on its grant of abandonment authority, one of which (the § 106 historic preservation condition) is pertinent here, see pages 6-7, infra.

The ICC issued the CITU on April 27, 1987,⁵ and MKT entered into an interim trail use/rail banking agreement with MDNR on June 25, 1987. Under the terms of the agreement, the 199.92-mile right-of-way was to be conveyed to MDNR pursuant to the Trails Act by quitclaim deed, which was subsequently executed on November 9, 1987.⁶ Both Section 6 of the agreement and the quitclaim deed expressly excluded the bridge from the property to be conveyed to MDNR. However, Section 6 of the agreement: (1) specifies that "the bridge shall be kept available for transportation purposes . . . and that MDNR upon execution of waivers of liability acceptable to MKT may utilize the bridge for trail purposes;" and (2) reserves for MKT "the right to modify the bridge structure as may be required to improve transportation, so long as MDNR's right to utilize the premises for interim trail use is not adversely affected thereby." See

⁴ MDNR had filed a Statement of Willingness to Assume Financial Responsibility for the line (Statement of Willingness), see 49 C.F.R. § 1152.29(a), on September 16, 1986.

⁵ Employing the language of 49 C.F.R. § 1152.29(a), the CITU provided as follows:

If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

⁶ The Board usually does not receive a copy of the interim trail use/rail banking agreement. However, the agreement in this case was submitted to the Board as Exhibit A of Missouri's petition for a declaratory order.

Petition, Exhibit A at 9, Agreement. Section 8 of the agreement provides that for “those portions of the premises for which possession has been delivered to MDNR, MDNR agrees to operate, assume legal liability for the use of, manage, maintain and control the premises” Id. at 10.

Instead of executing waivers of liability acceptable to MKT for use of the bridge, MDNR routed what became the Katy Trail State Park over the Missouri River via a parallel highway bridge, which was constructed with space reserved for the trail. The bridge has remained unused with its lift span locked in the raised position, and it is not currently usable even for bicycle and pedestrian traffic.⁷ Since 1991, the United States Coast Guard “has repeatedly demanded that UP remove the Bridge,” and in July 2002, it threatened to initiate a civil action under 33 U.S.C. § 525(b) if UP did not submit a demolition plan within 30 days and initiate action as soon as the Coast Guard approved the plan. See UP Reply of March 16, 2009, at 5, and Exhibit 3.

In December 2004, MDNR notified UP by letter that MDNR would exercise its right under the agreement to use the bridge for interim trail use purposes, subject to the execution of waivers of liability acceptable to UP, as MKT’s successor. MDNR reaffirmed its 1987 Statement of Willingness, in which it agreed to “assume full responsibility for taxes (if any), management, and legal liability for the structure,” subject to the terms of the agreement and the CITU. See Petition, Exhibit B. MDNR also complained that a span of the bridge had been removed without notice to it, or its approval, allegedly in violation of the terms of the agreement, and it opined that its intent to use the bridge for interim trail use purposes as soon as possible should obviate the Coast Guard’s concern about the unused bridge.

MDNR subsequently informed UP, in a letter dated May 20, 2005, that it was “permanently waiving its right under the [agreement] to utilize the bridge for trail purposes and releasing UP from any obligation under the [agreement] to keep the bridge available for transportation purposes [and terminating] any responsibility or assumption of liability for the bridge.” See Petition, Exhibit C.

UP then filed a notice of consummation with the Board on May 25, 2005, stating that MDNR had agreed to the bridge abandonment consummation and that UP, effective May 25, 2005, was “exercising its right under the CITU to fully abandon [the bridge].” See Petition, Exhibit D, Notice of Consummation at 1. UP said it was prepared to remove the bridge as soon as the Coast Guard and the U. S. Army Corps of Engineers (Corps) issued the necessary permits.⁸ Thereafter, UP developed plans to remove the bridge and reuse some of its spans to double-track UP’s bridge over the Osage River at Osage City, Mo., approximately 65 miles east of Boonville. UP did not assert that with regard to the bridge it had satisfied the § 106 historic preservation condition, imposed by the ICC in its 1987 decision authorizing the abandonment of

⁷ See State ex rel. Nixon v. Childers, Case No. 05AC-CC00673, slip op. at 4 (Cir. Court of Cole County, Mo., Apr. 25, 2006); Petition, Ex. D at 2, Notice of Consummation.

⁸ Asserting that “the notice of consummation is self-executing” UP said it was “not requesting any affirmative action from the Board.” See Petition, Exhibit D, Notice of Consummation at 2.

the line. Rather, UP noted that the Coast Guard and the Corps were “addressing Section 106 Historic Preservation requirements as to the bridge as part of their permitting processes.” See Petition, Exhibit D, Notice of Consummation at 3.

DISCUSSION AND CONCLUSIONS

Preliminary Matter. UP contends that the petition for a declaratory order is untimely. It claims that the notice of consummation was filed with the Board and served on Missouri on May 25, 2005; that it was a comprehensive document containing exhibits, the legal basis for consummation, and UP’s plans for satisfying the § 106 condition; and that any challenges to the notice should have been filed within 20 days of the filing date as required under 49 C.F.R. § 1104.13(a). We disagree. The Board retains jurisdiction over rail property until abandonment authority has been lawfully consummated. See generally Hayfield N. R.R. v. Chi. & N. W. Transp. Co., 467 U.S. 622, 633-34 (1984). Thus, interested parties are not precluded from challenging here whether UP’s abandonment authority for the Bridge has been properly consummated.

Declaratory Order. Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty in a matter that relates to the Board’s subject matter jurisdiction. We have broad discretion to determine whether to issue a declaratory order. See Intercity Transp. Co. v. U.S., 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). It is appropriate here to issue a declaratory order to provide clarification on the question presented: whether UP’s bridge abandonment consummation is valid.

UP’s purported abandonment consummation did not become effective because, before a rail carrier may consummate the abandonment of a line or portion of a line, it must comply with any historic preservation conditions imposed in the decision authorizing or exempting the proposed abandonment. Here, the ICC recognized that the Line had “historic structures such as bridges and buildings” and in MKT Aban., slip op. at 9, imposed the following condition:

If abandonment is effected under the CITU, MKT must (a) comply with the procedures in section 106 of NHPA and consult with the State Historic Preservation Officer for appropriate documentation of bridges and structures included in the National Register of Historical Places if they are to be demolished or substantially altered; and (b) consult with and obtain necessary permits from the [Corps] and other Federal and State agencies before salvaging bridges and structures.

UP interprets this provision as not requiring compliance with the § 106 procedures of NHPA in advance of abandonment consummation. Citing Abandonment and Discontinuance of Rail Lines and Transportation Under 49 U.S.C. § 10903, 2 S.T.B. 311, 316-317 (1997) (Abandonments), UP argues that the requirement to fulfill all conditions before an abandonment

may be consummated was not adopted until 1997, well after the ICC decisions in this case.⁹ UP's reliance on Abandonments is misplaced. There the Board adopted the requirement that rail carriers file a notice of consummation within 1 year after abandonment authorization or exemption is granted unless outstanding conditions are still operative. See Abandonments, 2 S.T.B. at 315-17; 49 C.F.R. § 1152.29(e)(2). The Board explained that many proceedings "have some type of condition (environmental, public use, trail use, etc.) that creates a legal and regulatory barrier to consummation . . . until the condition lapses or has been fulfilled." If outstanding conditions are still operative at the end of the 1-year period, the Board stated, "an applicant will have 60 days from the date of satisfaction, expiration or removal of the legal or regulatory barrier to file a notice of consummation." *Id.* The Board's decision did not address whether a rail carrier could file a notice of consummation where a § 106 NHPA condition is still in effect.

In fact, the ICC in 1987 clarified that "our out of service exemption rules contemplate that conditions required by the environmental laws will be imposed prior to the effective date of a notice [of exemption]," see Boston & Me. Corp. and Springfield Terminal Ry. Co.—Aban. and Discon. of Serv., AB 32 (Sub-No. 36), slip op. at 11 (ICC served Nov. 25, 1987). Then, in its December 11, 1987 decision in that same proceeding, slip op. at 2, the ICC established as Commission policy "now and for the future . . . not to let exemption decisions take effect when there are outstanding environmental issues."¹⁰ This policy was reiterated in Exemption of Out-Of-Service Rail Lines, 4 I.C.C.2d 400, 401 (1988).

Thus, notwithstanding the somewhat ambiguous language used in imposing the historic condition here (and in other proceedings at the time), the requirement to fulfill NHPA and other environmental conditions before an abandonment may be consummated has been ICC and Board policy since at least 1987. This policy is necessary for the Board to carry out its obligations under, and be able to take any steps necessary to enforce compliance with, § 106 of NHPA. This longstanding policy was reiterated and clarified in Consummation of Rail Line Abandonments

⁹ The final rules were actually adopted by the Board at 1 S.T.B. 894 in 1996. The decision UP cites denies reconsideration but makes clarifying changes to the final rule and, with respect to the notice of consummation requirement, clarifies that this requirement is not retroactive. UP, nevertheless, filed a notice of consummation with respect to the purported bridge abandonment consummation.

¹⁰ In the November 25, 1987 decision, slip op. at 9, the ICC explained its prior policy as follows:

When the railroad's notice is filed, SEE [now SEA] analyzes the railroad's environmental report and provides environmental documentation (generally an EA) based on that report. . . . If historic preservation, public use, or other environmental conditions are requested by SEE (or an interested party), we decide in a subsequent decision whether to condition the use of the exemption upon compliance with environmental statutes. Generally, any conditions are imposed prior to the time a notice of exemption becomes effective.

that are Subject to Historic Preservation and Other Environmental Conditions, EP 678, slip op. at 3-4 (STB served Apr. 23, 2008). There the Board stated as follows:

[A]bandonment may not be consummated, and potentially historic property may not be disturbed for any part of the line, until either there is a formal final determination by the Board's Section of Environmental Analysis (SEA) (acting on behalf of the Board) that the project would have no adverse effect on historic resources or a Memorandum of Agreement is entered into that sets forth the appropriate mitigation (i.e., documentation) to satisfy section 106 and the historic review condition is removed.

By this policy statement, the Board clarifies that, regardless of whether a section 106 condition applies to the entire line or is more limited, an historic preservation condition is a regulatory barrier to consummation. Therefore, a railroad should not file a notice of consummation seeking to remove the property from the Board's jurisdiction until the historic review process has been completed and the Board has removed the section 106 condition.

Thus, the § 106 process of NHPA had to be completed before UP could consummate the Bridge abandonment. Because the § 106 process was not completed, UP's bridge abandonment consummation is invalid, and Commenters' motion to compel compliance with § 106 of NHPA is granted.

The parties also disagree regarding whether UP first needed to seek modification of the CITU—to remove the bridge from the CITU, and obtain a replacement CITU for only the portions of the right-of way covered by the interim trail use/rail banking agreement—before it could consummate the abandonment of the bridge. The Board's regulations¹¹ do not specifically address this precise question where an interim trail use/rail banking agreement is reached for a lesser portion of the right-of-way proposed to be abandoned. While this question needs to be resolved, a rulemaking proceeding in which the public is invited to comment would provide a better forum than this proceeding in which to do so. We need not resolve this issue here, because we have already found UP's abandonment consummation invalid. Without ruling on whether UP was required to seek modification of the CITU before consummating the bridge abandonment, we will vacate the CITU for the portion of the right-of-way encompassed by the bridge. This decision is limited to the specific facts and circumstances of this case.

The Board is aware that the Corps had begun a § 106 process for the bridge, as that process was being monitored by SEA. In a new development, the Coast Guard in a letter filed on February 8, 2010, states that it has been notified that UP now intends "to transfer ownership of the subject bridge to the City of Boonville [and that the] impending transfer [would suspend] the Section 106 Memorandum of Agreement process that was currently in progress for the [then proposed] removal of the M-K-T Bridge."

¹¹ 49 C.F.R. § 1152.29(c)(2) and (d)(2).

Although the bridge is no longer embraced by the CITU, UP cannot consummate its abandonment until the Board fulfills its obligations under § 106 of NHPA. Because the bridge will be transferred, rather than demolished or substantially altered, SEA will consider whether a “no adverse effect” determination may be issued,¹² terminating the § 106 NHPA process. If SEA issues such a determination and the State Historic Preservation Officer concurs, UP’s interest in, and the Board’s jurisdiction over, the bridge would then be extinguished.

Cease and Desist Order: Commenters assert that UP intends to salvage the bridge and has already engaged in “anticipatory demolition” in violation of § 110(k) of NHPA, which prohibits Federal agencies from issuing loans, grants, permits, licenses, or other forms of assistance to applicants who adversely affect historic properties with the intent of avoiding the requirements of the § 106 process. They ask the Board to issue a cease and desist order to prevent UP from further demolition, removal, or salvage activities until the § 106 process of NHPA has been complied with.

UP responds that it removed a single 62-foot approach span to the 1,500-foot bridge in the early 1990s. It claims that this had no impact on the remainder of the bridge, and in particular, the historically important lift span, and it notes that no one had raised the anticipatory demolition issue until now. UP explains that it removed the approach span for flood mitigation purposes. By removing the span, UP says it was able to increase the vertical clearance, and thereby raise the roadbed, of an active line of the former Missouri Pacific Railroad Co. that runs parallel to the Missouri River.

Citing Section 6 of the agreement, UP contends that the removal of the approach span was consistent with MKT’s (now UP’s) reserved right to modify the bridge structure as may be required to improve transportation. UP insists that “[s]ince the early 1990s, no further removal or demolition activities have occurred, and [that it] will not remove any more of the bridge until completion of the historic review process.” See UP Reply of March 25, 2009 at 12; Petition, Exhibit A, Agreement at 9. Based on these assurances, we find that Commenters have not established that UP acted, or is likely to act, with the requisite intent to avoid the § 106 process of NHPA. Accordingly, we will deny their motion for a cease and desist order.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Missouri’s petition for leave to file a reply to UP’s reply is granted. Both Missouri’s reply and UP’s response are accepted into the record.

¹² “Adverse effect” is the second of 3 possible steps in the § 106 NHPA process (the other 2 are identification and mitigation). A determination that an action will have no adverse effect on a structure found eligible for the National Register of Historical Places ends the § 106 process.

2. Missouri's request for a declaratory order is granted as discussed above.
3. Commenters' motion to compel compliance with § 106 of NHPA is granted.
4. Commenters' motion for a cease and desist order is denied.
5. The CITU is vacated for the portion of the right-of-way encompassed by the bridge.
6. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.