

SERVICE DATE – JULY 31, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35982

JACKSON COUNTY, MO.—ACQUISITION AND OPERATION EXEMPTION—UNION
PACIFIC RAILROAD COMPANY

Digest:¹ This decision revokes the 2016 exemption for Jackson County, Mo., to acquire and operate a rail line.

Decided: July 30, 2019

In 2016, Jackson County, Mo. (the County), received authority through the Board's class exemption process at 49 C.F.R. § 1150.31 to acquire from Union Pacific Railroad Company (UP) and operate approximately 17.7 miles of rail line between milepost 288.3 and milepost 270.6, in Jackson County (the Line). Jackson Cty., Mo.—Acquis. & Operation Exemption—Union Pac. R.R. (February 2016 Decision), FD 35982 (STB served Feb. 4, 2016). On October 22, 2018, certain landowners² jointly filed a petition asking the Board to revoke the exemption, claiming that the County's purpose for acquiring the Line was only to circumvent the Board's procedures implementing the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d), and 49 C.F.R. § 1152.29. (Landowners Pet. 6.)

As discussed below, the Board will revoke the County's acquisition and operation exemption. The Board found in the February 2016 Decision that the County's original plan to potentially build a trail in the right-of-way of the Line and the County's statement that it had no plans to remove track for the trail were consistent with its stated intention also to acquire and operate a line of railroad meant for freight rail service. The County's recent activity, however, is incompatible with that stated intention on which the February 2016 Decision was based. By removing the track and placing the trail directly on the rail bed, where the track previously was,

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: Deborah S. Groh; DJHS Enterprises, LLC; JHB & MEB Enterprises, LLC; David W. Wells; Dawn R. Wells; Current Properties Investments, LLC; and Nephrite Fund I, LLC (collectively, the Landowners). The Landowners note that they are plaintiffs in a lawsuit before the U.S. Court of Federal Claims, Groh v. United States, Case No. 17-1066L (Fed. Cl., filed Aug. 7, 2017). By order filed in the docket on July 10, 2018, the court stayed the lawsuit so that the Landowners could pursue administrative remedies before the Board. On July 10, 2019, the Landowners filed a motion asking the court to lift the stay.

the County has taken a step that is contrary to the acquisition of a rail line. If the County intends to remove the track and place a trail on the rail bed, then the County should do so by using the Board's interim trail use/railbanking procedures under the Trails Act. See 49 C.F.R. § 1152.29.

BACKGROUND

On December 23, 2015, the County filed a verified notice of exemption under 49 C.F.R. § 1150.31 to acquire the Line from UP and to operate it. Notice of the exemption was served and published in the Federal Register on January 8, 2016 (81 Fed. Reg. 992).

On January 15, 2016, CenturyLink Communications, LLC (CenturyLink), filed a motion for a housekeeping stay of the exemption's effective date. Among other things, CenturyLink suggested that the County was not a bona fide common carrier because it had expressed a desire to use the Line as a recreational trail. (CenturyLink Mot. 3, Jan. 15, 2016.) CenturyLink also questioned whether the County had followed the "correct process" for the proposed transaction. (Id. at 7-8 & 9 n.11.) The County responded that, although it planned to use the right-of-way for a recreational trail and possibly allow commuter rail service on the Line, neither of those uses was inconsistent with its common carrier obligation to provide freight rail service upon reasonable request, which it claimed it would do through a contract operator. (County Reply 4, 8-9, Jan. 19, 2016.) The County also stated it had "no plans" to remove rail track for the trail and that "[n]umerous recreational trails run adjacent to active rail lines in the United States". (Id. at 9 (emphasis added).)

Based on those representations, the Board denied CenturyLink's motion for a housekeeping stay and permitted the exemption to become effective immediately. It found that the County had accurately described its obligations as a common carrier. February 2016 Decision, FD 35982, slip op. at 3. In addition, the Board found that the record before it at that time did not support CenturyLink's argument that the planned uses of the Line were inconsistent with the common carrier obligation the County committed to fulfill. Id. Thus, the Board found that the Line would remain part of the national rail network and available for freight rail service. Id.

On October 22, 2018, the Landowners jointly filed a petition asking the Board to revoke the exemption as void ab initio. (Landowners Pet. 2.) They claim that the County's 2016 assertions to the Board were fraudulent, alleging the County never had any intention to fulfill any common carrier obligation on the Line. (Id. at 3, 6.) According to the Landowners, the County filed for an acquisition exemption only with the intent to extend Missouri's Katy Trail. (Id.) As support, the Landowners provide a number of exhibits, including articles from 2015 and 2016 describing the County's trail ambitions as well as more recent photos from 2018 showing trail construction. (Id. at Exs. 9-19.) The Landowners add that the County only possesses a railroad easement under Missouri state law and that the current utilization of these Landowners' property for a recreational trail amounts to an inverse condemnation under both federal and state law. (Id. at 2.)

On October 25, 2018, the National Association of Reversionary Property Owners filed a comment supporting the petition for revocation. The Landowners filed a "notice of additional

authority” on October 26, 2018, to bring to the Board’s attention an earlier decision in Land Conservancy of Seattle & King County—Acquisition & Operation Exemption—Burlington Northern & Santa Fe Railway (Land Conservancy I), 2 S.T.B. 673 (1997). (Landowners Notice of Additional Auth. 2 & Ex. A, Oct. 26, 2018.) There, the Board revoked an exemption permitting the acquisition and operation of a rail line under 49 C.F.R. § 1150.31 where a party had sought to use those procedures to circumvent the Board’s abandonment and Trails Act processes. Land Conservancy I, 2 S.T.B. at 677.³

The County filed a reply in opposition to revocation on November 13, 2018. The County claims that the Landowners have submitted no evidence showing that the verified notice was false, misleading, or otherwise should be revoked. (County Reply 7, Nov. 13, 2018.) Moreover, the County claims that throughout the process of acquiring and redeveloping the corridor, it has informed the public that the corridor remains available for common carrier service as part of the national rail network. (*Id.* at 5.) Further, in managing its ownership, development, and use of the corridor, the County argues it has acted to ensure the integrity of the corridor is preserved in the event a future rail customer requires common carrier service. (*Id.*) The County notes that it stated in its verified notice of exemption that, if a reasonable request for service is made in the future, the County would provide it through a contract operator. (*Id.* at 10.) The County claims that based on this commitment to its common carrier obligation, the Land Conservancy cases are inapposite. (County Reply 10-11.) Instead, the County suggests that this situation is more similar to the situation in Sea Lion Railroad—Abandonment Exemption—in King County, Wash., AB 544X et al., slip op. at 3, 5 (STB served Aug. 11, 1998), where the Board denied a petition to revoke an acquisition and operation exemption for a rail line being used to support both continued rail service to existing shippers and a trail. (County Reply 11 n.20.)

On January 28, 2019, the Landowners filed another “notice of additional authority” and a separate “notice of supplemental information.” The Landowners’ notice of additional authority includes affidavits and photographs purportedly demonstrating that the track has been removed from the right-of-way. (Landowners Notice of Additional Auth. 2, Jan. 28, 2019.) The notice of supplemental information includes a copy of a presentation by the Blue Valley Industrial Association that the Landowners argue provides an analysis of the intended use of the corridor. They claim that this presentation demonstrates that the County provided false and misleading information in its verified notice. (Landowners Notice of Suppl. Info. 2, Jan. 28, 2019.)

In a decision served on February 5, 2019 (February 2019 Decision), the Acting Director of the Office of Proceedings instituted a proceeding under 49 U.S.C. § 10502(d).⁴ The February 2019 Decision noted that the evidence presented in the Landowners’ petition to revoke, the County’s response, and the Landowners’ supplemental filings raise questions about whether recreational trail use on this right-of-way remains consistent with the County’s acquisition and

³ The Board denied reconsideration in Land Conservancy of Seattle & King County—Acquisition & Operation Exemption—Burlington Northern & Santa Fe Railway (Land Conservancy II), FD 33389 et al. (STB served May 13, 1998).

⁴ Due to the partial shutdown of the federal government, the Board was not able to timely issue that decision. See 49 U.S.C. § 10502(d) (requiring the Board to determine whether to institute a proceeding within 90 days after receipt of a request for revocation).

operation of a rail line under 49 C.F.R. § 1150.31 and the County's common carrier obligation. Id. at 2.

The February 2019 Decision explained that, while the County had stated in its 2016 reply that it had no plans to remove the track from the right-of-way, certain affidavits and photographs submitted by the Landowners with their notice of additional authority indicated otherwise. Id. Moreover, several pictures included in Exhibit 18 of the petition to revoke and in the affidavits filed by the Landowners on January 28, 2019, suggested that the County had placed its trail directly on the rail bed where track had been removed, and not adjacent to the track, contrary to the representations made by the County in its 2016 reply. (Id.) The February 2019 Decision required the County to explain how this activity is consistent with acquiring a rail line on which the County has a common carrier obligation. (Id. at 2-3.) The County was also asked to explain whether its intentions regarding possible future common carrier rail service have changed since filing its verified notice, to clarify whether a tunnel on the Line can accommodate both a trail and rail track, and to address the "hierarchy pyramid" it submitted with its reply to the petition to revoke (see County Reply, Ex. A at Ex. A, Nov. 13, 2018), indicating that the County's common carrier obligation on the Line is the lowest of all priorities. (Id.)

The County submitted its supplement on March 29, 2019.⁵ The County argues that it has taken a number steps to ensure the development of the trail is done in a manner consistent with its common carrier obligation and with preserving the integrity of the right-of-way for possible future rail service. (County Suppl. Resp. 1, 7, 9-10.) It explains that, after a 2017 engineering study to determine what would be necessary to rehabilitate the track to Federal Railroad Administration standards, the County decided to remove 8.75 miles of track from the southern segment of the Line. (Id. at 5-7.) According to the County and its study, this track was in such poor condition that it would have to be removed and replaced before service could occur on the Line. (Id. at 6-7.) In what the County terms an additional step "to preserve the integrity of the [c]orridor," it has also reserved funds to replace a rail bridge it removed on the Line. (Id. at 7 n.14.)

The County claims that its intentions toward the Line and freight rail service have not changed since the filing of its verified notice in 2015. (Id. at 10.) Although the County states that it has found it economical to place the trail directly on the 8.75-mile stretch of rail bed and that it plans to do so on several sections on the northern segment,⁶ the County asserts that it would remove the trail if there were a reasonable request for freight rail service. (Id. at 4.) Similarly, the County states that, although it believes the tunnel on the Line can accommodate

⁵ By decision served on February 21, 2019, the Board granted a joint request from the Landowners and the County asking that the Board hold the proceeding in abeyance and commence mediation pursuant to 49 C.F.R. part 1109. Mediation occurred, but it did not result in a settlement. The Board then removed the proceeding from abeyance and provided dates for subsequent filings in a decision served on March 22, 2019.

⁶ The County explains that, based on engineering studies, it intends to leave the majority of the rail and ties in place on this northern segment of the corridor and will develop its recreational trail adjacent to the rail bed in this segment (except for limited locations where the width of the corridor will not accommodate such adjacent development).

both a trail and rail service, if the County were required to reinstall track through the tunnel to fulfill any common carrier obligation to provide future rail service, it would not use the tunnel for both purposes but would reroute the trail outside the tunnel. (Id. at 8.)

The Landowners filed a reply on April 18, 2019. Among other things, they claim that the County has now admitted that it is constructing the trail on the actual rail bed and as such has contradicted both the County's prior representation that it would not remove track and its implication that the trail would be located adjacent to the track, not on top of the rail bed itself. (Landowners Reply 2-3, Apr. 18, 2019.) The Landowners assert that placing the trail on the rail bed for the 8.75-mile segment was the County's plan all along, and that, just as in the Land Conservancy cases, the County has never intended for there to be freight rail service over the Line. (Id. at 3, 11-15.) As such, the Landowners argue, the County is abusing the Board's processes and so intended when it filed its verified notice with the Board. (Id.) The Landowners further suggest that the County has committed a fraud against the County's taxpayers by purchasing the Line from UP rather than properly railbanking it and that the Line was abandoned under Missouri state law when the track and ties were removed. (Id. at 13 n.26.)

Finally, between March 4 and April 29, 2019, Community Oversight Partner Services (COPS) filed a number of letters generally alleging that the County and others violated local law when participating in various aspects of the sale.

PRELIMINARY MATTERS

On May 8, 2019, the County filed a motion under 49 C.F.R. § 1104.8 to strike, as prejudicial, unsubstantiated, and irrelevant, portions of the Landowners' April 18, 2019 reply to the County's supplemental response and the series of submissions by COPS. In particular, the County challenges the Landowners' allegation that the County committed a fraud on the taxpayers by paying between \$50 million and \$80 million for the corridor when the County should have instead railbanked the Line. (County Mot. to Strike 2.) The County further challenges the Landowners' allegation that the Line "would have been abandoned" by UP but for the County's plan to develop a trail. (Id. at 3.) The County also objects to similar claims of fraud lodged by COPS. The Landowners replied in opposition to the motion to strike on May 10, 2019.

The County's motion to strike will be denied. Under 49 C.F.R. §1104.8, the Board may order that any redundant, irrelevant, immaterial, impertinent, or scandalous matter be stricken from any document. Although the material to which the County objects generally relates to state and local law issues, it helps illustrate the parties' dispute and helps provide context to the filings before the Board. The County has also not shown the portions meet the regulatory standard to be stricken. Inclusion of the material in the record is not prejudicial, as it does not form the basis of this decision.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10502(d), this exemption may be revoked, in whole or in part, if the Board finds that regulation of the transaction is necessary to carry out the rail transportation

policy of 49 U.S.C. § 10101. Because this exemption has become effective, the revocation request will be treated as a petition to reopen and revocation will be granted only if the petition presents new evidence, substantially changed circumstances, or material error. 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3(b) (addressing standard for discretionary appeals of Board decisions). To the extent that a party wishes to challenge the bona fides of a transaction, the Board retains the right to review the transaction to protect the integrity of its processes. See Ill. RailNet, Inc.—Acquis. & Operation Exemption—BNSF Ry., FD 34549 (STB served Feb. 1, 2006); Minn. Comm. Ry.—Trackage Rights Exemption—Burlington N. R.R., 8 I.C.C.2d 31, 37 (1991).

Here, new evidence indicates that the County has taken actions that are inconsistent with representations it made at the time of its acquisition regarding the purpose for the acquisition. As noted previously, the County represented in 2016 that it would not remove rail for the trail and that the trail would be adjacent to the rail line. (See County Reply 9, Jan. 19, 2016.) However, in direct contradiction to those representations, the County has removed 8.75 miles of track on the southern segment of the Line and placed the trail directly on the rail bed of that segment of the Line. The County also plans to remove track in several locations on the northern segment of the Line.

The County's actions are also no longer consistent with the acquisition exemption it invoked to acquire the Line. It is one thing to have to replace track that has been removed⁷ (especially when much of it would need to be replaced in any event) to restore rail service on a rail line. It is another, however, to remove track from a rail line available for freight service, develop and construct a trail in place of the track, and then have to remove that trail before reconstructing the track and track bed to comply with the common carrier obligation to provide rail service upon reasonable request. The latter is the scenario that should occur under the Trails Act, as explained below.

The Board has procedures available for an entity seeking to convert a line of rail into a trail under the Trails Act—specifically, 49 C.F.R. § 1152.29. Under these regulations, the appropriate path by which an entity could seek to place a trail on the rail bed would be for the line to be authorized for abandonment by the Board, and for the entity then to file with the Board a request for a notice of interim trail use or abandonment and negotiate with the abandoning carrier an interim trail use/railbanking agreement that complies with the Board's Trails Act regulations. Under these procedures, removing track and replacing it with a trail would be permissible, and indeed would be consistent with the very purpose of interim trail use/railbanking, which is to preserve for possible reactivation of rail service a rail corridor that the Board has authorized for abandonment (because the present or future public convenience and necessity require or permit the abandonment, see 49 U.S.C. § 10903(d), or an exemption is warranted) while also allowing it to be used in the interim as a recreational trail.

⁷ The Board has noted that track can be removed as long as no shipper seeks service and as long as the carrier is prepared to replace the track should it receive a request for service. See Kan. City S. Ry.—Aban. Exemption—Line in Warren Cty., Miss., AB 103 (Sub-No. 21X), slip op. at 9 (STB served Feb. 22, 2008).

Here, the County has removed track and placed a trail on the rail bed of a rail line that has not been authorized for abandonment. As noted in Land Conservancy I, 2 S.T.B. at 677, the acquisition exemption at 49 C.F.R. § 1150.31 is meant to support the continued operation of rail lines in lieu of abandonment. See also Land Conservancy II, FD 33389, slip op. at 10-11 (confirming that a party misused Board processes when it acquired a rail line merely as a “step toward converting what had once been an active rail line into a trail,” even though interim trail use/railbanking “would preserve this line for reactivation”). The County’s actions—removing track and then placing the trail directly on the rail bed—are inconsistent with the acquisition exemption’s purpose. The County has failed to follow the proper procedures for implementing trail use, and it would be inappropriate for the Board to allow the County to bypass those procedures.

While the County claims that it has taken steps to preserve the integrity of the corridor for possible future freight rail service, virtually all of these actions benefit the use of the property as a trail. Because the County’s recent activities show that it has misused the Board’s processes, the Board will revoke the acquisition exemption.

The County’s claim that the instant situation is nearer to Sea Lion Railroad than the Land Conservancy cases is also unpersuasive. Sea Lion Railroad involved a nonprofit corporation’s plan to acquire, abandon, and then transfer a rail line to a municipality while having a third-party operator provide contract rail service to existing shippers pursuant to a modified certificate. That plan envisioned that the operator would continue to provide freight rail service over a portion of the corridor while the municipality built and maintained a trail running next to the rail line. In rejecting a challenge to the plan, the Board distinguished the facts of that case from those of Land Conservancy I, noting that Land Conservancy I involved a party acquiring a line with an intent to convert it to a non-rail use. Sea Lion R.R., AB 544X, slip op. at 5.

Based on the record as currently constituted, it is necessary to revoke the acquisition exemption to ensure the integrity of the Board’s processes and therefore help ensure the continuity of a sound transportation system. See 49 U.S.C. § 10101(4). Although the Landowners ask the Board to find the exemption void ab initio, the Board does not and need not decide whether the County’s notice of exemption was false or misleading, as the new evidence of subsequent actions of the County justify revocation in this instance. Accord Land Conservancy I, 2 S.T.B. at 676-77 (revoking acquisition exemption to “protect the integrity of [the Board’s] processes,” and as “necessary to carry out the rail transportation policy of 49 U.S.C. [§] 10101”).

The Board makes no findings on the claims that the County or others defrauded taxpayers or violated other state or local law as part of the County’s acquisition of the right-of-way. Those matters do not inform this decision and are better suited for a state forum. The Board does note, however, that, although the Landowners claim that the Line was abandoned under Missouri state law, it is well settled that the Board has exclusive and plenary authority over the abandonment of rail lines. 49 U.S.C. §§ 10501(b)(2), 10502, 10903; see also Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 320 (1981) (“[T]he authority of the [STB] to regulate abandonments is exclusive.”); Grantwood Vill. v. Mo. Pac. R.R. Co., 95 F.3d 654, 659 (8th Cir. 1996) (“State law claims can only be brought *after* the [Board] has authorized an abandonment and after the railroad has consummated that abandonment authorization.”)

For the reasons discussed above, the Board will grant the Landowners' petition to revoke the County's acquisition and operation exemption.

It is ordered:

1. The County's motion to strike is denied.
2. The Landowners' petition to revoke the acquisition and operation exemption is granted as discussed above.
3. This decision is effective on its service date.

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