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October 21, 2019

Allison C. Davis
Office of Proceedings
Surface Transportation Board
395 E Street SW
Washington, DC 20423

ENTERED
Office of Proceedings
October 22, 2019
Part of
Public Record

Re: STB Docket No. AB-853 (Sub-No. 1X) - South Kansas & Oklahoma Railroad
Petition to Reopen

Dear Ms. Davis,

In response to the submittals of Thomas F. McFarland dated October 2, 2019 and Karl Morell dated October 7, 2019 (4 days after the Board's required October 3, 2019 response deadline), I submit that Mr. McFarland's and Morell's responses confirm the conclusion reached in my previous submission that, "The issue of any Sunflower rail banking agreement is and has been resolved. No such agreement was ever consummated prior to the expiration of the Sunflower NITU on August 2, 2008."

First, the Line Donation Contract (unsigned), as well as all of the additional documents purporting to transfer the railroad's interest in this property, submitted by Mr. McFarland is or would have been invalid under Kansas Law as cited in my previous submission. The documents submitted by Mr. McFarland are "null and void" and of no effect whatsoever. Mr. Morell's assertion that that,

Also, contrary to Elster's allegations, the agreements entered into between SRTC and K&O are not 'null and void'. If Elster were correct, no railbanking could ever be consummated in the State of Kansas.

ignores basic real estate law. Kansas law prohibits the transfer of the railroad's interest in the right of way. It does not prohibit an agreement allowing for a trail entity to use the railroad's right of way. The attempted transfer of the railroad's interest is "null and void" as are all of the documents attempting to do so presented by Sunflower. None of the documents presented purports to be a "railbanking agreement" or an agreement allowing the use of the railroad's right of way by Sunflower. If there was no valid railbanking agreement prior to August 2, 2008, then no such agreement was consummated prior to the expiration of the Sunflower NITU.

Setting aside the invalidity of the documents submitted by Mr. McFarland, his submission of these documents is an admission that Sunflower's NITU expired on August 2, 2008 without the consummation of a valid railbanking agreement. Consider that after a thorough examination by Sunflower and K&O which turned up multiple documents related to this matter as well as an unsigned copy of the Line Donation Contract, no signed Line Donation Contract was located. Surely with their extensive search and their location of every possible source of these documents, if a signed Line Donation Contract had existed one would have been located in these files. Proof by omission.

In addition to this proof, the earlier dated Quitclaim Deed (2009) submitted by Mr. McFarland that mentions the Line Donation Contract was never filed in Kiowa County. That Quitclaim document was abandoned and a new Quitclaim document (also null and void under Kansas Law) was completed and

filed in Kiowa County in 2011 – over a year after the Closing Date proposed in the drafted and unsigned Line Donation Contract and about three years after the Sunflower NITU expired. There is no reason for the second Quitclaim Deed (filed in 2011) other than the failure of the Line Donation Contract to be consummated timely. The fact that Sunflower abandoned and never filed the first Quitclaim document and subsequently replaced it with the latter Quitclaim Deed, well after the Sunflower NITU expired on August 2, 2008, and without mention of the Line Donation Contract, is certainly an admission that the Line Donation Contract was never completed.

Also, as I pointed out in my previous filings, this issue has been fully researched and litigated and proven contrary to Sunflower's position in *Farmers Co-op. Co. v. U.S.*, 98 Fed.Cl. 797 (2011), where the Court expressly found that all NITUs including Sunflower's NITU expired without a rail banking agreement.

The tax records in Kiowa County do not support Sunflower's position.

The documents provided by Sunflower are all "null and void" and of no effect. Sunflower never completed a rail banking agreement. Sunflower's NITU expired on August 2, 2008 without a valid railbanking agreement. There can be no doubt about this conclusion.

Sincerely,

Marc Elster

cc:

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