

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET AB-1032 (Sub No. 2)

248092

ENTERED
Office of Proceedings
July 2, 2019
Part of
Public Record

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

**LANDOWNERS' PETITION FOR INTERVENTION,
DECLARATORY JUDGMENT, INJUNCTIVE RELIEF
AND CERTIFICATE OF ABANDONMENT**

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PLAINTIFF LANDOWNERS
Arnold et al. v. United States
Court of Federal Claims Case No. 15-1252L

Dated: June 28, 2019

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET AB-1032 (SUB-NO. 2)

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

**PETITION TO INTERVENE IN PROCEEDINGS, FOR INJUNCTIVE RELIEF,
DECLARATORY ORDERS AND ABANDONMENT CERTIFICATE**

COME NOW the Petitioners,¹ by and through their counsel of record, R. Deryl Edwards, and, pursuant to 49 U.S.C. § 10501(a)(1)(A), (b)(2) and 49 U.S.C. § 10903(d)(1), (e)(1), and pertinent federal administrative regulations, herewith petition the Board to permit the herein named landowners in *Arnold v. U.S.*, Court of Federal Claims (CFC) Case No. 15-1252L (*see attached* Ex. A) to intervene in the above captioned matter, as co-landowner Petitioners along with “Landowners” in the *Flying S Land Co. v. U.S.*, Court of Federal Claims (CFC) Case No. 15-1253L and *Dawson v. U.S.*, CFC Case No. 15-1268L, respectively. These latter two landowner groups filed pleadings in the Surface Transportation Board (“STB” or “Board”) on June 11, 2019 in the above captioned matter.

These intervening named Landowners join, for the most part, with the arguments and authorities presented in the *Flying S* and *Dawson* joint pleadings and exhibits.

¹ B&D Farms, Inc., Mark Bailey, Shayla Bailey, H. Drake Gebhard, Karen Gebhard, Cecilia Hillerbrand, Jackson Irrevocable Farm Trust, Dewayne Jackson, Lee Martin Revocable Trust, Lee Martin, Bernice Martin, Kristelle Mizell, Rodney Ross, Tonda Ross, Ricky Temple, L&S Tubbs Family, L.P., Lloyd Tubbs, John Tweed Trust, JoAnn Tweed Trust, Ivan Bohl Living Trust, Morlock Children's Trust.

Furthermore, these Landowners separately seek the STB issuance of certain declaratory orders, and, alternatively, for a "certificate of public convenience and necessity authorizing abandonment" of the Lines together with the finding that "present and future public convenience and necessity...require or permit the abandonment," and that the abandonment would not have a "serious, adverse impact on rural and community development" for the following reasons:

INTRODUCTION

1. On June 11, 2009, the Surface Transportation Board (the "Board") was petitioned by two groups of landowners in two above-referenced pending CFC cases; therein each moving for declaratory and injunctive relief against the Nebraska, Kansas and Colorado Railway, Inc. (NKCR). The petitioning intervenors represent some of the additional adjacent named landowners whom the CFC has also found to have owned a fee interest in parcels adjacent to the railroad corridor at the time of this agency's issuance of an NITU in STB Docket No. 1032X. *See Arnold v. United States*, 137 Fed.Cl. 524 (2018).

2. The petitioning landowners seek to intervene in the captioned proceedings as co-landowners and adopt, in relevant part, the June 11, 2019 (247952) pleadings of the *Flying S* and *Dawson* landowners. Additionally, the intervenors further seek separate declaratory orders relative to the NKCR's actions while their June 12, 2015 Notice of Exempt Abandonment in this captioned case was still pending before the Board. Based upon these actions, and the STB's findings and orders, this Board is further requested to issue a certificate of abandonment of the Lines in order that Kansas property law may immediately take effect, if not already having occurred, thereby formally extinguishing any railroad-purposed and/or railbanking easement. This order would also recognize the

reversionary aspects of Kansas property law regarding abandoned railroad easements to fully vest, and merge the dominant and servient estates in the adjacent landowners, to the extent such reversions have not already occurred under federal and state law.

3. Prior to June 2015, the NKCR operated, *inter alia*, 57.31 miles of railroad lines located: (1) between milepost 3.35, near Orleans, Nebraska, and milepost 29.84, at Alma, Kansas; (2) between milepost 47.23, at Reager, Kansas, and milepost 78.05, at Oberlin, Kansas; and (3) the Norton Spur located in Norton, Kansas (the “Lines”). See *STB Docket AB 1032X*.

4. In May 2015, the NKCR set forth its intent to the STB “to abandon 57.31 miles of rail lines.” It also stated to this agency that, “[u]pon receipt of abandonment authority, NKCR intends to remove the rail, track material, and crossties.” It advised that “ballast will remain in place along the lines.” Finally, it represented to the STB that, “[t]he only alternative to abandonment would be to not abandon the Lines and forego the opportunity costs from salvaging the Lines.” *Id.*

5. In June 2015, NKCR filed a Notice of Exemption to “abandon” the Lines, with a “[p]roposed consummation date...on or shortly after the effective date of this [June 12, 2015] Notice of Exemption.” Therein, the railroad advised of its intent, now fulfilled, “to remove the rail, track material and crossties.” In October 2015, the Sunflower Rails-to-Trails Conservancy, Inc. was granted a “Notice of Interim Trail Use or Abandonment (NITU). However, the NITU subsequently expired, after an extension granted by the STB. The NKCR has requested, and was granted by this Board, four extensions of the authority to consummate abandonment. NKCR has never acted to fully abandon the Lines under federal law.

6. In relevant part, this Petition requests the Board issue certain findings of fact and law, and, alternatively, formally issue a certificate of abandonment on the Lines, as the Petitioners possess adequate legal standing to seek “adverse abandonment.” These Petitioners suggest that “present and future public convenience and necessity...permit the abandonment.” 49 U.S.C. § 10903(d)(1), (e)(1). Furthermore, the proposed abandonment would not have a “serious, adverse impact on rural and community development.” Rather, if granted, the abandonment will have a significant, positive impact upon rural and community development by permitting landowners unrestricted enjoyment of the former railroad/railbanking-purposed right-of-ways, which heretofore the NKCR has attempted to exploit for their financial gain by means of subterfuge, leveraging of the consummation deadlines, and other injurious actions.

STATEMENT OF AGENCY JURISDICTION

7. In *Arnold v. United States*, 137 Fed.Cl. 524, 551 (2018), the CFC described the STB’s authority, thusly,

“The STB has authority to regulate most railroad lines in the United States. See 49 U.S.C. § 702 (2012). A railroad seeking to abandon any part of its railroad line must either (1) file an application to abandon or (2) file a notice of exemption to abandon the line. See 49 U.S.C. § 10903 (2102); see also 49 C.F.R. § 1152.50 (2017). “If the STB approves a standard abandonment application or grants an exemption and the railroad ceases operation, the STB relinquishes jurisdiction over the abandoned railroad right-of-way and state law reversionary property interests, if any, take effect.” *Caldwell v. United States*, 391 F.3d 1226, 1228-29 (Fed.Cir.2004) (citing *Preseault v. Interstate Commerce Comm’n*, 494 U.S. 1, 6-8, 110 S.Ct. 914, 108 L.Ed.2d 1 (1990) (*Preseault I*)), *reh’g en banc denied* (Fed. Cir.), *cert. denied*, 546 U.S. 826, 126 S.Ct. 366, 163 L.Ed.2d 72 (2005).”

8. Title 49 U.S.C. § 10903 (2019) provides, in relevant part,

(a)(1) A rail carrier providing transportation subject to the jurisdiction of the Board under this part who intends to--

(A) abandon any part of its railroad lines; or

(B) discontinue the operation of all rail transportation over any part of its

railroad lines, must file an application relating thereto with the Board. *An abandonment or discontinuance may be carried out only as authorized under this chapter...*

(d) A rail carrier providing transportation subject to the jurisdiction of the Board under this part may--

(1) abandon any part of its railroad lines; or

(2) discontinue the operation of all rail transportation over any part of its railroad lines; only if the Board finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance. In making the finding, the Board shall consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development.

(e) Subject to this section and sections 10904 and 10905 of this title, if the Board-

(1) finds public convenience and necessity, it shall--

(A) approve the application as filed; or

(B) approve the application with modifications and require compliance with conditions that the Board finds are required by public convenience and necessity; or

(2) fails to find public convenience and necessity, it shall deny the application.

(49 U.S.C. § 10903(a)(1), (d)(1), (e)(1)) (Emphasis added). *See also* 49 U.S.C. § 10501(b).²

9. In *Modern Handcraft, Inc.-Abandonment in Jackson County, MO*, 363 I.C.C.

969,³ 972 (1981), the predecessor of the Board stated,

"The function of our exclusive and plenary jurisdiction over abandonments is to provide the public with a degree of protection against the unnecessary discontinuance, cessation, interruption, or obstruction of available rail service. *We will not allow our jurisdiction to be used to shield a carrier from the legitimate processes of State law where there is no overriding Federal interest in interstate commerce.*"

(Emphasis added).

² 49 U.S.C. § 10501(b) provides that "[t]he jurisdiction of the Board" over "transportation by rail carriers" and, among other things, the "abandonment, or discontinuance" of rail "facilities ... is exclusive [and] the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." quoted in *New York Cross Harbor RR v. Surface Transportation Board*, 374 F.3d 1177, 1182 (D.C. Cir. 2004), n. 3.

³ 1981 WL 22670 (August 19, 1981).

10. In *Chelsea Property Owners-Abandonment*. Docket No. AB-167 (Sub-No. 1094)

(August 28, 1992), the Board stated,

Our jurisdiction operates to defeat the condemnation of rail property under state law. A finding by this agency that the public convenience and necessity permits the abandonment of a line is evidence in any court proceeding that the line is not required for rail service in interstate commerce...

Id., at 775.

11. Any “interest[ed]” party can also initiate an abandonment proceeding - including “adverse” abandonment - under 49 U.S.C. § 10903. See *Thompson v. Texas Mexican Ry. Co.*, 328 U.S. 134, 145, 66 S.Ct. 937, 90 L.Ed. 1132 (1946); *Consol. Rail Corp v. ICC*, 29 F.3d 706, 710 (D.C. Cir. 1994) (*Conrail*), *Chelsea Prop. Owners - Abandonment*, 8 I.C.C.2d 773, 778 (Aug. 28, 1992), *aff.*, *Conrail*, 29 F.3d at 709.

12. "The situation presented here—where a rail line abandonment is sought by noncarrier applicants...while uncommon, is not unique..."⁴ (citation omitted). "Subject to establishing a proper interest in an abandonment proposal, any person may institute a proceeding for the issuance of a certificate of public convenience and necessity authorizing abandonment of a rail line." *Thompson, Id.*, 328 U.S. 134; *Modern Handcraft, Id.* at 971.

13. “Abandonment frees subservient landowners to exercise reversionary rights in...the railroad’s right-of-way.” *City of South Bend, IN v. Surface Transp. Bd.*, 566 F.3d 1166, 1168 (D.C.Cir.2009).

14. “We will not allow our jurisdiction to be used to shield a carrier from the legitimate processes of State law where there is no overriding Federal interest in

⁴ See *Baltimore and Annapolis R. Co. Abandonment*, 348 I.C.C. 678, 704 (1976).

interstate commerce.” *Modern Handcraft, Inc. – Abandonment on Jackson County, MO*, 363 I.C.C. 969, 972 (1981); *see also Norfolk Southern Railway Company – Adverse Abandonment –*

St. Joseph County, Ind., AB 290 (Sub-No. 286), p. 4 (“But we do not allow our jurisdiction to be used to shield a line from the legitimate processes of state law where no overriding federal interest exists.”).

PARTIES

15. This Petition for Intervention is presented upon the behalf of specified landowners (*see n. 1, infra*) who owned real property in Decatur, Norton and/or Phillips Counties, Kansas through which the NKCR, and its historical predecessors possessed a 100 foot or wider reversionary railroad right-of-way for railroad purposes on the date of the STB’s issuance of a NITU in Docket No. 1032X.

(Ex. A; *see Arnold v. United States, Id.* at 591, n. 1; *see also n. 4 herein supra*).

16. Additionally, these specified landowners are among the named Plaintiffs in an action against the United States for a Fifth Amendment "taking" of the same property for which declaratory findings, injunctive relief, and alternatively, a certificate of abandonment is requested from the Board.

(*See Arnold, Id.*)

17. The NKCR, at the time it submitted its Notice of Exemption (“NOE”) to the Board to abandon the Lines in June 2015, certified that the railroad was "a common carrier subject to 49 U.S.C. Subtitle IV, Chapter 105.”

(NKCR NOE dated June 12, 2015, p. 4, ¶ 3(a)(2)).

STATEMENT OF FACTS

I. INTRODUCTORY FACTS

18. On October 21, 2015, the federal Surface Transportation Board ("STB") issued a Notice of Interim Trail Use or Abandonment ("NITU"), pursuant to the National Trails System Act Amendments of 1983, 16 U.S.C. § 1241 *et seq.*, concerning 57.31 miles of the railroad right-of-way from: (1) milepost 3.35, near Orleans, Nebraska, and milepost 29.84, at Almena, Phillips County, Kansas; (2) milepost 47.23, at Reager, Kansas, and milepost 78.05, at Oberlin, Decatur County, Kansas and (3) the Norton Spur located in Norton, Norton County, Kansas (the "Lines").

(STB Docket No. AB 1032X; Decided: October 21, 2015).

19. At the time of the STB's issuance of the NITU, each of the named landowners owned cognizable property interests in real property located in Decatur, Norton or Phillips County, Kansas, through which the NKCR, and its historical predecessors, including the Burlington, Kansas & Southwestern Railroad Co., (later the Chicago, Burlington & Quincy Railroad Company ("CB&QR")), possessed a 100 foot or wider railroad-purposed right-of-way which was originally acquired primarily by condemnation or by private right-of-way deed.

20. The intervening landowners in the captioned STB proceeding are likewise among the Plaintiffs in a pending CFC case styled, *Arnold v. United States*, CFC Case No. 15-1252L, wherein the court has entered a partial summary judgment for the landowners against the United States arising out of the 5th Amendment taking of their respective interests in the former NKCR right-of-way.

(*Arnold v. U.S.*, 137 Fed.Cl. 524, 582-591).

21. The Burlington, Kansas & Southwestern Railroad Company ("BK&SR") and the Chicago, Burlington & Quincy Railroad Company ("CB&QR") were predecessors of the NKCR.

(I.C.C. Div. of Valuation, CB&QR, McCook Division, Phillips, Norton, and Decatur County, Kansas, KS-NE State line to Oberlin, Ks.; Sheets 1-74; (Grantee of Condemnation - Burlington, Kansas & Southwestern Railroad Co.; see Sheet 1 of 74, Parcel 1, 2, June 29, 1885); see also ICC - Valuation Maps).

II. NKCR'S INITIATION OF ABANDONMENT PROCEEDINGS OF THE LINES BEFORE THE STB - EXPIRATION OF THE OCTOBER 22, 2015 NITU

22. "The Nebraska, Kansas & Colorado Railway (NKCR) previously operated a railroad line that extended, in relevant part, approximately 57.31 miles through Harlan County, Nebraska, and Norton, Decatur, and Phillips Counties in Kansas."

(*Arnold v. U.S.*, 137 Fed.Cl. at 535).

23. "On May 14, 2015, NKCR proposed to the STB its intent to abandon 57.31 miles of the railroad line through Nebraska and Kansas, specifically (1) from milepost 3.35 near Orleans, Nebraska to milepost 29.84 at Almena, Kansas; (2) from milepost 47.23 at Reager, Kansas to milepost 78.05 at Oberlin, Kansas; and (3) the Norton Spur in Norton, Kansas."

(*Arnold v. U.S.*, 137 Fed.Cl. at 535).

24. "The railroad formalized its proposed abandonment of these segments on June 12, 2015, when it filed a verified Notice of Exemption with the STB. In its Notice of Exemption, the NKCR certified that no traffic had been handled over the railroad line segments for more than two years."

(*Arnold v. U.S.*, 137 Fed.Cl. at 535).

25. “The STB issued an abandonment exemption on August 7, 2015, giving the railroad until August 2016 to consummate abandonment.”

(Arnold v. U.S., 137 Fed.Cl. at 535).

26. “Subsequently, on September 2, 2015, Sunflower Rails-to-Trails Conservancy (Sunflower) filed a statement of willingness to assume financial responsibility over the portion of the rail line that NKCR sought to abandon.”

(Arnold v. U.S., 137 Fed.Cl. at 535).

27. “On September 14, 2015, Sunflower filed a request with the STB for trail use over the railroad segments that NKCR had proposed for abandonment.”

(Arnold v. U.S., 137 Fed.Cl. at 535).

28. “NKCR filed a notice on September 24, 2015 that it was willing to negotiate with Sunflower concerning the rail line.”

(Arnold v. U.S., 137 Fed.Cl. at 535).

29. “On October 22, 2015, the STB issued a NITU, which invoked Section 1247(d) of the Trails Act Amendment of 1983, 16 U.S.C. § 1247(d), and authorized the railroad to negotiate a trail use agreement with Sunflower.”

(Arnold v. U.S., 137 Fed.Cl. at 535).

30. “Although the NITU was originally for a period of 180 days, and initially expired on April 19, 2016, Sunflower requested, and NKCR did not oppose, an extension of the negotiation period. The STB issued a decision on April 14, 2016, extending the negotiation period until October 16, 2016.”

(Arnold v. U.S., 137 Fed.Cl. at 535).

31. “Thereafter, Sunflower requested, but NKCR opposed, a second extension. The STB did not grant any further extensions, and the NITU expired on October 16, 2016.”

(*Arnold v. U.S.*, 137 Fed.Cl. at 535).

32. “On November 17, 2016, the STB issued a decision providing that if NKCR chose to abandon its rail line, it must file a notice of consummation by December 15, 2016.”

(*Arnold v. U.S.*, 137 Fed.Cl. at 535).

33. “On December 14, 2016, NKCR requested an extension of its consummation deadline to March 15, 2017, and the STB granted NKCR’s request on December 15, 2016.”

(*Arnold v. U.S.*, 137 Fed.Cl. at 535).

34. “NKCR requested another extension of its consummation deadline on February 16, 2017, which the STB granted on March 3, 2017, thereby extending NKCR’s deadline to consummate abandonment of the rail line to September 11, 2017.”

(*Arnold v. U.S.*, 137 Fed.Cl. at 535).

35. “On September 11, 2017, the STB granted NKCR’s request to extend the deadline for NKCR to consummate its abandonment of the rail line from September 11, 2017 to March 1, 2018.”

(*Arnold v. U.S.*, 137 Fed.Cl. at 535).

36. “NKCR submitted an additional extension of time to consummate abandonment on February 23, 2018, and, on February 28, 2018, the STB granted NKCR an extension of time until March 1, 2019 to consummate abandonment of the railroad corridor.”

(*Arnold v. U.S.*, 137 Fed.Cl. at 535).

37. “NKCR submitted an additional extension of time to consummate abandonment on February 23, 2018, and, on February 28, 2018, the STB granted NKCR an extension of time until March 1, 2019 to consummate abandonment of the railroad corridor.”

(*Arnold v. U.S.*, 137 Fed.Cl. at 535).

38. On February 8, 2019, NKCR submitted an additional extension of time to consummate abandonment, and, on February 22, 2019, the STB granted NKCR an extension of time until March 1, 2020 to consummate abandonment of the railroad corridor.

(STB Docket No. AB 1032X; filing - February 8, 2019; Decision - February 22, 2019).

39. The Landowners adopt and incorporate by reference the pleadings and authorities filed by the *Flying S* and *Dawson* landowners, including all exhibits attached thereto, as though more fully set forth herein.

(STB Docket No. AB 1032X; filing dated June 11, 2019).

40. During the pending exempt abandonment filed by NKCR, the landowners received, during meetings or otherwise, a redacted copy of a document titled, “Oberlin Line Right-of-Way Purchase Agreement.” (“Agreement”). The document is attached as *Flying S/Dawson* Exhibit D (Intervening Landowners Ex. A), however, the landowners do not currently possess a true and correct copy of the Agreement by and between the NKCR and LI RR, LLC.

(See Ex. A).

41. The Agreement purports to be by and between Nebraska, Kansas & Colorado Railway, LLC (NKCR), as the seller, and LI RR, LLC (LIRR), as buyer. *Id.* The basis of the Agreement is the sale of “Seller’s railroad right-of-way,” including approximately

“57.31 miles of rail line,” which includes all of the Lines at issue in this proceeding, to non-carrier, LIRR. *See Arnold v. United States*, 137 Fed.Cl. 524, 535 (NKCR “operated a railroad line that extended...approximately 57.31 miles...”).

(See Ex. A).

42. If the sale is consummated as contemplated, NKCR will purportedly “sign a Quitclaim Deed conveying its right, title and interest in the subject right-of-way to [LIRR].” *Id.* at p. 1, ¶ 3. Subsequently, LIRR “will sell calls to adjacent landowners along the right-of-way who have expressed interest in purchasing that adjacent land from [LIRR].” *Id.* LIRR “intends to offer title to adjacent landowners based on what it purchased from [NKCR].” *Id.*

(See Ex. A).

43. The Agreement specifically recognizes that LIRR is “aware” of NKCR’s pending abandonment application in STB Docket No. AB 1032X. *Ex. A, pp. 2-3, ¶ 6.* It also recites that the railroad has filed “a number of continuances,” and the current extension of the “consummation deadline through March 1, 2020.” *Id. at 2.* The Agreement represents that, once “this Contract has been fully executed, and the transaction has been closed and funds transferred, [NKCR] will consummate the abandonment and the Property will no longer be considered an active rail lie subject to STB jurisdiction.” *Id., at 2-3.* The Contract is to be executed by the NKCR “c/o Omnitrax, Inc.[’s]” General Counsel. NKCR and Omnitrax have the same mailing address in Denver, Colorado.

(See Ex. A).

44. As previously indicated, lead CFC Plaintiff John Arnold (not a landowner in this proceeding) executed a document titled, “**Contract for Deeds from LI RR LLC to land**

owner and description:” (hereinafter “Contract”). He paid LIRR, in hand, the sum of \$6000 for 12 acres in the right-of-way at \$500 per acre. The proposed deed will “specify that LI RR LLC has purchased all of the property and holds the deeds from the 57 miles of the NKC [NKCR]...” *Id.* The Contract also provides, in part,

“LI RR LLC has received a contract for a Quit Claim Deed from NKC for the property below...”

Id.

(See Ex. B).

45. The STB was not formally apprised of any sale or conveyance of NKCR’s right-of-way property interests in the Lines, including, but not limited to, the railroad-purposed right-of-way, to LIRR during any of the four extensions of the consummation of abandonment deadlines.

(STB Docket AB 1032X).

III. ESTABLISHMENT OF A "PROPER INTEREST IN AN ABANDONMENT PROPOSAL"

A. Ancient Kansas Constitutional, Statutory and Case Law Authority for Railroad Acquisition of Right-of-Way by Condemnation

46. Article 12, § 4 of the Kansas Constitution provides,

"No right of way shall be appropriated to the use of any corporation, until full compensation therefore be first made in money, or secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation."

47. The Kansas Legislature, in antiquity, granted Kansas railroad corporations the legal ability to acquire an easement by condemnation. Article IX, of G.S. 1868 section 81 provides, in relevant part,

"SEC. 81: Any duly chartered and organized railway corporation may apply to the board of county commissioners of any county through which

such corporation proposes to construct its road, to lay off, along the line of such proposed railroad, as located by such company, a route for such proposed railroad, not exceeding one hundred feet in width . . . a right of way over adjacent lands sufficient to enable such company to construct and repair its roads and stations, and a right to conduct water by aqueducts, and the right of making proper drains."

(*Farmers Coop. v. United States*, 98 Fed.Cl. 797, 802-03 (2011)).

48. Section 84 of Article IX, G.S. 1868, specifying the nature and scope of the railroad's interest in the condemned land, further provides,

"SEC. 84: If such company shall cause the copy of the report [of Commissioners], so certified, to be, within ten days after such certifying, filed and recorded in the office of the register of deeds for such county, it shall have the right to occupy the land so embraced within such route, for the purposes necessary to the construction and use of its road; and to such portions of the road over which a railroad shall be actually constructed within such time, the perpetual use of such lands shall vest in such company, its successors and assigns, for the use of the railroad, as soon as so much of such railroad shall have been constructed fit for use."

(*Farmers Coop., Id.*, at 802-03).

49. The Kansas Legislature likewise regulated the railroad's acquisition of right-of-way by voluntary conveyance. Section 47 of Article VI of G.S. 1868 provides,

Every railway corporation shall . . . have power . . . [t]o take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railway; but the real estate received by voluntary grant, shall be held and used for the purposes of such grant only, and to purchase and hold with power to convey real estate for the purpose of aiding in the construction, maintenance and accommodation of its railway.

See codification at K.S.A. 66-501.

(*Farmers Coop., Id.*, at 802-03).

50. In 1879, the Kansas Supreme Court detailed the permissible uses and scope of a Kansas railroad easement, stating,

An easement merely gives to a railroad company a right of way in the land; that is, the right to use the land for its purposes. This includes the right to employ the land taken for the purposes of constructing, maintaining and operating a railroad thereon. Under this right, the company has the free and perfect use of the surface of the land, so far as necessary for all its purposes, and the right to use as much above and below the surface as may be needed. This would include the right to tunnel the land, to cut embankments, to grade and make road-beds, to operate and maintain a railroad with one or more lines of track, with proper stations, depots, turn-outs, and all other appurtenances of a railroad. The former proprietor of the soil still retains the fee of the land and his right to the land for every purpose not incompatible with the rights of the railroad company. Upon the discontinuance or abandonment of the right of way, the entire and exclusive property and right of enjoyment revert in the proprietor of the soil. After the condemnation and payment of damages, the soil and freehold belong to the owner of the land, subject to the easement or encumbrance, and such land-owner has the right to the use of the condemned property, provided such use does not interfere with the use of the property for railroad purposes. In some cases, the right of the owner of the soil would practically not amount to anything, because the purposes of a railroad company might require the use of all the land taken to such a degree as to forbid the owner from any benefit whatever. The paramount right is with the railroad company, and the land-owner can do nothing which will interfere with the safety of its road, appurtenances, trains, passengers, or workmen.

(*Farmers Coop., Id.*, at 802, citing *Kansas C. R. Co. v. Allen*, 22 Kan. 285, 293-4 (Kan. 1879)).

B. Original Acquisition of the Railroad Right-of-Way in Decatur, Norton and Phillips Counties in the State of Kansas

51. “NKCR acquired the railroad line at issue in these cases from its predecessors-in-interest, the Burlington, Kansas & Southwestern Railroad Company and the Chicago, Burlington & Quincy Railroad Company. The railroad, and its predecessors, obtained its interests in the railroad corridor in five ways: condemnation proceedings, the General Railroad Right-of-Way Act of 1875, 43 U.S.C. § 934 (1875), private ‘Right of Way Deeds,’ 1950 deeds from the United States, and deeds from the Lincoln Land Company.” (*Arnold v. U.S.*, 137 Fed.Cl. at 539-40).

52. The NKCR exclusively obtained and possessed the right-of-way over Plaintiff's property in Decatur, Norton and Phillips Counties, Kansas subject to a later reversion to the then owner of the real estate if the use for railroad purposes later ceased.

(Article 12, § 4 of the Kansas Constitution, Article IX, of G.S. 1868 § 81, Article IX, G.S. 1868 § 84; *Farmers Coop., Id.*, at 800).

**C. THE TEMPORARY BLOCKING OF THE LANDOWNER'S
KANSAS STATE LAW REVERSIONARY PROPERTY
INTERESTS BY THE STB'S ISSUANCE OF THE NITU**

53. If the railroad and the proposed trail operator indicate a willingness to negotiate a trail use agreement, "the STB stays the abandonment process and issues a notice allowing the railroad right-of-way to be 'railbanked.' "

(*See Arnold, Id.*, 137 Fed.Cl. at 551-53; *Farmers Coop., Id.* at 799, citing *Caldwell v. United States*, 391 F.3d 1226, 1229 (Fed. Cir. 2004).

54. The STB's issuance of the NITU suspends exemption proceedings for 180 days to allow for negotiation of an agreement.

(*See Arnold, Id.*, 137 Fed.Cl. at 551-53; *Farmers Coop., Id.* at 799, citing *Barclay v. United States*, 443 F.3d 1368, 1371 (Fed. Cir. 2006); 49 C.F.R. § 1152.29(b)(2) and (d)).

55. If a trail use agreement is not reached, the NITU expires 180 days after its issuance. Further, "[i]f no trail use agreement is reached, the NITU converts into an effective notice of abandonment, allowing the railroad to 'abandon the line entirely and liquidate its interest.' "

(*See Arnold, Id.*, 137 Fed.Cl. at 551-53; *Farmers Coop., Id.* at 799, citing *Barclay, Id.*)

56. If agreement is reached, “the STB retains jurisdiction for possible future railroad use, and state law reversionary interests that would normally vest upon abandonment are blocked.”

(*See Arnold, Id.*, 137 Fed.Cl. at 551-53; *Farmers Coop., Id.* at 799, citing *Caldwell, Id.* at 1230).

57. “[T]he issuance of the NITU is the only government action in the rail banking process that operates to prevent abandonment of the corridor and to preclude the vesting of state law reversionary interests.”

(*See Arnold, Id.*, 137 Fed.Cl. at 551-53; *Farmers Coop., Id.* at 799-800, citing *Caldwell, Id.* at 1235).

58. “In 1986, the Kansas legislature clarified that “a railroad right-of-way shall be considered abandoned when: (1) The tracks, ties, and other components necessary for operation of the rail line are removed from the right-of-way following the issuance of an abandonment order by the appropriate federal or state authority.”

(*Farmers Coop., Id.* at 804-5; citing Kan. Stat. Ann. § 66–525(a)(1).

59. NKCR’s manager, OmniTRAX, LLC, has testified in an affidavit that,

“That all of the rails and ties have been removed from the NKCR Oberlin Subdivision as of December 31, 2016 although the bridge structures and ballast, which sat below the ties and rails, are still present.”

(OmniTRAX, LLC affidavit, June 30, 2019, ¶ 4, Ex. C).

60. “[T]he issuance of the NITU by the STB in November 2003 forestalled the abandonment process in favor of the potential conversion of the railroad right-of-way to a use outside the scope of the original easement, it blocked the vesting of Plaintiffs’ state law reversionary interests.”

(*Farmers Coop., Id.* at 805).

STANDARD OF AGENCY REVIEW

61. "Subject to establishing a proper interest in an abandonment proposal, any person may institute a proceeding for the issuance of a certificate of public convenience and necessity authorizing abandonment of a rail line."

(*Modern Handcraft, Inc. - Abandonment in Jackson County, MO*, 363 I.C.C. 969, 1981 WL 22670 (1981), citing *Thompson v. Texas—Mexican Ry Co.*, 328 U.S. 134 (1946)).

62. "Non-carrier "third party" applicants have the burden to establish that the public convenience and necessity require or permit abandonment. Generally [the Board] den[ies] adverse abandonment applications if there is potential for continued operations and the carrier has taken reasonable steps to attract traffic."

(*Chelsea Prop. Owners, Id.* at 778).

63. The Board's evaluation of the "public convenience and necessity" means considering "the competing benefits and burdens of abandonment on all interested parties, including the railroad, the shippers who have used the line, the community involved, and interstate commerce generally."

(*New York Cross Harbor RR, Id.*, 374 F.3d at 1183).

64. "Indeed, in deciding an adverse abandonment...application by a *private* entity, the STB analyzes the applicant's asserted interests and the record and makes its own findings regarding the public interest.

(*Id.* at 1186).

**THE INTERVENING LANDOWNERS' ADDITIONAL ARGUMENTS AND
AUTHORITIES SUPPORTING INJUNCTIVE RELIEF, DECLARATORY
FINDINGS, AND THE BOARD ISSUANCE OF FINDINGS, ORDERS
AND/OR A CERTIFICATE OF ABANDONMENT BASED UPON
PUBLIC CONVENIENCE AND NECESSITY⁵**

The named landowner intervenors submit that, by the above fully supported facts and the co-petitioners' pleadings and exhibits, they have accomplished two objectives. These objectives meet the statutory requirements set forth in 49 U.S.C. § 10903. Among those requirements are a Board finding that "the present or future convenience and necessity require or permit the abandonment; particularly, "whether the abandonment...will have a serious, adverse impact on rural and community development." § 10903(d)(1). For the reasons set forth in this Petition, abandonment is warranted under these circumstances – both substantively and as a sanction for the actions of the NKCR. Abandonment would not have any "serious, adverse impact" upon development.

First, these landowner - noncarrier applicants have established their "proper interest in an abandonment proposal." *Modern Handcraft, Id.*, at 971. In other words, the landowners' ownership of land adjacent to and underlying the Decatur, Norton and Phillips Counties, Kansas former rail corridors establish that they possess a "legitimate claim under [Kansas] law to a reversionary interest in abandoned rail property." *Id.* The CFC has recognized their standing as reversionary property owners along the Lines.

Second, the facts are clear that these landowners have likewise met their burden to establish that the public convenience and necessity require or permit abandonment. In

⁵ The Intervening Landowner/Petitioners incorporate by reference the previous 64 paragraphs and the attached documentary exhibits into this portion of the Petition as though more fully set forth herein.

the present case, the railroad's actions evidence that there is no potential for continued operations and the carrier has no intentions of taking any reasonable steps to attract traffic." See *Chelsea Prop. Owners, Id.* at 778.

The Board has noted that the "appropriate standard for evaluating any abandonment - whether one initiated by the carrier itself or an adverse abandonment opposed by the carrier - is 'whether the present or future [public convenience and necessity] require or permit the proposed abandonment.'" *New York Cross Harbor, Id.*, 374 F.3d at 355 (citing, in part, 49 U.S.C. § 10903(d)). "The Board was accordingly required 'to balance the competing benefits and burdens of abandonment on all interested parties, including the railroad, the shippers who have used the line, the community involved, and interstate commerce generally.'" (citations omitted). *Id.* The landowners respectfully submit that abandonment is fully supported by the agency record. Furthermore, the balancing of benefits and burdens of abandonment weighs heavily in favor of the landowner applicants. The landowners address these concerns below.

A. Under These Circumstances, The Benefits of Abandonment Outweigh the Attendant Burdens

1. *The NKCR Appears to Have Previously Conveyed All of Its Interest in the Right-of-Way By Agreement/Deed to a Non-Carrier, Non-Trail Operator, Albeit Without Board Approval or Oversight*

The first area of analysis, weighing the relative benefits and burdens of the proposed abandonment, concerns the potential impact upon the NKCR. However, the NKCR may be viewed as having possibly voluntarily relinquished any objection to any abandonment by its actions inconsistent with continued railroad operations over the Lines.

At the time NKCR submitted their Notice of Exemption in June 2015, the carrier certified that "[t]here has been no local traffic on the Lines in over two years and any overhead traffic can be rerouted over other rail lines." *Notice of Exemption*, § 3.(a)(3), p. 4. Thus, there has not been traffic on the Lines in approximately 6 years. Furthermore, OmniTRAX, LLC, has certified as manager for NKCR, by affidavit, that "all of the rails and ties have been removed from the NKCR Oberlin Subdivision as of December 31, 2016..." (Ex. D - OmniTRAX, LLC affidavit, ¶ 4, attached). Consequently, there is no infrastructure for the NKCR, or any other carrier, to presently utilize for any potential railroad-purposed operations over the Lines.

Perhaps most telling concerning the NKCR's lack of a cognizable stake in the proposed abandonment is its purported sale of its limited right-of-way property interests to a non-carrier – without seeking STB approval. The Board is directed to the exhibits which establish the "Agreement." Based upon the surreptitious actions of NKCR, it appears that the railroad does not intend to use the Lines in the future, there is no demand or other need for rail service, the NKCR has no plans to sell or rehabilitate the Lines, or to restore rail service, and the railroad's Agreement to sell its interest to a third party non-carrier, indicates that the NKCR has no further interests in the Lines.

It is noteworthy that Kansas statutory law voids any attempt by a railroad to convey its right-of-way to anyone other than the servient estate owner, unless the railroad's successor "shall maintain *railroad operations* on such right-of-way."⁶ K.S.A.

⁶ K.S.A. 66-525(f) provides,

Except where a railroad company conveys its right, title and interest in and to railroad right-of-way which it owns in fee simple, any conveyance by a railroad company of any actual or purported right, title or interest in property acquired in strips for right-

66-525(f). (Emphasis added). The Agreement NKCR entered into with non-carrier LIRR contained no agreement to maintain railroad operations. *See Ex. A.* Furthermore, the Agreement specifically contemplated the railroad would, in fact, consummate abandonment at such time that the parties to the illicit agreement had received substantial funds from the sale of a railroad-purposed right-of-way.

The balancing test concerning the competing benefits and burdens of abandonment favor the abandonment sought by the landowners.

2. *Shippers Cannot Use The Lines As The NKCR Sold The Right-Of-Way to a Non-Carrier and Removed Track, Ties and Operational Equipment*

There is nothing to accomplish by attempting to balance the shippers' interest in the abandonment sought by the landowners. The NKCR's 2015 Notice of Exemption painted a bleak picture of the overhead capacity of the Lines existing for years prior to the filing. NKCR stated the "[t]here has been no local traffic on the Lines in over two years." NOE, p. 4. Further, the railroad advised that the "Lines largely traverse rural farmland...[with] little or no likelihood that the rail corridor is needed for transit or highway corridor." NOE, p. 5. The NKCR represented to the STB that due to "lack of traffic on the Lines, only very limited maintenance has been performed on the Lines for some time. Therefore, the proposed abandonment will have no impact on rail freight operations and maintenance practices on the Lines." NKCR Environmental Report, p. 2.

Perhaps most important to this balancing analysis is the fact that the NKCR has been represented as having "sold" the right-of-way to a non-carrier, and a non-trail

of-way to any party other than the owner of the servient estate shall be null and void, unless such conveyance is made with a manifestation of intent that the railroad company's successor shall maintain railroad operations on such right-of-way.

operator – all without STB supervision or approval. Implicit in this action is the recognition that shipping was not a legitimate consideration in conveying its property rights to a non-carrier. But, the telling blow to any shipping consideration occurred by the wholesale removal of the tracks, ties and operational equipment. *See Ex. C.* By these actions, the NKCR disavowed any desire to continue operations or otherwise planned on taking any reasonable future steps to acquire traffic.

Due to the fact that shipping is impossible on the Lines, the balance weighs heavily in favor of the abandonment sought by the landowners.

3. *The "Community Involvement" Factor Is Inapplicable As The Lines "Largely Traverse Rural Farmland" Areas*

The STB is required to consider, as part of the abandonment weighing process, the relative "inconvenience and loss" to communities and commerce of continued operation. *See New York Cross Harbor, Id.*, at 1183 ("The benefit to one of the abandonment must be weighed against the inconvenience and loss to which the other will thereby be subjected"). As stated previously, the NKCR candidly acknowledged to the Board, in the 2015 Notice of Exemption, that the Lines "largely traverse rural farmland" areas." NOE, p. 5. Harlan County, Nebraska actually "supports the abandonment of the line between Orleans and Almena." *Environmental Report*, p. 3. These factual observations, coupled with the absence of any evidence of adverse community impact or objection made at the time of the exemption, leads to the conclusion that this factor is not material to the abandonment sought by the landowners.

4. *The Weighing of the Benefits/Burdens on Interstate Commerce and the General Rail System Favors Abandonment*

The Board is required to consider abandonment in terms of its possible effect upon interstate commerce and the country's rail system. *New York Cross Harbor, Id.*, at 1183. However, the abandonment sought by the landowners is warranted, because the line had not carried traffic for at least two years at the time the NKCR filed the 2015 exemption notice, the Lines were not adequately maintained previous to the exemption filing, and no one to date has successfully proven that the proposed abandonment otherwise materially burdens interstate commerce or the nation's rail system. The largely rural nature of these Lines seemingly obscures any significant, deleterious effect upon either interstate commerce or the nation's general rail system. This factor supports abandonment.

B. The Record Establishes That A *De Facto* Abandonment Has Taken Place

The NKCR's actions establish that a *de facto* federal abandonment has occurred, thereby supporting the abandonment relief sought by the landowners. *See Modern Handcraft, Id.*, 363 I.C.C. at 971. No recognizable rail service or track maintenance has taken place for years prior to the 2015 exemption filing. The NKCR has not made any serious efforts to solicit traffic or reinstitute rail service. *Id.* In late 2016, the railroad caused track, ties and operational equipment to be removed from the Lines, *see Ex. C*, and it appears that NKCR entered into an Agreement with a Kansas non-carrier to sell the rights-of-way without the knowledge or approval of the STB.

Based upon the foregoing, the Board is requested to find that a *de facto* abandonment occurred as a matter of law. Consequently, the Board should issue a certificate of public convenience and necessity authorizing the abandonment of the Lines at issue.

C. The Interests of Employees Have Been Protected

Federal law requires that the Board must protect the interests of employees. *See 49 U.S.C. § 10903(b)(2)*. The NKCR represented to this agency in the 2015 Notice of Exemption that employees "who may be adversely protected by the proposed abandonment will be adequately protected by the labor protective conditions in *Oregon Short Line R. Co. - Abandonment - Goshen*, 360 I.C.C. 91 (1979). NOE, p. 5. This condition has been satisfied for an abandonment.

D. Environmental Concerns Were Addressed In the Notice of Exemption and Prior To Commencing Salvage Operations That Were Completed By The End of 2016

Any environmental concerns have been previously addressed by the NKCR's "Environmental Report." The Report considered the environmental and energy impacts of the proposed abandonment, and found those impacts as not being significant. Ultimately, this agency required five conditions, which were to be satisfied before the railroad began the salvage actions which were completed by the end of 2016. *See Ex. D*. Thus, these concerns are a non-factor in the railroad's abandonment.

Declaratory Orders

In addition to those declaratory orders sought by the co-Petitioners in STB Docket AB 1032X (Sub-No. 2), the intervening landowners seek the following orders and findings:

1. The landowner' Petitioner - noncarrier applicants have established their proper interest in any federal abandonment by NKCR;
2. The landowner Petitioners have met their burden to establish that the public convenience and necessity require or permit abandonment;
3. Any potential shippers are prohibited from accessing the Lines, as the track and ties have been salvaged, and NKCR has contracted away its property interest in the right-of-way;

4. Since the Lines “largely traverse rural farmland,” there is no “inconvenience or Loss” to communities and commerce of continued operation;
5. The weighing of the benefits/burdens on interstate commerce and the general rail system favors abandonment;
6. The present or future public convenience and necessity require and/or permit abandonment of the Lines by the NKCR;
7. There is no present or future public need for rail service over the Lines;
8. There is no public need(s) outweighed by other interests;
9. Abandonment of the Lines would not have a serious, adverse impact upon rural and community development;
10. The actions of the NKCR, as well as their submitted filings, indicate that the NKCR has no expressed desire to continue operations on the Lines;
11. The NKCR has taken no reasonable steps to acquire overhead traffic on the Lines;
12. The actions of the NKCR have attempted to use STB jurisdiction to shield the Lines from the legitimate processes of Kansas state law where no overriding federal interest exists;
13. Abandonment of the Lines would serve the public interest;
14. There are no potential environmental impacts of any abandonment of the Lines;
15. The NKCR timely complied with the five (5) environmental conditions, prior to the onset of salvage activities, ordered in the October 22, 2015 NITU;
16. Any NKCR affected rail employees have been adequately protected from the proposed abandonment of the Lines by employee protective conditions in *Oregon Short Line Railroad*, 360 I.C.C. 91 (1979);
17. All rails and ties were removed from the Lines in the NKCR Subdivision as of December 31, 2016;
18. The NKCR has contracted-away its railroad-purposed right-of-way interests in the Lines to a Kansas-based, non-carrier by Agreement with RI RR, LLC during the pending June 12, 2015 NKCR Notice of Exemption;
19. Any trail requests were due by August 17, 2015, *see* 80 Fed. Reg. 47,557 (August 7, 2015), and have expired;
20. The petition to reopen or requests for public use conditions under 49 C.F.R. § 1152.28 were to be filed by August 27, 2015, *see* 80 Fed. Reg. 47,557 (August 7, 2015), and have expired;
21. The NKCR has requested and received four STB decisions extending the consummation of abandonment of the Lines, and the authority to abandon is scheduled to expire on March 1, 2020;
22. The actions of the NKCR, including the negotiations, execution of an Agreement with NI RR, LLC concerning the Lines, receipt, in hand, of funds in consideration of the Agreement, and subsequent implementation of the Agreement, were all done while the NKCR Notice of Exemption was pending before the STB, but were all performed or occurred without STB knowledge or approval;
23. All of the above-stated actions of the NKCR were performed while consummation of abandonment authority was extended by NKCR requests and subsequent STB decisions;

24. The NKCR improperly utilized its authority to abandon the Lines, and the railroad has caused injury and damages to the reversionary landowners;
25. The actions of the NKCR, as established in the agency record, establishes that a *de facto* abandonment has taken place.

CONCLUSION

The named landowners seek to intervene in the captioned proceeding as co-landowner Petitioners. In doing so, these landowners join the other petitioning landowners in seeking injunctive relief against the NKCR under 49 U.S.C. § 1321(b)(4) for the reasons stated in their petition, which is adopted herein by this reference.

In addition, the landowners seek declaratory orders and judgments of the STB concerning the actions of the NKCR as detailed herein and by co-petitioning landowners. The declaratory findings should include two time frames. First, the Board should enter declaratory findings of NKCR's actions disclosed to the STB. This time frame would include the filing of the Notice of Exemption through the repetitive requests to extend consummation of abandonment deadlines for four years. As now known, the railroad manipulated these extensions as cover for their surreptitious activities. The second time frame includes all that time the NKCR and NI RR, LLC negotiated, executed and implemented their undisclosed, unapproved sale of the right-of-way to a non-carrier, non-trail operator otherwise barred by Kansas law – thereby improperly leveraging the consummation of abandonment deadlines to further their illicit scheme. *K.S.A. 66-525(f)*.

The STB should likewise find, either substantively or as a sanction, that the NKCR's actions demonstrate clearly and unequivocally that abandonment of the Lines was the intent of the railroad, as evidenced by its actions of removing rail and ties, and other conduct. Even if not a sanction, the intervening landowners suggest that the criteria for abandonment, adverse or otherwise, are present. This agency should immediately

order abandonment of the Lines. At the very least, the STB should hold that the actions of NKCR resulted in the abandonment of the Lines.

The STB's record establishes that the evaluation of the "public convenience and necessity," by weighing the competing benefits and burdens of abandonment on all interested parties, compels Board findings of fact and law, as well as an order of abandonment. The STB should promptly issue a "certificate of public convenience and necessity authorizing abandonment" of the Lines together with the finding that "present and future public convenience and necessity...require or permit the abandonment," and that the abandonment would not have a "serious, adverse impact on rural and community development," for the reasons set forth herein, and for such other and further reasons as this agency finds is just and proper.

Dated: June 28, 2019

Respectfully Submitted,

/s/ R. Deryl Edwards
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(417) 624-8099 Voice
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deryled@gmail.com
ATTORNEY FOR THE
INTERVENING LANDOWNERS/PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that I transmitted a copy of the *Arnold Landowners Petition To Intervene In Proceedings, For Injunctive Relief, Declaratory Orders And Abandonment*

Certificate upon all parties of record in this proceeding, electronically via email and/or by U.S. Mail on this 28th day of June, 2019.

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/s/ R. Deryl Edwards
R. Deryl Edwards

OBERLIN LINE RIGHT OF WAY PURCHASE AGREEMENT

This Oberlin Line Right of Way Purchase Agreement (“Contract”) is made by and between Nebraska, Kansas & Colorado Railway, LLC, a Delaware limited liability company (“Seller”), and LI RR, LLC, a Kansas limited liability company (“Buyer”); and is effective on the last date this Contract is signed by both parties (the “Effective Date”) as shown on the signature page of this Contract.

1. **Purchase Price.** The purchase price for the Property is XXXXXXXXXXXXXXXXXXXX (the “Purchase Price”).
2. **Deposit.** Buyer shall make an earnest money deposit of XXXXXXXXXXXXXXXXXXXX (the “Deposit”) by wire to a bank account as specified by Seller within five (5) business days of the Effective Date. The earnest money deposit is non-refundable pursuant to the provisions of paragraph 3 of this Contract.
3. **Payment.** Buyer agrees to pay to Seller the total amount of XXXXXXXXXXXXX for title to Seller’s railroad right-of-way, generally described as follows:

“Approximately 57.31 miles of rail line between (1) milepost 3.35 near Flynn Junction, Nebraska, and milepost 29.84 at Almena, Kansas; (2) milepost 47.23 at Reager, Kansas, and milepost 78.05 at Oberlin, Kansas; and (3) the Norton Spur in Norton, Kansas. Buyer does not hold title to and cannot convey any type of ownership to the 17.7-mile line of railroad owned by Kyle Railroad between milepost 29.6 at Almena and milepost 47.3 at Oronoque Junction, Kansas. Consummation of the abandonment proceeding more fully addressed in Section 6, herein, will also discontinue the trackage rights over this section of railroad.”

Buyer will pay XXXXXXXXXXXXXXXXXXXX as described in paragraph 2 of this Contract. Buyer subsequently, will sell calls to adjacent landowners along the right-of-way who have expressed interest in purchasing that adjacent land from Buyer. If Buyer gets the participation anticipated from adjacent landowners, Buyer will pay Seller the XXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXX within one hundred twenty (120) days from the Effective Date. If Buyer fails to secure the balance due to Seller within one hundred twenty (120) days from the Effective Date, Buyer will forfeit its earnest money deposit as described in paragraph 2 of this Agreement. Upon delivery of the balance due to Seller, Seller will sign a Quitclaim Deed conveying its right, title and interest in the subject right-of-way to Buyer. Buyer agrees to provide Seller with ten (10) days’ notice if it is unable to consummate the transaction. Subsequent to Buyer’s receipt of a deed from Seller, Buyer intends to offer title to adjacent landowners based on what it has purchased from Seller as more fully described in paragraph 4 of this Contract. Seller has no interest in and is not a party to any of the transactions contemplated between Buyer and landowners adjacent to Seller’s right-of-way. Buyer will indemnify, defend and hold harmless Seller from and against all claims, damages, losses and expenses (including reasonable attorneys’ fees) with respect to any claim arising out of or related to any interaction, negotiation, assignment or agreement between Buyer and a third party.

Exhibit A

4. **Call Options for Deeds.** Call options are defined as short-term contracts that specify Buyer will deliver a deed for title to respective adjacent landowners' properties along Sellers right-of-way as described in paragraph 3 above. Any conveyance between Buyer and any adjacent landowner has been previously agreed upon between Buyer and the adjacent landowner and Seller has no knowledge of the content of any such agreement nor is it a party in any fashion to the transactions that have occurred or will occur between Buyer and the adjacent landowners. Any deposit received by Buyer from any adjacent landowner will be deposited into an escrow account with the First National Bank of Long Island, Kansas and will be returned to the landowner if Buyer is unable to secure the funds to consummate the final XXXXXXXXXXXXXXXXXXXXXXXXXX payment to Seller.

5. **Property Condition.** The Property is offered and shall be sold in its "as-is/where-is" condition. Seller makes no representation or warranty, express or implied, to Buyer regarding the value, profitability, legal compliance, merchantability, fitness, environmental or physical condition, or usefulness of the Property; and Seller makes no representation or warranty, express or implied, to Buyer regarding Seller's title to the Property other than pursuant to the Closing Documents in the form attached hereto as Exhibits. Buyer hereby waives any right to conduct further due diligence or inspection of the Property, and waives any right to receive further information or deliverables from Seller other than the Closing Documents expressly provided for pursuant to Section 8 below. In addition, but without limiting the generality of the foregoing: (i) all documents, reports, studies, and other information or materials delivered or disclosed to Buyer by Seller, including, without limitation, any environmental reports, surveys, maps and other information provided to Buyer by or on behalf of Seller (collectively, "Seller Documents"), are being provided to Buyer for informational purposes only and only as an accommodation to Buyer; (ii) Seller has not made, is not making, and will not make any representation, warranty, or promise of any kind, express or implied, concerning the accuracy or completeness of all or any part of such Seller Documents; and (iii) any inaccuracy, incompleteness, or deficiency in any part of such Seller Documents and/or other information shall be solely the risk and responsibility of Buyer, shall not be chargeable in any respect to Seller, and shall not form the basis of any claims by Buyer against Seller or any person or entity that prepared, authored, compiled, or created any part of the information, such claims being expressly waived and relinquished by Buyer. Buyer agrees to indemnify and hold harmless Seller for any damages, loss, harm or claim (including without limitation, reimbursement of Seller's reasonable attorneys' fees incurred related thereto) suffered or alleged against Seller related to Buyer's inspection or due diligence of the Property, including without limitation access of the Property by any principal, officer, employee, agent or contractor of Buyer. Buyer acknowledges that Seller has not reviewed the title record for the entire Property, and Buyer agrees any review of title or Seller's rights to the Property is solely Buyer's obligation to perform. The terms of this Section expressly survive the Closings and termination of this Contract.

6. **STB Action.** Buyer is aware that Seller has filed for abandonment of the Property as a rail line with the Surface Transportation Board ("STB") under STB Docket No. AB-1032X. Subsequent to filing its initial Notice of Intent, Seller has filed a number of continuances. The most recent continuance was filed on February 8, 2019, and extends the consummation deadline through March 1, 2020. Once a Closing Date is scheduled, this Contract has been

fully executed, and the transaction has been closed and funds transferred, Seller will consummate the abandonment and the Property will no longer be considered an active rail line subject to STB jurisdiction.

7. **Decatur Cooperative Association.** Decatur Cooperative facility sites along the Oberlin line in Decatur County were sold to the Decatur Cooperative Association on November 26, 2018, and existing leases voided. These sites will be exempted from the land being conveyed to Buyer by Seller pursuant to the Quitclaim deed.
8. **Closings.** At Closing, Buyer shall transfer the balance of the Purchase Price, in full, to Seller.

Buyer shall pay all costs, charges and fees of Escrow Agent, including all recording fees. Except as otherwise expressly allocated in this Contract, each party will bear its own costs incurred related to this Contract and Closings. Buyer will complete and file the Kansas real estate sales validation questionnaire(s), and any similar filing required regarding the Nebraska portion of the Property and provide copies of such documentation to Seller. The Closing Agent will be Jolene Wiese of Norton County Abstract Co., Inc., 214 East Washington, Norton, Kansas 67654; (785)877-2141; jwsac@ruraltel.net.

Upon Closing, Seller will transfer the Property as identified in Exhibit A, to Buyer, pursuant to the terms of a Quitclaim deed, Exhibit B, a general bill of sale as to all personal property, if any, and Exhibit C, an assignment of contract and lease rights associated with the property being purchased. No payments under any contracts or leases will be pro-rated, but rather Seller will retain all payments delivered from any counterparty of an assigned contract or lease as of the Closing Date, and Buyer will retain all payments delivered from any counterparty of an assigned contract or lease after Closing Date. Seller has no obligation to enforce, pursue or account for any contract or lease payments not made by a counterparty, or prepaid by a counterparty. Within sixty (60) days after Closing, Buyer shall send notice to all counterparties of the assigned contracts or leases, with copies to Seller, that such contract or lease has been assigned to Buyer.

The terms of this Section expressly survive the Closings and termination of this Contract.

9. **Taxes and Assessments.** All general taxes and special assessment installments due or to become due regarding the property transferred at a Closing for prior years has been paid by Seller. Seller did not receive tax notices from Norton or Phillips Counties for the previous tax year due to the fact no valuation was assigned to those counties by the state assessor. Tax notices for Decatur, and Harlan Counties have been paid in full. New notices should be expected in December of 2019 or early 2020 and will become the responsibility of the Buyer or the adjacent landowners.
10. **Default and Remedies.** Following a default by Buyer under this Contract, which default continues for more than 10 days after receiving notice of such default from the Seller, Seller has the following remedies:

Upon an uncured Buyer default of Closing, Seller's sole remedy is to terminate this Contract by written notice to Buyer, Seller retains the Deposit as originally contemplated in Section 2 of the

Contract, and all other funds and deliverables delivered into escrow will be promptly returned to the depositing party and this Contract will be considered terminated, null and void. Additionally, Seller's remedies for Buyer's default under Sections 5, 16, and 17 shall include all remedies available at law or in equity, and include Seller's right to be awarded reimbursement of its reasonable attorneys' fees incurred to enforce the terms of this Contract.

The terms of this Section expressly survive the Closings and termination of this Contract.

11. **Governing Law.** This Contract is governed by the laws of the State of Kansas. The terms of this Section expressly survive the Closings and termination of this Contract.
12. **Execution; Entire Agreement; Modification; Construction.** This Contract may be executed in counterparts, and signatures delivered via email, .pdf or other copy/image (and not "wet ink") are binding. This Contract and the exhibits attached hereto constitute the entire agreement of the parties concerning the Property and may be modified only by a written agreement signed by both parties. There are no oral agreements, understandings, representations or promises made by either party which modify, contradict, or supersede this Contract. Both parties were represented by legal counsel in the negotiation and drafting of this Contract, and no portion of this Contract will be more strictly construed against the drafter thereof.
13. **Timing.** Time is of the essence for the performance of every obligation under this Contract. Any date for performance or deadline under this Contract that falls on a Saturday, Sunday, or legal holiday shall be deemed to be the date of the first business day thereafter.
14. **Assignment.** Buyer may not assign this Contract or any rights or obligations hereunder without Seller's prior written consent.
15. **1031 Exchange.** Either party may involve the Property in a like-kind exchange, provided that such involvement may not cause any delay of the Closings, and may not obligate the other party to incur any additional risk or cost.
16. **Brokers/Commissions.** Each party agrees to indemnify and hold harmless the other party against any claim by a third party that a commission, finder's fee or similar payment or fee is due related to this Contract pursuant to an agreement for such fee with the indemnifying party. The terms of this Section expressly survive the Closings and termination of this Contract. due from Seller.
17. **Further assurances.** Each party agrees to take further reasonable actions to fulfill the intent of this Contract. If, after the Closings, Seller discovers that not all of its interests related to the Oberlin Line were transferred to Buyer, Seller shall convey to Buyer and Buyer shall accept the additional interests via a conveyance document of the same form as those attached hereto as Exhibit A. The terms of this Section expressly survive the Closings and termination of this Contract.
18. **Confidentiality.** Unless required by operation of law, for two years neither party shall disclose to any third party or publicly the price term of this Contract or proposed transaction. Each party

may disclose this Contract or proposed transaction to its respective agents, accountants, lenders, counsel, and publicly, to the extent reasonably necessary or prudent, including without limitation, to comply with any legal or regulatory requirements or as part of any legal dispute, provided that in each instance of sharing the information with a private third party, the disclosing party agrees to indemnify and hold harmless the other party from any loss, damage or harm if the private third party does not keep the Contract or proposed terms confidential, or uses such information for the private third party's own benefit. Seller may disclose this Contract or terms hereof to the Kansas Department of Transportation, and provide any necessary notices, including without limitation, to county offices and the Kansas Department of Revenue. The terms of this Section expressly survive the Closings and termination of this Contract.

Seller will grant Buyer the right to share a redacted version of this contract with adjacent property owners if they so request. The financial terms of this Contract may not be disclosed.

19. **Notice.** Any required notice shall be sent by hand-delivery, facsimile (if the confirmation sheet is retained as proof of delivery) with follow up by one of the other permitted notice delivery methods, certified mail return receipt requested, or overnight delivery service. Notice is deemed given when received (or, if undeliverable due to a party providing incorrect notice delivery information, then on the first date of delivery attempt). Notice shall be delivered to the following addresses, which either party may update at any time by providing notice of such update to the other party:

The rest of this page left intentionally blank.

To Seller:
Nebraska, Kansas & Colorado Railway, LLC
c/o Omnitrax, Inc.
Attn: General Counsel
252 Clayton Street, 4th Floor
Denver, CO 80206
Phone: 303-398-4500

To Buyer:
LI RR, LLC
Attn: Terry Nelson
PO Box 38
Long Island, KS 67647
Fax: _____

With copy to:
John McClymont
McClymont Law Office, PA
120 S State St.
P.O. Box 364
Fax: 785-877-3368
Email: jfmc@att.net

**Nebraska, Kansas & Colorado
Railway, LLC**

LI RR, LLC

By: _____

By: _____

Printed Name: _____

Terry Nelson, its _____

Title: _____

Date: _____

Date: _____

Contract for Deeds from LI RR LLC to land owner and description:

"Call options for the deeds" Calls are merely short term contracts that specifies that LI RR LLC will deliver a deed for the description of the landowner's property that the NKC railroad currently traverses. That deed will specify that LI RR LLC has purchased all of the property and holds the deeds from the 57 miles of the NKC Railroad from the Orleans interchange to Oberlin as described in NKC's deed description and we will provide a deed from LI RR LLC to the landowner for a dollar consideration agreed on between LI RR LLC and the landowner. That dollar amount will be deposited in an escrow account in the First National Bank in Long Island, Kansas and will be returned to the landowner if we are unable to secure enough funds to consummate the \$XXXXXXXX final installment. To be specific: The deed from NKC to LI RR LLC and the deed from LI RR LLC to the landowner should happen simultaneously on the same day. LI RR LLC will retain the right to remove and pile the ballast on the RR ROW until December 31, 2021.

LI RR LLC has received a contract for a Quit Claim Deed from NKC for the property below and will transfer to the landowner below when the contract is consummated or return funds.

Legal: 35-2s-26w of 6th pm NE4 Decatur

Description: POB center of road 509 and center of NKC RR ROW going east
& NE 100' wide along ROW 6517' = $\frac{15}{12}$ acres x \$500 = \$7500.00

\$6000.00

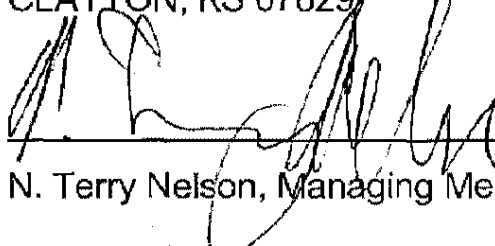
5-24-19

Owner:

JOHN ARNOLD

2669 R LANE

CLAYTON, KS 67629



N. Terry Nelson, Managing Member for LI RR LLC

5-24-2019

X John Arnold
Check NO. 6221
LI RR LLC

STATE OF KANSAS)

) ss

COUNTY OF _____)

This instrument was acknowledged before me this day of _____,

2019,

Notary Public _____

My Appointment Expires: _____

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JOHN ARNOLD., et al	)	
	)	
Plaintiffs,	)	
v.	)	Case No. 15-1252L
	)	Hon. Marion Blank Horn
	)	
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

AFFIDAVIT OF ROBERT GUINAN

COMES NOW the Affiant, Robert Guinan, and after being duly sworn, states as follows for his Affidavit:

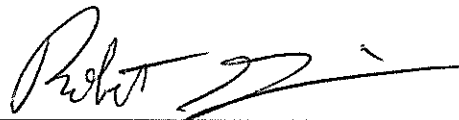
1. That I am employed by OmniTrax, Inc. as Director of Procurement -- Infrastructure.

2. That OmniTrax, Inc. has management agreements in place with the Nebraska, Kansas and Colorado Railway, LLC ("NKCR").

3. Accordingly, I am familiar with the NKCR infrastructure that was in place or has been removed from the Oberlin Subdivision.

4. That all of the rails and ties have been removed from the NKCR Oberlin Subdivision as of December 31, 2016 although the bridge structures and ballast, which sat below the ties and rails, are still present.

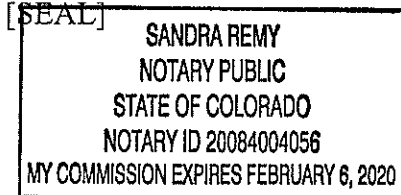
FURTHER THE AFFIANT SAYETH NOT.



Affiant Name and Signature

STATE OF COLORADO)
COUNTY OF Denver) ss:
)

Subscribed and sworn before me this 20th day of June, 2019,
by Robert Curran.



Sandra Remy
Notary Public

2-6-2020
Commission Expiration Date