

SERVICE DATE – NOVEMBER 7, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35982

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

Digest:¹ This decision orders Jackson County, Mo., to cease all construction of a hiking and biking trail in the right-of-way of a rail line.

Decided: November 6, 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 in the County (the Line). 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 build a recreational trail and circumvent the Board's procedures implementing the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d).

In a decision served on July 31, 2019, the Board revoked the County's acquisition and operation exemption. The Board explained that by removing track and placing its trail directly on the rail bed, where the track previously was, the County's actions are "no longer consistent with the acquisition exemption it invoked to acquire the Line." Jackson Cty., Mo.—Acquis. & Operation Exemption—Union Pac. R.R. (July 2019 Decision), FD 35982, slip op. at 6 (STB served July 31, 2019).

On August 12, 2019, the Landowners filed a "Motion for Adverse Abandonment and Injunctive and Declaratory Relief," in which they claim that the County is violating the Board's July 2019 Decision by continuing construction on the trail. The Landowners request a "finding of adverse abandonment" and an injunction to stop further construction of the trail. (Landowners Mot. 2, 6.) The County replied on August 20, 2019, defending its continued construction, and the Landowners filed a surreply on August 23, 2019. On September 3, 2019, the County replied

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; DJJHS Enterprises, LLC; JHB & MEB Enterprises, LLC; David W. Wells; Dawn R. Wells; Current Properties Investments, LLC; and Nephrite Fund 1, LLC (collectively, the Landowners).

to the Landowners' request regarding adverse abandonment, and the Landowners filed a surreply on September 5, 2019. Additionally, on September 6, 2019, Community Oversight Partner Services (COPS) submitted a comment.

PRELIMINARY MATTER

On August 27, 2019, the County moved to strike the Landowners' surreply filed on August 23, 2019. The County argues that the Landowners' submission violates 49 C.F.R. § 1104.13(c), which prohibits "replies to replies," and should be struck as redundant, irrelevant, and scandalous under 49 C.F.R. § 1104.8. The Landowners replied on August 29, 2019.

The motion to strike will be denied. The County has not shown the August 23, 2019 filing meets the regulatory standard to be stricken. Inclusion of that material in the record is not prejudicial, as it does not form the basis of this decision and it helps provide context to the filings before the Board. Furthermore, although that filing and the September 5, 2019 filing are not authorized under the Board's regulations, these submissions will be accepted in the interest of a complete record. The record therefore includes these filings as well as the COPS submission.

DISCUSSION AND CONCLUSIONS

The County claims in its August 20, 2019 reply that its continued construction in the right-of-way does not violate the July 2019 Decision, because it has ceased all activity that it claims formed the basis of that decision—specifically, removing track material and building the trail directly on the rail bed. The County argues that the Board did not prohibit continued trail construction in the right-of-way but *off* the rail bed. (Jackson County Reply 2, 4 Aug. 20, 2019 (emphasis added).)

The Board disagrees and finds that the County's continued construction of the trail is impermissible under the July 2019 Decision. After the revocation of the County's acquisition and operation exemption, the County's ongoing ownership of the Line is unlawful, as the County did not properly acquire the Line under 49 U.S.C. § 10901. It is unclear, therefore, upon what legal basis the County may continue *any* construction activities, whether directly on the rail bed or not. Moreover, continued trail construction on another part of the Line, even if it is not on the rail bed itself and does not involve further removal of track, is clearly related to the wrongful actions that led the Board to revoke the County's exemption in the first place. To permit the County to continue construction would allow it to continue to benefit from its prior improper actions.

The Board therefore will direct the County to cease all construction activities within the right-of-way of the Line.³ See Del. & Hudson Ry.—Lease & Trackage Rights Exemption—Springfield Terminal Ry., 8 I.C.C.2d 839, 849 (1992) (citing United States v. Chesapeake &

³ Because the Board is finding that the County's construction is in violation of the Board's previously issued July 2019 Decision and is ordering the County to cease violating that order, it is not necessary to rule on the Landowners' injunction and declaratory order requests and, therefore, the requests will be denied as moot.

Ohio Ry., 426 U.S. 500, 514 (1976)); see also ICC v. Am. Trucking Ass'ns., 467 U.S. 354, 364-65 (1984) (the Board “has discretion to take actions that are ‘legitimate, reasonable, and directly adjunct to the [agency’s] explicit statutory power’”) (citing predecessor to 49 U.S.C. § 1321(a)) (internal citations omitted); cf. Pyco Indus.—Feeder Line Application—Lines of S. Plains Switching, Ltd. Co., FD 34890, slip op. at 2, 5-6 (STB served Jan. 24, 2007) (voiding actions that undermine Board processes and contravene prior Board order). The Board recognizes that the County and UP filed a petition for exemption seeking abandonment authority in Docket No. AB 33 (Sub-No. 342X) on October 4, 2019. The County and UP indicate that the County will seek the issuance of a trail condition under the Trails Act.⁴ Unless and until a trail condition is issued and the Board is notified that an interim trails use/railbanking agreement has been reached, however, the County’s construction activities are unlawful.

Turning to the Landowners’ request for “a finding of adverse abandonment,” a motion is not the proper mechanism to seek such an extraordinary remedy. If a party wishes to seek adverse abandonment or discontinuance, it must do so through an application that complies with the requirements of 49 C.F.R. part 1152. See SMS Rail Serv., Inc.—Adverse Discontinuance of Serv. Exemption—Gloucester Cty., N.J., AB 1095X, slip op. at 1 (STB served Mar. 2, 2012) (“Under agency precedent, [adverse discontinuance] must be sought in an application.”); Union Pac. R.R.—Aban. Exemption—in Rio Grande & Mineral Ctys., Colo., AB 33 (Sub-No. 132X), slip op. at 7 (STB served May 3, 2005) (rejecting third-party abandonment request made in the context of the Board’s offer of financial assistance process and noting that the party should file an application for adverse abandonment under 49 U.S.C. § 10903). The Landowners’ motion for adverse abandonment, therefore, will be denied.

It is ordered:

1. The County is ordered to cease immediately all trail construction activity within the right-of-way of the Line.
2. The County’s motion to strike is denied.
3. The Landowners’ August 12, 2019 requests for an injunction and declaratory order are denied as moot, and the motion for adverse abandonment of the Line is denied.
4. The Landowners’ August 23, 2019 and September 5, 2019 filings are accepted into the record.
5. This decision is effective on its date of service.

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

⁴ The County and UP indicate that the County will seek a certificate of interim trail use (UP and County’s Pet. 8, Oct. 4, 2019, Union Pac. R.R.—Aban. Exemption—in Jackson Cty, Mo., AB 33 (Sub-No. 342X)), but the proper mechanism would be a notice of interim trail use, as they seek an exemption.