

**BEFORE THE SURFACE AND TRANSPORTATION BOARD
STB DOCKET NO. AB 1032 (Sub-No.2)**

ENTERED
Office of Proceedings
August 20, 2019
Part of
Public Record

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

**LANDOWNERS' SUPPLEMENTAL AUTHORITY IN SUPPORT OF THEIR
MOTION FOR DECLARATORY AND INJUNCTIVE RELIEF**

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Dated: August 20, 2019

**LANDOWNERS' SUPPLEMENTAL AUTHORITY IN SUPPORT OF THEIR
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The Landowners in *Flying S. Land Co. v. United States* and *Dawson v. United States* filed their Motion for Declaratory and Injunctive Relief on June 7, 2019. The Landowners' motion set forth the entire procedural history and present posture of the abandonment of the right-of-way at issue. The motion also set forth the details of a deal between Nebraska, Kansas & Colorado Railway ("NKCR") and a Kansas entity, LI RR, LLC, designed to elicit payment from these Landowners for their own property underlying the right-of-way in return for NKCR's agreement to consummate the abandonment. As stated in Landowners' motion, NKCR cannot legally transfer the right-of-way to LI RR, LLC under federal law without following the rules and regulations established by the Board. Now, in a detailed newspaper article concerning the status of NKCR's abandonment, the entire scheme is laid out and confirmed (the newspaper article from the Garden City Telegram is attached hereto as Exhibit A).

As set forth in Exhibit A, NKCR is attempting to rely on the permission or authority to abandon already granted by the STB in the Notice of Interim Trail Use ("NITU") to transfer the right-of-way to LI RR, LLC, which is in violation of federal law and the Board's rules and regulations, because NKCR has not actually consummated abandonment even though they were previously given permission to do so. The scheme, which is clearly set forth in Exhibit A, establishes that NKCR has violated federal law and the Board's rules because NKCR has transferred the right-of-way to LI RR, LLC without the Board's approval:

- 1) **"In order to expedite this venture, the LI RR, LLC was formed and began talks with the Nebraska, Kansas & Colorado Railway to purchase its right-of-way through its abandonment of the railroad";**¹—NKCR simply cannot sell the right-of-way to LI RR, LLC or anyone else without following the law;

¹ See Exhibit A, at 1.

- 2) **“Because the Nebraska, Kansas & Colorado Railway was not interested in selling the 12 miles of track right-of-way that runs parallel to US-383 between Alma and Harlan County, Nebraska, the LI RR, LLC will have to purchase the entire abandoned route of 57.31 miles”;**²—NKCR is selling the entire right-of-way without following the law;
- 3) **“We can sell contracts for quit claim deeds to each Landowner adjacent to the railroad that will pay for the contract negotiated within NKCR so landowners can stop Rails-to-Trails and actually receive deeds for the railroad right-of-way that goes through their property. We have 120 days from May 6, 2019 (Sept. 3), to complete this and the best part is the Landowners absolutely have control of the outcome today”;**³—NKCR received permission to abandon through the Trails Act and is now intentionally failing to consummate abandonment in order to extort landowners and transfer the right-of-way, which they don’t own, and without following federal law, while the right-of-way is still under the jurisdiction of the STB;
- 4) **“The second possible outcome is that NKCR could continue to ask for additional extensions to abandon the railroad for another year every March for an indefinite amount of time. It would allow the railroad to relay the railroad rails at any time”;**⁴—NKCR is subject to an adverse abandonment action and can’t replace the rails and ties once abandoned;
- 5) **“For the past 2 years, we have been working on call options for the deeds, said Nelson, calls are merely short-term contracts that specify that LI RR, LLC will deliver a deed for the description of the Landowners’ property that the NKCR currently transverses. That deed will indicate that LI RR, LLC has purchased all of the property and holds the deeds from the 57 miles of NKCR. We in turn will provide a deed from LI RR, LLC to the landowners for a dollar consideration agreed on between LI RR, LLC and the landowner. That dollar amount will be deposited in an escrow account”;**⁵—this is the illegal scheme and NKCR has specifically admitted that they are blatantly ignoring and rejecting federal law and the Board’s rules and processes; and
- 6) **“In the meantime, LI RR, LLC retains the right to remove and pile the ballast on the railroad right-of-way until Dec. 31, 2021. The rock will be made available first to those Landowners who committed their funds to buy the railroad right-of-way”;**⁶—NKCR has not only removed the rails and ties, but LI RR, LLC has also confiscated the ballast too, which they have no right to do.

² *Id.* at 2.

³ *Id.* at 3.

⁴ *Id.*

⁵ *Id.* at 4.

⁶ *Id.*

The scheme has now been confirmed. Neither NKCR or LI RR, LLC have any legal right to transfer the right-of-way without following the rules and regulations of the Board and NKCR does not have the right to sell the land underlying the corridor to LI RR, LLC, or anyone else, because NKCR cannot sell what it does not own. With the removal of the rails and ties, and even removal of the ballast, NKCR has clearly abandoned the right-of-way. NKCR has never notified the Board of the transfer of the right-of-way and has not consummated abandonment either.

The Board should place a condition on NKCR's permissive abandonment authority under 49 C.F.R. § 1152.29(e)(2) by stating that NKCR cannot transfer or sell their interest in the line prior to exercising their permissive abandonment authority. The Board should also immediately direct NKCR to immediately confirm with the Board its consummation of abandonment. Since the apparent deadline for this transaction, as stated in Exhibit A, is September 3, 2019, the Board's immediate action is necessary.

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Case No. 15-1268L

CERTIFICATE OF SERVICE

I certify that I have this day served copies of document upon all parties of record in this proceeding, by U.S. Mail this 20th day of August, 2019.

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The
Garden
City

Telegram

Possible solution to K-383 expansion issues?

By Bev Glass / Special to The Telegram

Posted Aug 16, 2019 at 1:17 PM

Updated Aug 16, 2019 at 3:02 PM

For most drivers along K-383 highway North beginning at the US-36 highway intersection, every day presents the possibility of an accident that could cost a life, loss of cargo or destruction of property.

The unforgiving blind curves and hairpin turns on this very narrow highway — which has no shoulders or turn or passing lanes — waits for a much-needed makeover as the Kansas Department of Transportation (KDOT) struggles to find the funds needed to do more than a cosmetic patch job.

“Whereas we understand that the highway funding has been gutted, it doesn’t take away the fear and anxiety we all feel every time we turn onto 383,” said Craig Ingram, Long Island cattle and grain producer.

Ingram, along with Terry Nelson, Chris Cox, Steve Cox and Jerry Cox, surmised that a critical component on the improvements was tied to the need to capture the right-of-way to allow for the shoulders and passing and turning lanes. More significantly, it included the abandoned Nebraska Kansas & Colorado Railway (NKCR) line that could provide ample space for the needed improvements.

In order to expedite this venture, the LI RR LLC was formed and began talks with the Nebraska Kansas & Colorado Railway to purchase its right-of-way through its abandonment of the railroad.

A bit of background

On June 12, 2015, the NKCR filed a Verified Notice of Exemption with the Surface Transportation Board (STB). In mid-September 2015, the Sunflower Rails to Trails Conservancy filed a request with the STB for a Notice of Interim Trail Use or Abandonment (NITU). The STB issued the NITU on Oct. 22, 2015, and was good for one year.

Rails to Trails Conservancy is a nonprofit organization dedicated to creating a nationwide network of trails from former rail lines and connecting corridors to build healthier places for healthier people.

In mid-September 2016, Sunflower requested an extension of the NITU until April 1, 2017, to allow for further negotiations between it and the NKCR. On Oct. 3, 2016, the railway objected to Sunflower's request for an extension of the interim trail use notice. The October 2015 NITU expired Oct. 16, 2016. That was followed by the Surface Transportation Board officially denying Sunflower's request to extend the NITU. The board maintained that the railroad could now fully abandon the rail line.

By mid-December, the railroad had requested an extension for the consummation of abandonment until March 25, 2017. There would be three more requests for extensions made from NKCR and granted by the STB. The most current extension is scheduled to expire on March 1, 2020.

A step closer to yes

Because the Nebraska Kansas & Colorado Railway was not interested in selling the 12 miles of track right-of-way that runs parallel to US-383 between Almena and Harlan County, Neb., the LI RR LLC will have to purchase the entire abandoned route of 57.31 miles. The rail line runs from milepost 3.35 near Orleans, Neb., to milepost 29.84 at Almena and from milepost 47.23 at Reager, Kan., to milepost 78.05 at Oberlin and the Norton Spur in Norton.

"NKCR filed for abandonment, removed the rails and had every intention of donating it to Sunflower Rails to Trails," said Terry Nelson, LI RR LLC president. "Because of a meeting with several other people and a lobbyist in the Phillips County Courthouse to pursue the purchase of the railroad for a realignment of Highway 383 from Almena through Long Island, we realized that the expansion couldn't happen if we ended up with a Rails to Trails."

Nelson said he and the other LI RR LLC members made hundreds of telephone calls and sent about the same amount of emails and text messages to persuade NKCR to drop the Rails to Trails arrangement in exchange for a hybridized version to transfer the complete set of deeds and property for the 57 miles of what is known as the Oberlin Spur to his organization.

As of July 31, of the 131 tracts along the 57-mile rail corridor, 119 of those tracts, or around 91 percent, have been committed to the project.

“The overwhelming support reflects a deep sense of obligation folks here have in making this section of K-383 safer for everyone who uses it, whether it’s just once, every month or every day,” Nelson said. “It makes us very proud but not surprised to see this level of participation in providing the solution to a safety and quality-of-life issue.”

What’s next

According to Nelson, there are several possible outcomes to this venture.

“We can sell contracts for quit claim deeds to each landowner adjacent to the railroad that will pay for the contract negotiated with NKCR so landowners can stop Rails to Trails and actually receive deeds for the railroad right of way that goes through their property. We have 120 days from May 6, 2019 (Sept. 3), to complete this and the best part is the landowners absolutely have control of the outcome today.”

The second possible outcome is that NKCR could continue to ask for additional extensions to abandon the railroad for another year every March for an indefinite amount of time. It would allow the railroad to relay the railroad rails at any time.

The third possible outcome, according to Nelson, would be to wait for a Rails to Trails agreement and then all of the landowners would have a class-action lawsuit against the federal government for a “taking action,” or when the government restricts the owner’s rights so much that the governmental action becomes the functional equivalent of a physical seizure of property.

The fourth possibility is to have different attorneys acquire permission from multiple landowners to file a class-action lawsuit against the federal government for taking action, which would greenlight any Rails to Trails to assume any or all of the property. The railroad could have the ability to re-establish the railroad any time in the future.

“For the past two years, we have been working on call options for the deeds,” said Nelson. “Calls are merely short-term contracts that specify that LI RR LLC

will deliver a deed for the description of the landowners' property that the NKCR currently transverses. That deed will indicate that LI RR LLC has purchased all of the property and holds the deeds from the 57 miles of NKCR. We in turn will provide a deed from LI RR LLC to the landowners for a dollar consideration agreed on between LI RR LLs and the landowner. That dollar amount will be deposited in an escrow account."

Nelson continued, saying that if for some reason LL RR LLC is unable to secure enough funds to consummate the final installment of the purchase price, then all landowner funds are returned as soon as possible.

In the meantime, LI RR LLC retains the right to remove and pile the ballast on the railroad right of way until Dec. 31, 2021. The rock will be made available first to those landowners who committed their funds to buy the railroad right of way. Those landowners will get the rock removed from their property and will pay around \$15/ton should they care to purchase the rock that will be screened from dirt and steel.

Other landowners along the rail line who have chosen not to participate, as well as other potential customers, will pay a higher fee. Profit from the sale of the ballast will be used to satisfy the remaining NKCR balance due upon the closing of the contract.

"It seems like a lot of effort to secure that railroad right of way, but it will make negotiating with KDOT on the location and make-up of the K-383 North section that runs between Almena, Long Island and Alma, Neb., go a lot better," said Ingram.

"The money spent on securing the railroad right of way is a much better use of funds than having a trail few if any will use and the funding and upkeep falls to the county or a small citizen group," he said. "Whether landowners choose to participate in this endeavor or not, all will benefit from the vast improvements needed to make this a safe highway for all drivers. There's no price tag on that kind of safety and security."