

SERVICE DATE – APRIL 30, 2020

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 853 (Sub-No. 1X)

KANSAS & OKLAHOMA RAILROAD, INC.—ABANDONMENT EXEMPTION—IN
HODGEMAN, COMANCHE, KIOWA, AND PRATT COUNTIES, KS

Digest:¹ This decision denies a landowner's petition to reopen the Board's December 29, 2008 decision permitting Sunflower Recreational Trails, Inc., to negotiate for interim trail use on a rail line located in Kansas.

Decided: April 29, 2020.

On May 29, 2019, Marc Elster, a landowner in Kiowa County, Kan., filed a petition to reopen this proceeding in which Kansas & Oklahoma Railroad, Inc. (K&O), obtained authority to abandon two segments of rail line (collectively, the Line). Elster requests that the Board declare a portion of the Line that crosses his property officially abandoned and issue a certificate of abandonment so that the right-of-way may revert to him pursuant to Kansas law. Sunflower Rail-Trails Conservancy, Inc. (SRTC), and K&O claim that they timely reached an interim trail use/rail banking agreement for the Line under section 8(d) of the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d). Elster disputes that an appropriate Trails Act agreement exists and argues that the Line should be declared abandoned.

There is no basis for the Board to declare the Line abandoned, as Elster requests. As discussed below, the Line is either properly railbanked under the Trails Act, or it remains an active, unabandoned rail line because K&O's authority to abandon expired without having been consummated. In either case, the Line remains under the Board's jurisdiction and the underlying right-of-way would not revert to Elster, as he claims it would. However, the Board's ongoing jurisdiction over the Line does not preclude Elster from pursuing a state law remedy, as discussed below.

BACKGROUND

In 2003, K&O filed a verified notice of exemption under 49 C.F.R. part 1152 subpart F—Exempt Abandonments to abandon the Line: (1) a 10.7-mile rail line between milepost 36.3 at Hanston and milepost 47.0 at Jetmore, in Hodgeman County, Kan.; and (2) a 46.8-mile rail line between milepost 589.2 at Coats and milepost 636.0 at Protection, in Comanche, Kiowa, and

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).

Pratt Counties, Kan. Notice of the exemption was served and published in the Federal Register on August 27, 2003 (68 Fed. Reg. 51,637).

Between 2003 and 2009, several notices of interim trail use or abandonment (NITUs) under 49 C.F.R. § 1152.29 were issued, providing time for parties to negotiate and seek to reach agreement for interim trail use/rail banking of the Line or portions of it pursuant to the Trails Act. Of relevance to this proceeding, on February 4, 2008, a NITU was issued allowing Sunflower Recreational Trails, Inc. (SRT, now SRTC), to negotiate with K&O for interim trail use/rail banking on the 46.8-mile segment until August 2, 2008. On December 29, 2008, a NITU was issued providing time for SRT to negotiate with K&O for interim trail use/rail banking on the 10.7-mile segment until June 7, 2009.

On May 29, 2019, Elster filed a petition to reopen the proceeding. According to Elster, a portion of his land is encumbered by the “physically” abandoned 46.8-mile rail line. (Pet. 2-3.) Elster states that a modular home has been placed on the right-of-way and is “turning [his property] into a junk yard as well as becoming a general nuisance.” (Id., Cover Letter at 1.) Elster requests that the Board declare that the railroad right-of-way adjacent to his property has been abandoned as a matter of law and issue a certificate of abandonment so that the portion of the right-of-way that traverses his property may revert to him, pursuant to Kansas law. (Id. at 2, 9.) Elster also asks that the Board quash any claims by former trail operators asserting that the rights-of-way have been railbanked. (Id. at 1.) To support his argument, Elster argues that K&O discontinued any use of the rights-of-way more than 20 years ago, all railroad assets were removed more than a decade ago, the Board has not enforced any “railroad obligations” on the Line, and all issued NITUs have been vacated or expired without an interim trail use/rail banking agreement having been finalized. (Id. at 3.) Elster argues that K&O has no legitimate railroad interest in the rights-of-way, and that, as such, the requested abandonment could impose no possible burden on K&O. (Id. at 9.)

On June 4, 2019, SRTC filed a reply to Elster’s petition, arguing that the 46.8-mile segment was “successfully railbanked” prior to the end of the NITU negotiating period on August 2, 2008.² (SRTC Comment 2.) While noting that a copy of the actual interim trail use agreement cannot be located, SRTC attaches a copy of a Quitclaim Deed recorded in the Register of Deeds’ office in Kiowa County, a Donative Bill of Sale, and an Assignment. The Donative Bill of Sale and the Assignment both refer to the Trails Act and a Line Donation Contract, which both the Donative Bill of Sale and the Assignment state is dated July 15, 2008. SRTC argues that these documents show that the 46.8-mile segment was successfully donated for interim trail

² The current requirement in § 1152.29(h) that a railroad and trail sponsor jointly file a notice with the Board when an interim trail use/rail banking agreement has been reached became effective in 2012, and therefore did not apply at the time. See Nat’l Trails Sys. Act & R.R. Rights-of-Way, EP 702, slip op. at 5 (STB served Apr. 30, 2012).

use/rail banking under the Trails Act. (SRTC Comment 2.) Elster filed a reply to SRTC's reply³ on June 6, 2019, asserting that the court in Farmers Cooperative Co. v. United States, 100 Fed. Cl. 579, 583 (2011), a Trails Act takings case brought by certain landowners against the United States, which included portions of the Line at issue here, previously stated that a trail use agreement had not been reached on the Line. (Elster Reply 2, June 6, 2019.)

In response to the issues raised by Elster and the ambiguity regarding the status of the Line, the Board directed SRTC, the County, and K&O, by decision served on September 13, 2019, to provide supplemental information regarding railbanking activities. On September 20, 2019, Elster filed a response raising many of the same arguments proffered in his petition and his reply to SRTC's reply, as well as other arguments not ultimately relevant to the Board's analysis. (Elster Suppl. 1-2.) On October 2, 2019, SRTC filed comments again asserting that K&O and SRTC had entered into agreements for interim trail use/rail banking for both segments of the Line.⁴ (SRTC Suppl. 4-6.) SRTC also alleges that Elster does not have standing to challenge the status of the 10.7-mile segment as Elster lives many miles away, in Belvidere, Kan., adjacent to the 46.8-mile segment. (*Id.* at 3.) By filing dated October 3, 2019, K&O noted that it was unable to locate any relevant documents but asserted that, based largely upon the evidence and documents previously submitted by SRTC, it is obvious that SRTC and K&O timely entered into an interim trail use/rail banking agreement under the Trails Act. (K&O Suppl. 3-4.) SRTC and Elster subsequently filed letters regarding whether Kansas law precludes or invalidates the conveyances of property by rail carriers to anyone other than owners of servient estates. (SRTC Reply 2-3, Oct. 9, 2019; Elster Reply 1, Oct. 22, 2019.)⁵ By letter filed on February 4, 2020, Elster filed additional comments in this docket. In response, K&O filed a motion to strike, pursuant to 49 C.F.R. § 1104.8, asserting that Elster's filing contained "redundant" and "immaterial" matter.⁶

For the reasons discussed below, Elster's petition to reopen will be denied.

³ Under 49 C.F.R. § 1104.13(c), a reply to a reply is not permitted. However, in the interest of a more complete record, the Board will accept Elster's filing into the record.

⁴ SRTC submitted with its comments an unsigned copy of a Line Donation Contract, under which, it claims, K&O agreed to convey the right-of-way to SRT for interim trail use and rail banking. (SRTC Suppl. 4 & Appendix 3.)

⁵ However, based upon the Board's determination below, the Board need not address this issue. Similarly, the Board need not determine whether Elster has standing to challenge the status of the 10.7-mile line.

⁶ Under 49 C.F.R. § 1104.13(c), a reply to a reply is not permitted. Again, in the interest of a more complete record, the Board will accept Elster's comments into the record. Therefore, K&O's motion to strike will be denied.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 1322(c) and 49 C.F.R. § 1115.4, the Board may reopen a proceeding because of “material error, new evidence, or substantially changed circumstances.” The alleged grounds must be sufficient to convince the Board that its prior decision in the case would be materially affected in order for reopening to be granted. See Montezuma Grain v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003); Canadian Nat’l Ry.—Control—EJ&E W. Co., FD 35087 (Sub-No. 8), slip op. at 4 (STB served Dec. 21, 2018).

Elster has failed to present any new evidence or changed circumstances that would require reopening this proceeding. See 49 C.F.R. § 1115.4. Further, although not specifically raised by Elster, the Board finds no material error in any of its prior decisions in this proceeding. Id.

Although the record includes some indicia that one or both segments of the Line may have been railbanked under the Trails Act, the evidence, even as supplemented, is not definitive. However, regardless of whether a Trails Act agreement was reached, the Board, cannot, for the reasons set forth below, declare the Line abandoned as Elster requests.

The Board’s authority over the abandonment of rail lines that are part of the interstate rail network is exclusive and plenary. See 49 U.S.C. §§ 10501(b)(2), 10502, 10903. If the Line, or any portions of it, was properly railbanked under the Trails Act, it is not abandoned, and it remains under the Board’s exclusive jurisdiction as part of the interstate rail network. See 16 U.S.C. § 1247(d) (properly invoked interim trail use of rights-of-way under the Trails Act “shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.”).

Even if the Line was never properly railbanked under the Trails Act, it nonetheless remains under the Board’s exclusive jurisdiction as an active rail line, because K&O’s abandonment was never consummated and therefore its abandonment authority has long since expired. Abandonment authority issued by the Board is permissive, and the railroad may decide not to exercise it; the agency retains jurisdiction over the rail right-of-way until abandonment authority has been exercised. Honey Creek R.R.—Pet. for Declaratory Order, FD 34869 et al., slip op. at 4 (STB served June 4, 2008); see also Hayfield N. R.R. v. Chi. & N.W. Transp., 467 U.S. 622, 633-34 (1984); Baros v. Tex. Mexican Ry., 400 F.3d 228, 236 (5th Cir. 2005); Birt v. STB, 90 F.3d 580, 589 (D.C. Cir. 1996).

Since 1997, pursuant to 49 C.F.R. § 1152.29(e)(2), the Board’s regulations have provided that a railroad must file a timely notice of consummation with the agency to signify that it has exercised the abandonment authority granted and intends that the property be removed from the interstate rail network. The filing of a notice of consummation provides the only legally cognizable way to consummate abandonment of a rail line that is subject to the Board’s licensing requirements. Honey Creek R.R., FD 34869 et al., slip op. at 5-6 (holding that a line remained

an active line of railroad subject to Board jurisdiction, even where the tracks and switch had been removed, because the carrier had not yet filed a notice of consummation); see also Baros, 400 F.3d at 236. If consummation has not been effected by the railroad's filing of a notice of consummation, the authority to abandon automatically expires after one year from the service date of the decision permitting abandonment, unless there remain any outstanding conditions that are barriers to consummation, including interim trail use/rail banking conditions under the Trails Act. 49 C.F.R. § 1152.29(e)(2). If any such barriers to consummation remain at the end of the one-year period, the abandonment authority expires 60 days after satisfaction, expiration, or removal of the last such barrier. Id. Once the abandonment authority expires, the railroad must begin a new abandonment proceeding if it wishes to abandon the line. Id.

Here, if the Line was never properly railbanked, the NITUs expired on August 2, 2008, and June 27, 2009. As there were no other barriers to consummation, any notice of consummation would have been due by October 1, 2008, and August 26, 2009, respectively. As Elster acknowledges, no notices of consummation were timely filed; therefore, absent a valid interim trail use/rail banking agreement, the Line remains an active line of railroad subject to Board jurisdiction. See 49 C.F.R. § 1152.29(e)(2); Honey Creek R.R., FD 34869 et al., slip op. at 4-5; Aban. & Discontinuance of Rail Lines & Transp. Under 49 U.S.C. 10903, 1 S.T.B. 894, 905 n.12 (1996).⁷

Regardless of whether the Line was properly railbanked, however, Elster is not precluded from pursuing any appropriate state law remedies that might be available to seek to remove the modular home and other appurtenances on the right-of-way, if those remedies are not preempted by federal law. Under 49 U.S.C. § 10501(b), state and local actions are preempted if they intrude upon matters directly regulated by the Board or if they are carried out in a manner that has the effect of unreasonably burdening or interfering with rail transportation, including railbanking. See N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007) (stating that § 10501(b) preempts state laws that have the effect of managing or governing rail transportation); Norfolk S. Ry.—Pet. for Declaratory Order, FD 35950, slip op. at 3-4 (STB

⁷ Elster's reliance on Farmers Cooperative is misplaced. As that proceeding was a takings case against the United States, neither SRTC nor K&O were parties to it, and it is not clear whether the existence of an interim trail use/rail banking agreement was essential to the court's determination. It does not appear that the doctrine of collateral estoppel, or issue preclusion, binds the Board to the Claims Court's statement that no trail use agreements were reached on these segments. See Farmers Coop., 100 Fed Cl. at 581; see also B&B Hardware, Inc. v. Hargis Indus., Inc., 575 U.S. 138, 148 (2015) (explaining the elements of issue preclusion, including that the issue must have been essential to the judgment and that the parties must be the same); Capitol Servs. Mgmt., Inc. v. Vesta Corp., 933 F.3d 784, 794 (D.C. Cir. 2019) (same). Moreover, as noted above, even if no interim trail use/rail banking agreement was reached, the Line would remain an active rail line within the Board's jurisdiction, as no consummation notice was filed for either segment. See Farmers Coop., 100 Fed. Cl. at 581-83 (acknowledging that the segments remain in the Board's jurisdiction until a consummation notice is filed).

served Feb. 29, 2016) (generally, activities not related to transportation by rail carrier are not entitled to federal preemption under § 10501(b)); Jie Ao—Pet. for Declaratory Order, FD 35539, slip op. at 4-7 (STB served June 6, 2012) (addressing preemption questions concerning a railbanked right-of-way). If the modular structure and other appurtenances on the right-of-way that Elster considers nuisances are entirely unrelated to rail transportation or railbanking, federal preemption would not preclude Elster from bringing a state law action tailored to address those issues. Idaho N. & Pac. R.R.—Aban. & Discontinuance Exemption—in Wash. & Adams Ctys., Idaho, AB 433 (Sub-No. 2X) et al., slip op. at 9-10 (STB served Apr. 1, 1998) (federal preemption does not necessarily preclude state and local actions to address nuisances on rail lines being used as interim trails under the Trails Act); see also JGB Properties—Pet. for Declaratory Order, FD 35817 (STB served May 22, 2015) (addressing preemption questions involving state court findings concerning easements and other state property law matters).⁸

Based upon the foregoing, the Board will deny Elster's petition. Elster has not shown any material error, new evidence, or substantially changed circumstances that would warrant reopening this proceeding.

It is ordered:

1. Elster's submissions filed on June 6, 2019, and February 4, 2020, are accepted into the record.
2. K&O's motion to strike is denied.
3. Elster's petition to reopen is denied.
4. This decision is effective on its service date.

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

⁸ The Board notes that SRTC claims it is the trail sponsor on a railbanked line under the Trails Act. Under the Trails Act and 49 C.F.R. § 1152.29(a)(2), a trail sponsor assumes full responsibility for, among other things, maintaining the right-of-way.