

46772
DO

SERVICE DATE – FEBRUARY 5, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35982

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

Decided: February 4, 2019

On December 23, 2015, Jackson County, Mo. (Jackson County or the County), filed a verified notice of exemption under 49 C.F.R. § 1150.31 to acquire from Union Pacific Railroad Company and to operate approximately 17.7 miles of rail line between milepost 288.3 and milepost 270.6, in Jackson County (the Line). The notice of exemption was served and published in the Federal Register on January 8, 2016 (81 Fed. Reg. 992).

On January 15, 2016, CenturyLink Communications, LLC (CenturyLink) filed a motion for a housekeeping stay of the exemption's effective date.¹ Among other things, CenturyLink suggested that Jackson County was not a bona fide common carrier because it had expressed a desire to use the Line as a recreational trail. (CenturyLink Mot. 3, Jan. 15, 2016.) Jackson County responded that, although it planned to use part of the right-of-way adjacent to the Line for a recreational trail and possibly allow commuter rail service on the Line, neither of those uses was inconsistent with its freight service obligation. (Jackson Cty. Reply 9, Jan. 19, 2016.) It also stated that it had no plans to remove track for the trail. (Id.)

The Board denied CenturyLink's motion for a housekeeping stay in a decision served on February 4, 2016, and permitted the exemption to become effective immediately. Jackson Cty., Mo.—Acquis. & Operation Exemption—Union Pac. R.R., FD 35982, slip op. at 3 (STB served Feb. 4, 2016). Regarding CenturyLink's suggestion that Jackson County is not a bona fide common carrier, the Board found that Jackson County had accurately described its obligations as a common carrier and commitment to providing rail service through a contract operator should a freight customer require such service. Id. In addition, the Board found that the record before it at that time did not support CenturyLink's argument that the planned uses of the Line were inconsistent with the freight service obligation Jackson County was to assume. Id. Thus, the Board found that the Line would remain part of the national rail network and available for freight rail service. Id.

¹ By decision served on January 21, 2016, the effective date of the exemption was postponed to provide sufficient time for the Board to address the arguments presented.

On October 22, 2018, certain landowners² jointly filed a petition asking the Board to revoke the exemption. The National Association of Reversionary Property Owners replied in support on October 25, 2018, and the landowners filed a supplement on October 26, 2018. In their October supplement, the landowners reference Land Conservancy of Seattle—Acquisition & Operation Exemption—Burlington Northern & Santa Fe Railway, FD 33389 (STB served Sept. 26, 1998). In that case, the Board revoked an exemption permitting the acquisition and operation of a rail line under 49 C.F.R. § 1150.31 where a party had sought to use those procedures to circumvent the agency’s abandonment processes and the recreational trail use provisions of Section 8(d) of the National Trails System Act, 16 U.S.C. § 1247(d), and 49 C.F.R. § 1152.29. The County filed a reply in opposition to revocation on November 13, 2018. On January 28, 2019, the landowners filed a notice of additional authority and a notice of supplemental information.³ In the notice of supplemental information, they include a copy of a recent presentation, which they claim demonstrates that Jackson County provided false and misleading information in its verified notice. In the notice of additional authority, the landowners include affidavits and photographs supporting their argument that the track has been removed from the right-of-way.

The evidence presented in the landowners’ petition to revoke, the County’s response, and the landowners’ supplemental filings raise questions about whether recreational trail use on this right-of-way remains consistent with the County’s acquisition and operation of a rail line under 49 C.F.R. § 1150.31 and the County’s common carrier obligation. Specifically, several pictures included in Exhibit 18 of the petition to revoke, and within the affidavits filed by the landowners on January 28, suggest that Jackson County is placing its trail on the rail bed, where the track previously was, and not adjacent to the track, contrary to the representations made by Jackson County in its 2016 reply. In fact, the County states in footnote 4 of its reply dated November 13, 2018, that certain “[s]ections of the recreational trail will lie on the rail bed.” Additionally, one of the pictures shows a tunnel, and it is not clear if the rail line continues through that tunnel or if the tunnel can accommodate both a trail and a rail line. Finally, the County also includes a “hierarchy pyramid” indicating that the County’s common carrier obligation on the Line is the lowest of all priorities. (See Jackson Cty. Reply, Ex. A at Ex. A, Nov. 13, 2018.)

If Jackson County is placing the trail on the rail bed where the track should be located, the County must explain how this activity is consistent with acquiring a rail line on which it has a

² The landowners consist of: Deborah S. Groh; DJHS Enterprises, LLC; JHB & MEB Enterprises, LLC; David W. Wells; Dawn R. Wells; Current Properties Investments, LLC; and Nephrite Fund I, LLC. The landowners note that they are plaintiffs in a lawsuit before the U.S. Court of Federal Claims, Groh v. United States, Case No. 17-1066L. By order filed in that docket on July 10, 2018, the court stayed the lawsuit so that the landowners could pursue administrative remedies before the Board.

³ These filings are dated January 4, 2019, and January 10, 2019, respectively, but because of the recent partial shutdown of the Federal government, they are being considered filed on January 28, 2019. See Filings Submitted or Due to Be Submitted During the Partial Fed. Gov’t Shutdown, EP 751 (STB served Jan. 28, 2019).

common carrier obligation. The County should also explain if its intentions toward freight rail service have changed since filing its verified notice, and address the concerns noted above.

A supplemental response on the above issues from the County is due by February 25, 2019, and replies from interested parties are due by March 15, 2019. To allow the record to more fully develop and to allow the agency time to consider the matters raised, a proceeding is being instituted under 49 U.S.C. § 10502(d).⁴

It is ordered:

1. Under 49 U.S.C. § 10502(d), a proceeding is instituted.
2. The County is directed to submit a supplemental response, and interested parties will have the opportunity to reply, in accordance with the schedule set forth above.
3. This decision is effective on its service date.

By the Board, Allison C. Davis, Acting Director, Office of Proceedings.

⁴ Due to the partial shutdown noted above, the Board was not able to timely issue this decision. See 49 U.S.C. § 10502(d) (requiring the Board to determine whether to institute a proceeding within 90 days after receipt of a request for revocation).