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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36034

SUNFLOWER RAILS-TRAILS CONSERVANCY, INC.—PETITION FOR DECLARATORY ORDER—SALE OF RAILBANKED RIGHT-OF-WAY

Digest:[1] This decision finds that a county's foreclosure on, and sale of, parcels of a railbanked line that occurred in 2004 are preempted by federal law. The decision also provides the parties with guidance on how they could proceed to have their claims addressed.

Decided: February 21, 2017

On May 12, 2016, Sunflower Rails-Trails Conservancy, Inc. (Sunflower), filed a petition for declaratory order asking that the Board find that the 2004 sale by Neosho County, Kan. (County), of three parcels of railbanked right-of-way near Chanute, Kan., violated section 8(d) of the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d), and the Board's regulations implementing that act at 49 C.F.R. § 1152.29. As discussed below, the Board will grant Sunflower's petition. The three parcels of land at issue here were railbanked in 1998 in accordance with the Trails Act and the Board's Trails Act regulations. As such, the parcels are still part of a line in the national rail network and subject to the Board's exclusive jurisdiction. By foreclosing on and then selling the three parcels for failure to pay taxes, the County unreasonably interfered with the railbanked line and the possibility of reactivating rail service. The foreclosures and sales are therefore preempted by federal law.

There remains, however, a dispute as to whether the taxes should have been levied in the first place. That is a question of state law and is better suited for the courts. If, as the County contends, Sunflower or its predecessor failed to meet their obligations under the Trails Act, which includes paying taxes properly assessed under state law, then the County could petition the Board to revoke the condition permitting railbanking and interim trail use. But until the Board's trail condition is revoked and abandonment is consummated, the right-of-way remains subject to the Board's exclusive jurisdiction and part of the national rail network.

[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. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

BACKGROUND

In 1997, South Kansas and Oklahoma Railroad, Inc. (SKO) filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon a 19-mile portion of its rail line between milepost 130.0, near Chanute, and milepost 149.0, near Fredonia, in Neosho and Wilson Counties, Kan. (the Line). Notice of the exemption was served and published in the Federal Register on May 23, 1997. See S. Kan. & Okla. R.R.—Aban. Exemption—in Neosho & Wilson Ctys., Kan., AB 471 (Sub-No. 1X) (STB served May 23, 1997); 62 Fed. Reg. 28,533. After the Board issued a Notice of Interim Trail Use (NITU), American Trails Association, Inc. (ATA), the trail sponsor, negotiated with SKO, and on March 30, 1998, ATA notified the Board that an interim trail use/railbanking agreement had been reached.

On October 24, 2007, ATA filed a request to terminate interim trail use on the Line as of November 5, 2007. By decision served on November 13, 2007, the Board granted ATA's request. Soon after, on December 31, 2007, Sunflower[2] filed a request for issuance of a NITU for the Line. SKO indicated it had not consummated abandonment of the Line and agreed to negotiate with Sunflower. On January 24, 2008, a NITU was served and, after several extensions of the negotiating period, Sunflower and SKO reached an interim trail use/railbanking agreement for the Line in 2009. According to Sunflower, SKO conveyed it the right-of-way by quitclaim deed for interim trail use and railbanking purposes in 2011. (See Pet. 3-4.)

On May 12, 2016, Sunflower filed its petition for declaratory order in this proceeding. It claims that, after the Line was initially railbanked in 1998 with ATA as the trail sponsor, the County unlawfully levied property taxes on the railbanked property. Sunflower states that, when ATA did not pay these taxes, the County improperly foreclosed on and sold three parcels of the 19-mile Line in 2004.[3] The Board was not made aware of the sales until Sunflower filed its petition.

Sunflower contends that, under Kansas state law, the right-of-way was not subject to the levied taxes because the railroad here held only an easement interest in the right-of-way, and right-of-way easements are not subject to ad valorem taxes under the Kansas Constitution. Sunflower now asks the Board to find that the County's sales of these three parcels (each of

[2] Sunflower was previously known as Sunflower Recreational Trails, Inc., and changed its name to Sunflower Rail-Trails Conservancy, Inc. in 2010. (See Pet. 3, n. 3.)

[3] The County also foreclosed on and sold, for failure to pay taxes, a number of other parcels that are not involved with this Line. (See County Reply, Exs. B and D.)

which evidently span the full width of the right-of-way)[4] violated the Trails Act and the Board's Trails Act regulations at 49 C.F.R. § 1152.29. Specifically, Sunflower argues that the County needed to have the NITU vacated by the Board before the County acted.

On July 20, 2016, the County filed a reply in opposition to Sunflower's petition.[5] The County claims that it legally levied taxes, initiated and completed foreclosure, and sold the property. The County argues that the issue here is the ownership of the three parcels, and that issue should be decided by either a federal court or Kansas state court. The County states that in taking no steps to challenge the tax action, ATA, which was notified when the County moved to foreclose on and sell the parcels, consented to the sale. The County also claims that ATA received funds exceeding the amount of the property tax assessment and questions whether ATA and Sunflower failed to manage the railbanked Line as interim trail sponsors under the Trails Act. Finally, the County notes that although Sunflower was deeded the property in 2011 for interim trail use and railbanking purposes, it has not yet filed a bond or proof of escrow account as required under Kansas state law.

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 (formerly 49 U.S.C. § 721) to issue a declaratory order to terminate a controversy or remove uncertainty. It is appropriate to issue such an order to remove uncertainty here. As discussed below, the Board finds that the 2004 foreclosures and sales are preempted by federal law.

The Trails Act is intended to preserve railroad rights-of-way that might otherwise be abandoned for future reactivation of rail service, while allowing the right-of-way to be used in the interim as a trail. See Preseault v. ICC, 494 U.S. 1, 5 (1990); Birt v. STB, 90 F.3d 580, 582-83 (D.C. Cir. 1996). The statute expressly provides that "such interim use 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." 16 U.S.C. § 1247(d). Congress also provided that the interim trail sponsor is to assume responsibility for liability in connection with the trail use, including managing and paying any taxes that are due on the right-of-way. See Idaho N. & Pac. R.R.—Aban. & Discontinuance Exemption—in Wash. & Adams Ctys., Idaho (Idaho Northern), 3 S.T.B. 50, 59 (1998). Thus, § 1247(d) allows the right-of-way to remain intact and available for future railroad use (i.e., "railbanked"), while relieving the railroad of liability and financial responsibility for the right-of-way during the period of interim trail use. See Rail Abans.—Use of Rights-of-Way as Trails, 5 I.C.C.2d 370, 370-71 (1989).

[4] The sheriff's deeds describe the parcels as "all the railroad right-of-way of the former AT&SF Railroad" [a predecessor to SKO] on three strips in Neosho County. (See Pet., Ex. B.)

[5] The County simultaneously filed a motion asking that the Board accept the late-filed reply. In the interests of a more complete record, the County's motion will be granted.

As explained in Idaho Northern, 3 S.T.B. at 59, the Board's chief concern once a trail condition has been imposed is that the statutory railbanking conditions not be compromised and that nothing occur that would preclude a railroad's right to reassert control over the right-of-way at some future time to revive active service. See also Jie Ao—Pet. for Declaratory Order (Jie Ao), FD 35539 (STB served June 6, 2012) (ownership claims to a portion of railbanked property preempted under 49 U.S.C. § 10501(b) for potentially precluding reactivation of service on the line).[6] Here, the three parcels that the County sold when ATA was the trail sponsor were part of the railbanked Line and, therefore, still part of the national rail network and subject to the Board's jurisdiction. See Birt, 90 F.3d at 582. The fact that this right-of-way is railbanked and there are currently no specific plans to reactivate the Line does not mean that the property is not within the Board's jurisdiction and that all or part of the right-of-way might not be reactivated for future rail service.[7] See City of Lincoln v. STB, 414 F.3d 858, 862 (8th Cir. 2005) (taking property that is part of the rail network is a "permanent action, and it can never be stated with certainty at what time any particular part of a right-of-way may become necessary for railroad uses"). The law is clear that because this Line is railbanked and still part of the national rail network, the County cannot take unilateral actions - including the foreclosure on and sale of property - that would prevent the potential restoration of rail service unless and until the NITU is vacated, interim trail use ceases, and abandonment is consummated.[8] See 16 U.S.C. § 1247(d);

[6] The Interstate Commerce Act is "among the most pervasive and comprehensive federal regulatory schemes." Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981). The Board's jurisdiction over "transportation by rail carrier" is "exclusive," and the remedies provided under U.S. Code title 49, subtitle IV, part A with respect to regulation of rail transportation "are exclusive and preempt the remedies provided under Federal or State law." 49 U.S.C. § 10501(b); see Tri-City R.R.—Pet. for Declaratory Order (Tri-City), FD 35915, slip op. at 5-6 (STB served Sept. 14, 2016), pet for judicial review pending sub nom. City of Kennewick v. STB, No. 16-73595 (9th Cir. filed Nov. 9, 2016).

[7] The Board has vacated a number of NITUs to allow railbanked lines to be reactivated. E.g., R.J. Corman R.R.—Constr. & Operation Exemption—in Clearfield Cty., Pa., FD 35116 (STB served May 21, 2012) (authorizing construction of a new 10-mile rail line and reactivation of an adjoining 10-mile railbanked line, to provide rail transportation to a new waste-to-ethanol facility, quarry, industrial park, and other shippers).

[8] After railroad property has been lawfully abandoned, state condemnation or property laws can be applied because the Board's regulatory mission has come to an end. See Hayfield N. R.R. v. Chi. & N.W. Transp. Co., 467 U.S. 622, 632-33 (1984).

Jie Ao, slip op. at 6-7.[9] Thus, ATA's questionable conduct notwithstanding,[10] because the foreclosure and sales run afoul of the Board's continuing jurisdiction over the property, those actions are preempted.

However, the Board applies a rebuttable presumption that an organization willing to meet the statutory requirements is fit to be a trail sponsor. See Norfolk & W. Ry.—Aban. Exemption—between Kokomo & Rochester in Howard, Miami, & Fulton Ctys, Ind., AB 290 (Sub-No. 168X), slip op. at 12 (STB served May 4, 2005). Accordingly, if the County believes that an interim trail sponsor is not meeting its obligations under the Trails Act (including payment of taxes), it could petition the Board to revoke the trail condition. In such a proceeding, the fuller record provided by a petition and responses would permit the Board to better examine the County's suggestions that the Trails Act requirements were not or are not currently being met in this case. If Kansas state law indeed required ATA to pay taxes and it did not, or if ATA and/or Sunflower did not meet their other obligations under the Trails Act, such failures could lead to revocation of the trail condition, See Idaho Northern, 3 S.T.B. at 58. Once the NITU has been revoked, the railroad would then be free to consummate its abandonment authority, thereby removing the Board's jurisdiction over the property.

As discussed above, the land sale auctions here took place after ATA allegedly failed to pay taxes, but Sunflower claims that the assessment of taxes was not proper in the first place. Whether it was lawful for the County to assess these taxes under Kansas law would need to be

[9] Both the Board and the courts have found that the Board's broad and exclusive jurisdiction over railroad transportation prevents the application of state laws that would otherwise be available, including condemnation to take property that is part of the national rail network, if those laws would have the effect of foreclosing, or unduly restricting, rail use, present or future. See Ozark v. Union Pac. R.R., No. 16-1186 (8th Cir. Dec. 19, 2016) (order requiring railroad to restore crossing closed in violation of state law preempted if restoration will unduly interfere with present or future rail operations), citing Tri-City (state law condemnation and acquisition by two cities for an at-grade crossing at location that would unreasonably interfere with a railroad's present and future operations preempted). See also City of Lincoln (city's proposed use of eminent domain to acquire 20-foot strip of railroad right-of-way that might interfere with storage of materials by railroad on remainder of right-of-way preempted); Norfolk S. Ry.—Pet. for Declaratory Order, FD 35196 (STB served Mar. 1, 2010) (condemnation action to take property on which the railroad was not actively operating trains preempted when proposed condemnation would unreasonably interfere with railroad's future plans).

[10] It is unclear from the record here why ATA did not object to the foreclosure and accepted the remaining funds from the proceeds of the sale, given that the County's actions would have interfered with ATA's obligations as a trail user.

adjudicated by an appropriate court before a petition to revoke the trail condition would be ripe for consideration by the Board. See Mo. Pac. R.R.—Aban. Exemption—in Morris & Dickinson Ctys., Kan., AB 3 (Sub-No. 121X) (STB served Mar. 4, 2013); Cent. Kan. Ry.—Aban. Exemption—in Marion & McPherson Ctys., Kan., AB 406 (Sub-No. 6X), slip op. at 5 (STB served May 8, 2001); Idaho Northern, 3 S.T.B. at 60. If a court were to find that the County properly assessed the taxes but that the taxes were not paid, the County could seek to have the NITU revoked on the ground that the trail user was not in compliance with the Trails Act.[11] However, unless and until the Board revokes the trail condition and the Line is no longer railbanked, sales of the right-of-way or other acts by third parties that would prevent restoration of rail service (such as the foreclosures and sales that occurred in 2004) are preempted by federal law and thus invalid.

Because it would be necessary in any event for an appropriate court to determine the lawfulness of the County's assessment of taxes before the Board would consider a petition to revoke the trail use condition due to a failure to pay taxes, it is reasonable to also leave it to the courts to determine how to void the 2004 foreclosures and sales and how to address any other issues resulting from this preemption determination. A court would be the appropriate forum to address how to apply state property law to assure that this rail corridor remains intact and available for potential reactivation, notwithstanding the County's actions, unless and until the Board revokes the trail use condition and the right-of-way is no longer railbanked.[12] A court also could provide a remedy, if appropriate, to address harm to those who purchased the parcels in 2004.

As stated above, the Board's chief concern once a trail condition has been imposed is that nothing occur that would preclude a railroad's right to reassert control over the right-of-way at some future time to revive active service. SKO, the entity that should be the most interested in the potential reactivation of rail service, was not served a copy of Sunflower's petition and has not filed in response to it. To ensure that SKO is aware of our ruling here and the potential of future actions, we direct Sunflower to serve a copy of this decision on the carrier within five days of the service date of this decision and to certify contemporaneously to the Board that it has done so. Additionally, to ensure that those who purchased the parcels in 2004 are made aware of this

[11] Whether such a petition would be granted would depend on the arguments presented. See e.g., Victor Wheeler—Pet. for Declaratory Order—Rail Line in Erie Cty. Pa, FD 35082 (STB served Aug. 27, 2008) (finding that a trail user that was not currently in arrears had not violated its financial responsibility obligations, despite an alleged failure to pay taxes 10 years prior).

[12] The Board's interest is in ensuring that the parcels remain part of the rail network under the Board's jurisdiction as long as the right-of-way is railbanked, whether that is through a mutually agreed upon remedy by the parties that would protect the Board's interest, or through a court proceeding brought by Sunflower, the County, SKO, or others that are affected.

decision, we ask the County to serve a copy of this decision on those purchasers within five days of the service date of this decision and to certify contemporaneously to the Board that it has done so. Lastly, to ensure that the Board is aware of developments involving this Line, which remains under our jurisdiction unless and until the Line is no longer railbanked, Sunflower is directed to provide status reports every six months to keep the Board apprised of developments regarding resolution of the issues discussed above. Sunflower's first status report is due by August 23, 2017.

It is ordered:

1. The County's July 20, 2016 motion is granted, and its reply is accepted into the record.

2. Sunflower's petition for declaratory order is granted, as discussed above.

3. Sunflower is directed to serve a copy of this decision on SKO within five days of the service date of this decision and to certify contemporaneously to the Board that it has done so.

4. The County is asked to serve a copy of this decision on the affected landowners within five days of the service date of this decision and to certify contemporaneously to the Board that it has done so.

5. Sunflower is directed to file the status reports discussed above. Sunflower's first status report is due by August 23, 2017.

6. This decision is effective on its service date.

By the Board, Board Members Begeman, Elliott, and Miller.