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service Date - November 4, 1996

SURFACE TRANSPORTATION BOARD¹
DECISION

Docket No. AB-6 (Sub-No. 332)

BURLINGTON NORTHERN RAILROAD COMPANY--ABANDONMENT--
IN OTOE AND NEMAHA COUNTIES, NEBRASKA

Decided: October 23, 1996

The National Association of Reversionary Property Owners (NARPO) and John and Donita Thompson (the Thompsons) (collectively petitioners) filed petitions for administrative review on February 20, 1996, and February 21, 1996, respectively, of a decision by the Director of the Office of Proceedings served on January 31, 1996. The January 31, 1996 decision vacated a certificate of interim trail use or abandonment (CITU) and issued a replacement CITU substituting the Nemaha Natural Resources District (NNRD) as the trail user. On August 6, 1996, NNRD filed a reply in opposition to the petitions for administrative review². On August 30, 1996, Burlington Northern Railroad Company (BN) filed comments in support of NNRD. The petitions for administrative review will be denied.

¹204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 16 U.S.C. 1247(d) and (e). Therefore, this decision applies the law in effect prior to the ICCTA. It should be noted that there has been no change in the law relating to trail use other than that such functions shall be administered by the Board. The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). section

²NNRD's reply to the petitions was filed more than 5 months after the petitions. Replies to petitions are due within 20 days. NNRD states that it was never served with copies of the petitions. The petitions were served on the Rails-toTrails Conservancy (RTC), which had, together with the Burlington Northern Railroad (BN), jointly filed the motion which produced the Director's January 31, 1996 decision. Because of this, and because both NNRD and RTC were represented by the same attorney, petitioners may have believed that service on RTC effectively resulted in service on NNRD. RTC filed a petition on March 1, 1996, stating that it was not the trail operator and that petitioners should serve NNRD. On March 11, 1996, we received a copy of the Thompsons' petition, reciting that it had been served on NNRD. On July 15, 1996, we received a letter from NARPO, stating that it had served a copy of its petition on NNRD.

NNRD filed its reply on August 6, 1996, more than 4 months after the Thompsons served their petition on NNRD. The Thompsons have not moved to strike NNRD's reply, however, and although it is late filed, we will accept, it.

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BACKGROUND

By decision served September 9, 1991, the ICC found that the present and future public convenience and necessity permitted abandonment by BN of its 21.35-mile rail line between milepost 6.00 near Arbor, and milepost 26.54 near Cooper Spur, in Otoe and Nemaha Counties, NE.

By decision and CITU served October 25, 1991, the ICC granted Southeast Nebraska Railroad Association, Inc. (SENRA), NNRD, and Nebraska Trails Council (NTC) a 180-day period in which to negotiate an interim trails use agreement under the Trails Act, 16 U.S.C. 1247(d). By decision served March 30, 1993, the CITU negotiation period was extended to March 31, 1993.

By decision served December 15, 1993, the ICC denied a NARPO petition for administrative review of the March 30 decision. The ICC held that extensions of time for negotiating trail use agreements are routinely granted to promote the Trails Act's goal of preserving rail corridors for possible reactivation of rail service. That decision also noted that BN and SENRA had entered into an Interim Trail Use Agreement during the extension period granted by the March 30 decision.

By decision served January 31, 1996, the Director of the office of Proceedings reopened the proceeding, vacated the CITU served October 25, 1991, and issued a replacement CITU applicable to NNRD as the new trail user.

On August 30, 1996, BN filed a comment to provide some historical background for the record. BN states that an interim trail use/rail banking agreement was executed on March 26, 1993, with SENRA, prior to expiration of the CITU negotiation period on March 31, 1993. After that time, the line **was** rail banked pursuant to section 8(d) of the National Trails System Act. According to EN, it was only after SENRA was unable to fulfill its financial commitments to BN that SENRA agreed to the transfer of the trail to RTC or NNRD to avoid foreclosure. EN states it has been committed to rail banking this line since the inception of the original CITU because of the possibility of reactivating the line for rail service should Nebraska Public Power District's nuclear plant be converted to a coal fired plant.

PRELIMINARY MATTER

. In its reply filed August 6, 1996, NNRD argues that NARPO lacks capacity and standing. Because NARPO's members are potentially affected by Board decisions interpreting and applying the Trails Act, NARPO may participate in this proceeding. NARPO does not purport to represent anyone except itself and therefore -need- not be an attorney or registered practitioner.

DISCUSSION AND CONCLUSIONS

NNRD, RTC, and BN advised the ICC on September 27, 1995, that SENRA and BN had agreed to terminate their trail use agreement and that NNRD, with BN's consent, had agreed to assume the role of interim trail manager. SENRA's counsel authorized RTC to state in the filing "that SENRA has no property interest in this matter, and thus does not feel any need to take a position." RTC filed a statement of willingness to assume financial responsibility. Because the parties had made a serious effort to comply with the provisions of 49 CFR 1152.29(f), had provided a reasonable explanation as to why SENRA had not joined in their pleading, and had served counsel for SENRA, the Director
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reopened the proceeding, vacated the CITU served on October 25, 1991, and issued a replacement CITU applicable to NNRD as trail user effective September 30, 1995.

Petitioners question the Director's January 31, 1996 decision on four grounds. First, the petitioners argue that the Board lost jurisdiction to reopen this proceeding, when the last CITU expired on March 31, 1993, or at least, when the rails and ties assertedly were removed on April 1, 1994.

As noted in the decision served December 15, 1993, SN had entered into a trail use agreement with SENRA during the extension period granted in the March 30, 1993 decision.³ At that point, the line became "rail banked" and the ICC (and now the Board) retains jurisdiction over the line to return it to the national rail system. Removal of rail

³ B N confirms that an agreement was executed on March 26 1993,

and ties is consistent with trail use.

Second, NARPO contends that the January 31 decision did not follow the regulations set out in 49 CFR 1152.29(f) by requiring SENRA to sign the filing.

The Director found that petitioners' submission was in „substantial compliance,, with the regulations. The rules require SENRA to sign a request to change trail users; that is, to indicate that the current trail user is aware of the proposal and consents to it. SENRA refused to participate in the petition, but provided a statement that indicates that SENRA is aware of the petition and does not oppose it, thus complying with the spirit if not the letter of the regulations. Under the circumstances, the Director acted reasonably in holding that NN'RD, RTC and BN had substantially complied with the regulations. We have never held that issuance of a CITU to a trail user precludes the issuance of other CITU's in favor of other trail users as long as the railroad is willing to negotiate with them. Even after a trail use agreement is negotiated, our regulations provide for a transfer from one trail user to another. BN and NNRD explained the reasons for the procedure they followed. The Director acted reasonably in concluding that t'-e petitioners had complied with the regulations as much as they could and that the refusal of SENRA to participate in the petition did not constitute a good reason to deny the request of BN and NNRD. We will uphold the Director's finding of substantial compliance with the requirement. To the extent SENRA did not join in the filing, we will waive the requirement.

Third, petitioners contend that SENRA never complied with 49 CYR 1152.29(a), which requires the filing of a statement of Willingness to assume financial responsibility and a map.⁴

The decision served December 15, 1993¹ in footnote 3, noted that:"A review of the record in this proceeding indicates that SENRA submitted a statement of willingness' pursuant to the Commission's rules on September 30, 1991-11 In its reply, NNRD also reviewed the record and provided the Board with a copy of SENRA's 1991 statement and map.'

⁴I NNRD seeks reimbursement from petitioners for that expense. NNRD cites no statutory or regulatory authority to support this request.

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Fourth, NARPO argues that NNRD did not file a "current" statement that it can meet the financial obligations of maintaining the right-of-way.

The rule at 49 CFR 1152.29(f)(2) requires merely the filing of 'a statement of willingness to assume financial responsibility by the new trail user. Such a statement was filed on September 27, 1995, and it has not been withdrawn.

Petitioners also question NNRD's ability to assume financial responsibility for the trail. In its reply, NNRD submitted verified statements from Paul Rohrbaugh, General Manager of NNRD, and Steven C. Woerth of the Steamboat Trace Association. Mr. Rohrbaugh states that RTC provided all funding for the acquisition of the BN corridor and that NNRD has received two grants for development of the trail: \$50,000 from the State's trails assistance fund and \$386,000 from the Intermodal Surface Transportation Efficiency Act's "transportation enhancements" fund. Mr. Woerth states that broad community support for the trail led to the formation of the "Steamboat Trace Association" to provide volunteer help to NNRD with development and maintenance of the trail. NNRD has held meetings and plans additional meetings to address any concerns that adjacent landowners may have.

Section 1152.29(f) allows the substitution of a new trail user who assumes the financial responsibility for a railroad right-of-way currently enjoying interim trail use/rail banking pursuant to 16 U.S.C. 1247(d). NNRD has shown that it can assume the financial responsibility for the trail.

We will deny the petitions for administrative review.

This action will not significantly affect either the quality of the human environment or conservation of energy resources

It is ordered:

1.The petitions for administrative review are denied.

2.This decision is effective on its service date.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams

Secretary

