

Editor's note: 80 I.D. 301; Appealed -- aff'd, sub nom. Neuhoff v. Morton, Civ. No. R-2921 (D. Nev. Sept. 12, 1975), aff'd No. 75-3284 (9th Cir. July 17, 1978) 578 F.2d 810

E. L. CORD

DONALD E. WHEELER

EDWARD D. NEUHOFF

IBLA 71-92, 134, 150, 165, 318 Decided May 9, 1973

73-198

Appeals from separate Bureau of Land Management decisions (ES 4532-4536, 6801, 4529) rejecting applications for cash redemption of forest lieu selection rights.

Affirmed.

Railroad Grant Lands -- Scrip: Generally

A release filed by a land-grant railroad pursuant to section 321(b) of the Transportation Act of 1940, 54 Stat. 954, extinguishes the right of the railroad or its attorneys-in-fact to select lands or receive compensation in lieu of lands originally acquired by it under the Act of July 27, 1866, in aid of construction of the railroad but relinquished under the Act of June 4, 1897.

Scrip: Payment in Satisfaction

Where a railroad's forest lieu selection rights are extinguished by a release given to the United States, the rights (if any) of a purchaser of the selection rights from the railroad are also extinguished.

APPEARANCES: Edward D. Neuhoff, Esq., pro se and for E. L. Cord;

Thomas Trimble, Esq., of Jennings, Strouss & Salmon, for Donald E. Wheeler.

OPINION BY MR. RITVO

E. L. Cord, Donald E. Wheeler, and Edward D. Neuhoff seek review of separate Bureau of Land Management decisions rejecting their respective applications for cash redemptions of certain forest lieu selection rights made pursuant to the Act of August 31, 1964, 43 U.S.C. § 274 (1970), and the pertinent regulation 43 CFR 2012.1 et seq. ^{1/} Each decision recited that the alleged rights, derived through the

^{1/} The names of the applicants, their application numbers, the date of the Bureau of Land Management decision and the appeal numbers are as follows:

E. L. Cord	ES 4532	October 16, 1970	IBLA 71-92		
	4533	"	" 71-92	4534	December 14, 1970
71-150		4534	May 26, 1971	" 71-318	4536
January 8, 1971	" 71-165		Donald E. Wheeler	ES 6801	December 1, 1970
Edward D. Neuhoff	ES 4529	November 2, 1972	" 73-198		" 71-134

Santa Fe Pacific Railway Company (hereafter Santa Fe), had been released and relinquished by Santa Fe and were not valid. The gravamen of the several appeals is substantially similar. The appellants deny that their rights were extinguished by the release. They assert that they hold valid subsisting scrip and that they are entitled to satisfaction as provided by the Act of August 31, 1964, supra. The appeals, therefore, are consolidated for the purposes of this decision.

Appellants' scrip stems from the interaction of several statutes granting lands or lieu rights to Santa Fe. Certain lands were patented to the railroad under the grant made by the Act of July 27, 1866, 14 Stat. 292. They were reconveyed by the railroad to the United States pursuant to the Forest Exchange Act of June 4, 1897, 30 Stat. 36, as amended, by the Act of June 6, 1900, 31 Stat. 614. These Acts provided for selection rights to public land by a patentee or a settler or owner of an unperfected bona fide claim of land included within the limits of a public forest reserve upon his relinquishing his claim or title to the tract to the United States. Although the 1897 and 1900 Acts were repealed by the Act of March 3, 1905, 33 Stat. 1264, provision was made for the continuing recognition of certain selection rights under the earlier Acts. Santa Fe sold its selection rights in the early years of this century. Since exchange selection rights were held to be personal and nonassignable,

see George L. Ramsey, 58 I.D. 2272 (1942), Santa Fe adopted a procedure utilizing two powers of attorney. The first appointed an attorney-in-fact to make a selection in the name of the railroad while the second authorized him to convey the selected lands to whomever he chose. This procedure has been noted. Battle Mountain Company, A-29146 (January 31, 1963), aff'd Udall v. Battle Mountain, 385 F.2d 90 (9th Cir. 1967), cert. denied, 390 U.S. 957 (1968). The appellants hold separate appointments from Santa Fe as attorneys-in-fact through mesne conveyances.

The appellants recorded their selection right documents pursuant to the Scrip Recordation Act of 1955, 69 Stat. 534, noted at 43 U.S.C. § 274 (1970), and the pertinent regulations, 43 CFR Subparts 2610, 2611. Proceeding under the Act of August 31, 1964, supra, which authorizes any person who recorded his claim properly to elect to receive cash instead of land, the appellants chose to receive cash. The value of forest lieu selection rights is \$ 275 an acre. 43 CFR 2221.2-3 (1970). 2/

As noted above, the Bureau's decisions held that the railroad, and, consequently, the claimants, lost all selection rights against

2/ Under the Act of August 31, 1964, as amended, the right to apply for land or cash expired on January 1, 1970, except for soldiers' additional claims, for which filing may be made to and including December 31, 1974. 43 CFR 2612.4 (1972). Appellants filed their applications prior to January 1, 1970.

the United States when the railroad executed a release of certain rights to railroad grant lands and indemnity rights pursuant to section 321(b) of the Transportation Act of 1940, supra.

The Bureau relied upon several cases to support its conclusion. The first, Udall v. Battle Mountain, supra, held that forest lieu rights were not assignable, at least prior to the Acts of July 6, 1960, 74 Stat. 334, and of August 3, 1964, supra, and when the United States reconveyed to the railroad the land upon which the forest lieu rights were based, as it had in that case, the selection right was extinguished. Consequently, the United States did not have to recognize any rights in the assignee even though he had recorded his rights under the 1955 Act, supra, prior to the reconveyance. ^{3/} It then concluded that in another case, United States v. Santa Fe Railroad and Donald E. Wheeler, Civil No. 64-1430 (C. D. Cal. filed December 16, 1968) (hereafter Wheeler), the court held that the railroad's release had wiped out the selection rights of its assignees.

The appellants assert that Battle Mountain is not controlling because there the United States reconveyed the base lands to the

^{3/} In Lade v. Udall, 432 F.2d 254 (9th Cir. 1970) the Court followed Battle Mountain. There the facts were the same except that the land was conveyed after the rights were recorded and not before as in Battle. To the same effect Richard M. Lade, 1 IBLA 189 (1970); Richard M. Lade, 1 IBLA 192 (1970).

railroad whereas here it still retains them. Further they contend that Wheeler, while recognizing the holding in Battle Mountain, held only that a patent issued to the assignee rather than the railroad in violation of the Department's regulations will be canceled. It did not, they say, rule on the effect of the railroad release vis-a-vis forest lieu rights.

Neither Battle Mountain nor Wheeler reaches the issue upon which these appeals hinge. Nevertheless, the Bureau's conclusion that the release put an end to the forest lieu selection rights of Santa Fe or its attorneys-in-fact is correct.

To see why, we turn to section 321, Part II, Title III of the Transportation Act of 1940, 49 U.S.C. § 65 (1970). Section 321(a) made concessions to the railroads which authorized increased rates and other transportation charges to the United States. To qualify for the new rates, sec. 321(b) required a railroad to execute a release of any claim it might have "* * *" against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any "* * *" predecessor in interest under any grant to such carrier or such predecessor in interest."

It further provided that "Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it."

On December 18, 1940, Santa Fe filed a release which provided that it:

"* * * relinquishes, remises and quitclaims to the United States of America and all claims of whatever description to lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted, or claimed should have been granted by any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad.

The release stated that it did not embrace

"* * * lands sold by the company to innocent purchasers for value prior to September 18, 1940, lands embraced in selections made by the company and approved by the Secretary of the Interior prior to September 18, 1940, or lands which have been patented or certified to the company or any predecessor in interest in aid of the construction of its railroad."

The scope of the release was considered in Krug v. Santa Fe Pacific R.R., 329 U.S. 591 (1947), which reviewed two departmental decisions which had denied Santa Fe's application for certain

indemnity rights. ^{4/} In each case, but under separate statutes, Santa Fe had relinquished, by deed to the United States, lands to which its right under a land grant had vested. The Court held:

* * * The railroad urges that these claims are not covered by the Act or by the release. They, allegedly, are not claims "on account of" or "under any grant" of lands, but rest on contractual exchanges of lands made under the Acts of 1874 and 1904. 18 Stat. 194; 33 Stat. 556. These Acts largely represented a congressional effort to settle conflicts among railroads, Government, and settlers, which arose by reason of settlement by homesteaders on railroad-granted lands after the grants had been made. Both Acts provided that where settlers had so occupied railroad-granted lands, the railroad could, upon relinquishment of its title to them, select other lands in lieu of them. The procedure for selecting the lieu lands under the 1874 and 1904 Acts was substantially identical to the original procedure provided by the Acts for selection of indemnity lands. Before the 1940 Act respondent had, under the 1874 and 1904 Acts, relinquished title to the Government to certain lands previously granted. In August 1940, and subsequently in March 1943, respondent filed applications with the Secretary of the Interior to select its lieu lands. After the respondent signed the release, and because of it, the Secretary rejected the applications. The railroad then filed this suit in a Federal District Court for relief by injunction or by way of mandamus to require the Secretary and other Interior Department officials to pass on its applications without regard

^{4/} Santa Fe Pacific Railroad Company, 58 I.D. 596 (1944); Santa Fe Pacific Railroad Company, 58 I.D. 601 (1944). Other departmental decisions held that the release extinguished a railroad's unexercised right to select indemnity land, Atlantic and Pacific Railroad Company, 58 I.D. 577 (1944); that the transferee of a railroad's right to unselected indemnity land is not an innocent purchaser for value to whom a patent may be issued pursuant to the saving clause of sec. 321(b) of the Transportation Act, supra; Atlantic and Pacific Railroad Company, 58 I.D. 588 (1944); Santa Fe Pacific Railroad Company, 58 I.D. 591 (1944).

to the release. The District Court dismissed the bill on the merits, holding that the statute and release barred the claims. It read the 1940 Act as defining a congressional purpose "to wipe the slate clean of such claims by any railroad which enjoyed the benefits of the rate concessions made by the Transportation Act * * *" 57 F. Supp. 984, 987. The United States Court of Appeals for the District of Columbia reversed, holding, as respondent urges in this Court, that the 1940 Act did not apply to the type of claims involved here. 80 U.S. App. D.C. 360, 153 F.2d 305. Importance of the question decided caused us to grant certiorari.

We agree with the District Court. We think, as it held, that the Secretary of the Interior's construction of the 1940 Act was clearly right. Therefore, we do not discuss the Government's contention that, since the Secretary's construction was a reasonable one, it was an allowable exercise of his discretion which should not be set aside by injunction or relief in the nature of mandamus. See Santa Fe P.R.R. v. Work, 267 U.S. 511, 517; cf. Santa Fe P.R.R. v. Lane, 244 U.S. 492.

The respondent argues the case here as though the 1940 Act applied only to claims for "lands under any grant." The language is not so narrow. It also required railroads to surrender claims for "compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted * * * under any grant." (Emphasis supplied.) This language in itself indicates a purpose of its draftsmen to utilize every term which could possibly be conceived to give the required release a scope so broad that it would put an end to future controversies, administrative difficulties, and claims growing out of land grants. Beyond a doubt, the words "compensation" and "reimbursement" as ordinarily understood would describe a payment to railroads in money or in kind for the surrender of lands previously acquired by them "under a grant." If they do not have this meaning, their use in the Act would have been hardly more than surplusage. And when viewed in the context of the historical controversies and claims under the land grants, the conclusion that the 1940 Act covers claims such as respondent's seems inescapable.

The legislative history of the Act shows that Congress was familiar with these controversies. In 1929 it passed an Act intended to authorize and require judicial determination of land-grant claims of the

Northern Pacific Railroad in order finally and completely to set them at rest. 46 Stat. 41. The suit authorized by that Act was tried in a Federal District Court and was pending in this Court when the 1940 Act was passed. United States v. Northern Pac. Ry., 311 U.S. 317. Our decision in it shows the complexity and ramifications of the numerous questions involved in land-grant controversies. Reference to this case was made by Government officials in urging Congress to include in the predecessors of the 1940 Act a requirement that the railroad surrender all claims arising out of land grants as a prerequisite to any Government rate concessions. Here, as in the 1929 Act, which applied to the claims of only one railroad, we think Congress intended to bar any future claims by all accepting railroads which arose out of any or all of the land-grant acts, insofar as those claims arose from originally granted, indemnity or lieu lands. All the Acts here involved, the Acts of 1866, 1874, 1904 and 1940, relate to a continuous stream of interrelated transactions and controversies, all basically stemming from one thing -- the land grants. We think Congress wrote finis to all these claims for all railroads which accepted the Act by executing releases. (329 U.S. at 596-598).

To emphasize -- the Court held that the release included a payment to the railroad in money or in kind for surrender of lands previously acquired by them under a grant. In this case, as in those, the indemnity rights of the railroad were "payments in kind" for the surrender of lands previously acquired by it under a grant. So here, too, they fall within one release.

Appellants seek to distinguish these cases from Krug. They assert that the release did not apply to lands "patented" to Santa Fe. In support they cite Santa Fe Pacific R.R. v. Cord, 482 P.2d 503 (Ariz. 1971); cert. denied, 404 U.S. 912 (1971). There Santa Fe

had conveyed land to the United States pursuant to the Act of June 4, 1897, supra, and had sold powers of attorney based upon that reconveyance. In 1955 and later, Santa Fe obtained quitclaim deeds from the United States for the base lands and conveyed them to the heirs of the original purchasers of the powers of attorney. Cord and Wheeler, who there, too, held the powers through mesne conveyances, filed suit, alleging that Santa Fe had destroyed their selection rights, and asked damages. In holding for the plaintiff, the Court rejected Santa Fe's contention that its release had terminated the forest lieu selection rights in 1941. The Arizona Court held that Krug applied only to "granted" land and not to land that had been patented, that once land had been patented they are no longer "grant-lands."

This distinction is not persuasive. The Arizona Court reasoned that "grant-lands" were lands to which the railroads had an unperfected right whereas patented lands were lands to which the railroads were perfected and were thus no longer "grant-lands."

The distinction between lands to which a railroad has a perfected or unperfected right does not depend upon whether a patent has issued. A railroad's rights to land falling within the place limits of the grant vest upon its filing of a map of definite location showing the route of the road. Tarpey v. Madsen, 178 U.S. 215, 223, 227 (1900).

Thus the right of the railroad to the land within its place limits was vested and it could not be deprived of it without its consent. 5/ Santa Fe Pacific Railroad Company, 58 I.D. 596, 600 (1944). Accordingly, the distinction between granted and vested, but not patented, and patented land is not substantive enough to hold that unsatisfied lieu or indemnity rights stemming from the former are cut off by the release but those arising from the latter are not.

The exception in the statute and release pertains to patented lands made pursuant to a grant, which were not reconveyed to the United States and which did not serve as base for lieu or indemnity selection rights or any other form of compensation or reimbursement then unsatisfied.

We note that in Krug the railroad's right to the base lands was conveyed to the United States by a deed, although no patent had previously issued. Therefore, we cannot ascribe the same importance as the Arizona Court, to the fact that a patent had issued. 6/

5/ An apparent exception is that a patent will not issue if land is found to be mineral in character at any time prior to the issuance of a patent. Barden v. Northern Pacific R.R., 154 U.S. 288 (1894); Southern Pacific Company, 71 I.D. 224, 228 (1964).

6/ The District Court decision, Santa Fe Pacific R.R. v. Ickes, 57 F. Supp. 984, 986, 987 (D.C. 1944), which Krug affirmed, stated:

We conclude that the Act of 1897, as amended, supplemented the original granting Act of 1866, supra, and that the unperfected rights to select lieu lands were extinguished by the release of 1941.

(fn. 6 continued)

"The issue therefore is whether the release embraces, and thereby extinguishes, the right to select lands in lieu of relinquished lands under the Acts of 1904 and 1874, supra, respectively.

"The release embraces any and all claims of whatever description to lands and interests therein granted by any Act of Congress to plaintiff or any predecessor in aid of the construction of any portion of its railroad. Plaintiff's right to select lieu lands is a claim to lands, and this is not disputed. Plaintiff does contend, however, that it is not a claim to lands granted by any Act of Congress in aid of construction; that is, that the Acts of 1904 and 1874, supra, are not granting acts in aid of construction, and therefore that such claim is not included in the release.

"The Act of 1866, supra, under which plaintiff's predecessor acquired title to the lands relinquished, is concededly a granting act in aid of construction. The Acts of 1904 and 1874, supra, are supplemental to, and in legal effect amendatory of, the Act of 1866, supra. They made provision for the relief of settlers who were found to be occupying the lands of the railroad company. They gave the railroad company the right to select equal quantities of lands in lieu of lands which they relinquished for the benefit of such settlers. They were measures found to be desirable by reason of unforeseen developments arising out of the operation of the railroad land grant acts. The plaintiff itself probably was not without selfish motive in the relinquishment of its lands, which tended to prevent an exodus of established settlers along its right of way who without conscious fault found themselves without title.

"As I perceive the intent of Congress, from the language of the statutes themselves, the lieu lands, when selected, were to be, so far as humanly possible, a counterpart of, and in substitution for, the original lands granted, and were to be lands granted by Congress in aid of construction, precisely as were the original lands. The Act of 1904, supra, gives the right to select public lands of equal quality and contemplates a substitution of section for section. The Act of 1874, supra, gives the right to select 'an equal quantity of other lands in lieu thereof from any of the public lands not mineral and within the limits of the grant not otherwise appropriated at the date of selection, to which they [railroad grantees] shall receive title the same as though originally granted.'

The appellants also point to the Acts of August 5, 1955, 69 Stat. 534, and August 31, 1964, 78 Stat. 751 (both appearing in notes following 43 U.S.C. § 274 (1970)). They contend that the 1955 statute specifically recognized the validity of their holdings under the proviso for recording "a forest lieu selection right, assertable under the act of March 3, 1905." They remark that the 1964 Act provided for the cash satisfaction of properly recorded forest lieu scrip in the name of the present holder as an assignee and that it is not necessary to apply for cash redemption as an attorney-in-fact. They also contend that the 1960 and 1964 Acts revived any prior extinguished forest lieu right which might have

(fn. 6 continued)

"The three Acts are each a part of the same legislative scheme and purpose to grant lands in aid of construction of railroads. The subsequent Acts are not independent granting Acts without relation to any other grant, but are clearly dependent upon, and supplemental to, the grant contained in the Act of 1866, supra, and provide for grants contingent upon the relinquishment of lands granted under such Act. In other words, the Acts of 1904 and 1874, supra, are, respectively, granting Acts in aid of construction when coupled, as they must be, with the Act of 1866, supra.

"The fact, as contended by plaintiff, that it gave a consideration, namely a deed to the lands relinquished, for the right to select others, does not make either of the Acts any less a grant. A railroad land grant is not a gift, but is a transfer of title to lands in return for the construction and operation of a railroad. Nor, as urged by plaintiff, does the fact that plaintiff's rights are contractual remove the applicable statutes from the category of granting statutes.

"Under these circumstances, I am of the opinion that these unperfected rights of plaintiff to select lieu lands are claims to lands granted by Acts of Congress to plaintiff in aid of the construction of its railroad, and are therefore within the scope of, and extinguished by, the release, which was given in pursuance of an apparent Congressional purpose to wipe the slate clean of such claims by any railroad which enjoyed the benefits of the rate concessions made by the Transportation Act of 1940."

been released by the railroad to the end that the scrip rights of the present holders must be recognized.

While the 1964 Act, supra, recognized the rights of assignees of forest lieu rights, it did not revive rights which had previously been extinguished.

The appointment of an attorney-in-fact by the railroad was a contract between the railroad and the appointee. As noted above, the United States accrued no liability when it dealt with the principal even though the principal may have acted in the derogation of the rights of its appointed attorneys-in-fact. 7/ The aggrievement, if there be one, is between the attorney-in-fact (the scrip purchaser) and the railroad; it is not between the attorney-in-fact and the United States. Battle Mountain, supra; Wheeler, supra.

We conclude that Santa Fe's 1897 lieu rights were extinguished when it executed its release under the Transportation Act and that there is no present right under the 1897 Act which the railroad or its attorneys-in-fact may exert against the Government. The alleged scrip rights claimed by appellants as derived from the railroad are without efficacy or validity.

7/ In Krug, the railroad had filed a selection list for lands in satisfaction of forest lieu rights. The selection was pending at the date the release was signed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Martin Ritvo, Member

We concur:

Frederick Fishman, Member

Joan B. Thompson, Member.

