

34965
EB

SERVICE DATE - OCTOBER 25, 2004

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-33 (Sub-No. 213X)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT EXEMPTION—
IN DALLAS COUNTY, IA

Decided: October 22, 2004

By petition filed on July 7, 2004, Union Pacific Railroad Company (UP) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a line of railroad known as the Perry Subdivision, extending from milepost 296.8 near Waukee, IA, to milepost 275.9 (Equation milepost 275.9 = 361.8) near Perry, IA, and from milepost 361.8 to milepost 369.0 near Dawson, IA, a total distance of 28.1 miles, in Dallas County, IA. Notice of the filing was served and published in the Federal Register on July 27, 2004 (69 FR 44728). A request for imposition of a public use condition and issuance of a notice of interim trail use (NITU) was filed by the Dallas County Conservation Board and the Iowa Natural Heritage Foundation (collectively, INHF). We will grant the petition for exemption, subject to trail use, public use, environmental, and standard employee protective conditions.

BACKGROUND

There are currently four shippers located on the line: Farmers Cooperative (Farmers), Heartland Coop (Heartland), Tyson Fresh Meats (Tyson), and Quebecor World (Quebecor). According to UP, three of these shippers used the line proposed for abandonment during 2002, four during 2003, and two in 2004. Specifically, in the year 2002, 232 carloads were handled for the following shippers: Farmers – 50 carloads; Heartland – 44 carloads; and Tyson – 138 carloads. In 2003, 222 carloads were handled for the following shippers: Farmers – 32 carloads; Heartland – 77 carloads; Tyson – 112 carloads; and Quebecor – 1 carload. And from January through March 2004, 3 carloads were handled for Heartland and 18 carloads for Tyson. Commodities transported over the line consisted of potash, superphosphate, ammoniating fertilizers, meats, lard, tallow, meat bone, and newsprint.

UP states that the four shippers on the line realize that continued operation of the line is not economically feasible,¹ and they have adjusted or are in the process of adjusting their shipping procedures. In particular, UP states that Heartland has indicated that it would cease all shipments on the line by July 1, 2004. UP adds that the four shippers on the line either support

¹ UP has calculated an avoidable loss from operations of \$75,156 for the base year (April 2003 to March 2004), and of \$115,314 for the forecast year (June 2004 to May 2005).

or will not protest the proposed abandonment. UP maintains that it is clear that the shippers on the line are relocating and/or have practical transportation alternatives that they are using or plan to use, in the form of trucking and transloading, that will adequately replace the loss of direct rail service. Finally, petitioner states that there are no known prospects for new shippers on the line.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without our prior approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will also foster sound economic conditions and encourage efficient management by relieving UP of the expense of maintaining a line that is no longer used and allowing it to use its assets more productively elsewhere on its system. [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be affected adversely.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. It appears that the four shippers on the line are relocating or have other transportation alternatives, and they do not oppose the proposed abandonment. Nevertheless, to ensure that the shippers are informed of our action, we will require UP to serve a copy of this decision and notice on each of them within 5 days of the service date and to certify to us that it has done so. Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, we will impose the employee protective conditions set forth in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979).

UP has submitted an environmental report with its petition and has notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed action. See 49 CFR 1105.11. The Board's Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, analyzed the probable effects of the proposed action on the quality of the human environment, and served an environmental assessment (EA) on September 3, 2004.

In the EA, SEA states that the National Geodetic Survey (NGS) has identified eight geodetic station markers along the rail line that may be affected by the proposed abandonment and has requested 90 days' notification in advance of any activities that may disturb or destroy these station markers to plan for their relocation. Therefore, SEA recommends that UP be required to notify NGS 90 days prior to salvage activities that may disturb or destroy the geodetic station markers located on the line.

UP has submitted a historic report, and has served the report on the State Historical Society of Iowa (SHPO). See 49 CFR 1105.8. SEA states in the EA that the SHPO has not yet completed its review of the proposed abandonment. SEA indicates that, according to UP, there is a bridge at milepost 363.50 which is over 50 years old. Therefore, SEA recommended in the EA that a condition be imposed on any decision granting abandonment authority requiring UP to retain its interest in and take no steps to alter the historic integrity of all sites and structures on the right-of-way that are 50 years old or older until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f.

Comments on the EA were due by October 4, 2004. No comments were filed by the due date. Accordingly, we will impose the conditions recommended by SEA in the EA. Based on SEA's recommendation, we conclude that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

As previously noted, INHF filed a request for the issuance of a NITU under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and for imposition of a public use condition under 49 U.S.C. 10905. INHF filed the request on August 5, 2004, but corrected it on August 18, 2004. INHF has submitted a statement of willingness to assume financial responsibility for the right-of-way, and has acknowledged that use of the right-of-way is subject to possible future reconstruction and reactivation of the right-of-way for rail service as required under 49 CFR 1152.29. By letters filed on July 29, 2004, and August 12, 2004, UP states that it is willing to negotiate with INHF for interim trail use. Because INHF's request complies with the requirements of 49 CFR 1152.29, and UP is willing to enter into trail use negotiations, we will issue a NITU for the subject line. The parties may negotiate an agreement during the 180-day period prescribed below. If an agreement is executed, no further Board action is necessary. If no agreement is reached within 180 days, UP may fully abandon the line, subject to the conditions imposed below. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

SEA has indicated in its EA that, following abandonment and salvage of the line, the right-of-way may be suitable for other public use. INHF requests imposition of a 180-day public use condition prohibiting UP from: (1) disposing of the corridor, including ballast, bridges, culverts and right-of-way, except for public use on reasonable terms; and (2) removing or destroying potential trail-related structures such as ballast, bridges, trestles, culverts, tunnels and

right-of-way. INHF states that the rail corridor would make an excellent transportation and recreation trail and would enable the extension of the Raccoon River Valley Trail, which currently ends in Dawson, and the Hiawatha Trail in Perry. INHF also states that the corridor's preservation as a trail would facilitate the county's efforts to conserve important wildlife habitat. INHF states that the 180-day period is needed to complete negotiations with the railroad.

We have determined that persons who file under the Trails Act may also file for public use under 49 U.S.C. 10905. See Rail Abandonments--Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986) (Trails). When the need for both conditions is established, it is our policy to impose them concurrently, subject to the execution of a trail use agreement. INHF has met the public use criteria prescribed at 49 CFR 1152.28(a)(2) by specifying: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) justification for the period of time requested. Accordingly, a 180-day public use condition will be imposed on the rail line to be abandoned, commencing from the effective date of this decision and notice, to enable any state or local government agency or other interested person to negotiate the acquisition of the line for public use. If a trail use agreement is reached on a portion of the right-of-way, UP must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, we note that a public use condition is not imposed for the benefit of any one potential purchaser. Rather, it provides an opportunity for any interested person to acquire the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, UP is not required to deal exclusively with INHF, but may engage in negotiations with other interested persons.

The parties should note that operation of the trail use and public use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in Trails, 2 I.C.C.2d at 608, offers of financial assistance (OFA) to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking and public use. Accordingly, if an OFA is timely filed under 49 CFR 1152.27(c)(1), the effective date of this decision and notice will be postponed beyond the effective date indicated here. See 49 CFR 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. See 49 CFR 1152.27(f). Finally, if the line is sold under the OFA procedures, the petition for abandonment exemption will be dismissed and trail use and public use precluded. Alternatively, if a sale under the OFA procedures does not occur, the trail use and public use processes may proceed.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903 the abandonment of the above-described line, subject to the employee protective conditions set forth in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979), and the conditions that UP shall: (1) leave intact all of the right-of-way, including bridges,

trestles, culverts and tunnels (except track, ties, and signal equipment) for a period of 180 days from the effective date of this decision and notice, to enable any state or local government agency or any other interested person to negotiate the acquisition of the line for public use; (2) comply with the terms and conditions for implementing interim trail use/rail banking as set forth below; (3) notify NGS 90 days prior to salvage activities that may disturb or destroy the geodetic station markers located on the line in order to plan for their relocation; and (4) retain its interest in and take no steps to alter the historic integrity of all sites and structures on the right-of-way that are 50 years old or older until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f.

2. UP is directed to serve a copy of this decision and notice on the line's shippers within 5 days after the service date of this decision and to certify to the Board that it has done so.

3. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for the management of, any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

4. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.

5. If interim trail use is implemented and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

6. If an agreement for interim trail use/rail banking is reached by the 180th day after service of this decision and notice, interim trail use may be implemented. If no agreement is reached by that time, UP may fully abandon the line, provided the conditions imposed above are met.

7. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by November 4, 2004, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by the filing fee, which currently is set at \$1,100, but is scheduled to increase to \$1,200, effective October 31, 2004. See Regulations Governing Fees for Services Performed in Connection with Licensing and Related Services—2004 Update, STB Ex Parte No. 542 (Sub-No. 11) (STB served Oct. 1, 2004).

8. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **"Office of Proceedings, AB-OFA."**

9. Provided no OFA has been received, this exemption will be effective on November 24, 2004.² Petitions to stay must be filed by November 9, 2004; petitions to reopen must be filed by November 19, 2004.

10. Pursuant to the provisions of 49 CFR 1152.29(e)(2), UP shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by UP's filing of a notice of consummation by October 25, 2005, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Nober, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A. Williams
Secretary

² UP has asked that this exemption be effective on the date of this decision and notice, but has failed to justify the need for such action. Consequently, we will impose the customary effective date of 30 days from service.