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SERVICE DATE – JANUARY 20, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 33 (Sub-No. 300X)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT EXEMPTION—IN
POTTAWATTAMIE COUNTY, IOWA

Docket No. AB 414 (Sub-No. 6X)

IOWA INTERSTATE RAILROAD, LTD.—DISCONTINUANCE OF SERVICE
EXEMPTION—IN POTTAWATTAMIE COUNTY, IOWA

Digest:¹ This decision allows Union Pacific Railroad Company (UP) and Iowa Interstate Railroad, Ltd. (IAIS) to end their responsibility to provide freight rail service over a .45-mile rail line and a 400-foot connecting track in Pottawattamie County, Iowa. UP plans to sell the line and connecting track to a shipper located on the line for private use, and IAIS plans to continue to provide rail service to the shippers located on the line via private agreements.

Decided: January 18, 2012

By petition filed on October 3, 2011, Union Pacific Railroad Company (UP) and Iowa Interstate Railroad, Ltd. (IAIS) (collectively, petitioners) jointly seek an exemption under 49 U.S.C. § 10502 from the provisions of 49 U.S.C. § 10903 to permit: (1) UP to abandon and IAIS to discontinue service over UP's railroad line known as the Chicago and Great Western Industrial Lead, between milepost 503.6 and milepost 504.05, a distance of approximately 0.45 miles, in Council Bluffs, Pottawattamie County, Iowa (the UP line); (2) UP to abandon and IAIS to discontinue service over UP's connecting track from UP milepost 503.85 on the UP line to the end point at IAIS milepost 486.8, a distance of 400 feet (the UP connecting track); (3) IAIS to discontinue its trackage rights over the UP line and the UP connecting track; and (4) UP to discontinue its overhead trackage rights over that portion of IAIS's mainline from IAIS milepost 486.8 to IAIS milepost 488.0, a distance of 1.2 miles. Notice of the exemption was served and published in the Federal Register on October 18, 2011 (76 Fed. Reg. 64,425). Petitioners also seek an exemption from the offer of financial assistance (OFA) provisions of 49 U.S.C. § 10904 and the public use provisions of 49 U.S.C. § 10905.

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).

For the reasons discussed below, the Board will grant the exemption from 49 U.S.C. § 10903, subject to a historic preservation condition and standard employee protective conditions. The request for an exemption from the OFA process will be denied, and the request for an exemption from the public use provisions of § 10905 will be denied as moot.

BACKGROUND

According to petitioners, the UP line was originally constructed in 1901 by the Mason City and Fort Dodge Railroad. The portion of the UP line to the southeast was abandoned in 1971, and the portion of the UP line to the northwest was abandoned in 2000, leaving the remaining UP line a distance of approximately 0.45 miles. In 2000, the UP connecting track was constructed to connect the remaining UP line with IAIS's mainline. IAIS and UP entered into a trackage rights agreement granting UP trackage rights between IAIS milepost 486.8 and IAIS milepost 488.0 and granting IAIS trackage rights between UP milepost 503.6 and UP milepost 504.05.² In 2008, UP and IAIS petitioned the Board for an exemption from the provisions of 49 U.S.C. § 10903 to abandon and discontinue service over the same lines at issue here. In a December 12, 2008 decision, the Board denied the petition, explaining that petitioners had not adequately demonstrated that the interests of the shippers would be protected or provided economic justification for the abandonment and discontinuance.³ The petition filed in 2008 did not include any details of an agreement with the shippers or any statements from the shippers that reflected their consent to the proposed plans.

Here, petitioners state that Red Giant Oil Company (Red Giant) and Midwest Walnut Company of Iowa (Midwest Walnut), the only shippers on the UP line, have reached an agreement, which provides for UP to sell the UP line and connecting track to Red Giant, subject to a permanent access easement for Midwest Walnut.⁴ Petitioners state that the agreement will provide for the following: 1) Red Giant and Midwest Walnut to have permanent, direct access to IAIS, the common carrier railroad that serves them; 2) Red Giant and Midwest Walnut to own, control, and use their respective interests in the UP line and UP connecting track as a typical

² Iowa Interstate R.R. and Union Pac. R.R.–Joint Relocation Project Exemption–in Council Bluffs, Pottawattamie Cnty, Iowa, FD 33883 (STB served June 30, 2000).

³ Union Pac. R.R. –Aban. Exemption–in Pottawattamie Cnty, Iowa, AB 33 (Sub-No. 274X) and Iowa Interstate R.R. –Discontinuance of Service Exemption– in Pottawattamie Cnty, Iowa, AB 414 (Sub-No. 4X) (STB served Dec. 12, 2008).

⁴ Petitioners included copies of the following: 1) Settlement Agreement; 2) Mutual Release of All Claims; 3) Operating Agreement between Midwest Walnut and Red Giant; and 4) Railroad Industry Track Agreements between IAIS and Red Giant and IAIS and Midwest Walnut.

shipper-owned industrial lead; and 3) IAIS to serve both Red Giant and Midwest Walnut pursuant to railroad industry track agreements each has entered into with IAIS.

According to petitioners, during the past 4 years, IAIS has been the sole common carrier rail service provider to and from the UP connecting track and line and has handled all of the rail traffic for Red Giant and Midwest Walnut. Petitioners state that in 2010, Midwest Walnut received 6 carloads and anticipates similar movements in the future. Petitioners also state that Red Giant has used rail service for inbound and outbound carloads of petroleum products and expects to continue such rail service from IAIS.

Petitioners further state that neither Red Giant nor Midwest Walnut desire to become nor will they become common carriers as a result of the proposed abandonment and discontinuances and the transactions under their proposed agreements. Both Midwest Walnut and Red Giant filed letters in support of the petition.

DISCUSSION AND CONCLUSIONS

Exemption from Section 10903. Under 49 U.S.C. § 10903, a rail line may not be abandoned without the Board's prior approval. Under 49 U.S.C. § 10502, however, the Board must exempt a transaction or service from regulation when it finds that: (1) continued regulation is not necessary to carry out the rail transportation policy (RTP) 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 of the proposed abandonment and discontinuance under 49 U.S.C. § 10903 is not necessary to carry out the RTP. Consistent with 49 U.S.C. §§ 10101(5) and (9), an exemption will foster sound economic conditions and encourage efficient management by: (1) allowing UP to discontinue operations and avoid the unnecessary expenses associated with retaining the UP line and connecting track; and (2) permitting IAIS to discontinue its trackage rights while ensuring that the 2 shippers will have continued rail service provided by IAIS via railroad industry track agreements. Further, by minimizing the administrative expense of the application process, an exemption will minimize the need for Federal regulatory control over the rail transportation system and will reduce regulatory barriers to exit, in accordance with 49 U.S.C. §§ 10101(2) and (7). Other aspects of the RTP will not be adversely affected by the use of the exemption process.

We also find that regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power.⁵ As explained earlier, both Midwest Walnut and Red Giant support the abandonment and discontinuance, provided that they continue to receive rail service from IAIS. Nevertheless, to ensure that Midwest Walnut and Red Giant are informed of our action, we will require UP and IAIS to serve a copy of this decision on Midwest Walnut and Red Giant, so that they will receive it within 5 days of the service date of this decision, and to certify contemporaneously to the Board that they have done so.

Exemption from Section 10904. Under 49 U.S.C. § 10904, a financially responsible person may offer to purchase, or subsidize continued rail operations over, a rail line sought to be abandoned. The Board has granted exemptions from the OFA provisions of 49 U.S.C. § 10904 when the record shows that the right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service. See, e.g., BNSF Ry.-Aban. Exemption-in Los Angeles Cnty., Cal., AB 6 (Sub-No. 477X) (STB served Sept. 16, 2011).

Here, petitioners argue that the UP line and connecting track is obligated to be transferred to Red Giant and the exemption will enable the parties to finalize the transactions. Petitioners' arguments that Midwest Walnut and Red Giant desire ownership, control, and use of the UP line do not demonstrate that the right-of-way is needed for a valid public purpose. Rather, petitioners seek the exemption to facilitate the sale of the UP line and connecting track for private use. Because we find no reasonable basis for departing from the statute's objective of providing an opportunity for maintaining common carrier rail service as part of the abandonment process, petitioners' request for an exemption from the OFA provisions at 49 U.S.C. § 10904 will be denied, and the OFA process will be allowed to proceed. See e.g., CSX Transp.-Aban. Exemption-in Chesterfield and Darlington Cntys, S.C. AB 55 (Sub-No. 703X) (STB served Jan. 19, 2011) (denying requested exemption from the OFA process to facilitate sale of a line to the shipper for its private use). Nevertheless, given the apparent lack of need for this line by shippers other than Midwest Walnut and Red Giant, any person seeking to file an OFA must provide evidence that there is some shipper other than Midwest Walnut and Red Giant that would make use of common carrier service. See id.

Exemption from Section 10905. Petitioners have also requested an exemption from the public use condition provisions of 49 U.S.C. § 10905. Requests for a public use condition were due by November 10, 2011, and no requests were filed. Therefore, petitioners' request will be denied as moot.

⁵ Because we find that regulation of the proposed abandonment is not necessary to protect shippers from the abuse of market power, we need not determine whether the proposed abandonment is limited in scope.

Employee protection. Under 49 U.S.C. § 10502(g), the Board may not use its 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 upon petitioners the employee protective conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979).

Environmental review. Petitioners submitted a combined environmental and historic report with its petition and notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the environmental impacts of the proposed action. See 49 C.F.R. § 1105.11. The Board's Office of Environmental Analysis (OEA) has examined the reports, verified the data they contain, and analyzed the probable effects of the proposed action on the quality of the human environment.

OEA issued an Environmental Assessment (EA) for public review and comment on December 2, 2011. In the EA, OEA states that UP served its historic report on the State Historical Society of Iowa (SHPO), pursuant to 49 C.F.R. § 1105.8(c). UP notes there are no structures on the UP line and connecting track that are 50 years old or older and that, at the time the EA was served, the SHPO had not yet commented on the historic effects of the proposed abandonment. Accordingly, OEA recommends a condition requiring UP and IAIS to retain their interests in and take no steps to alter the historic integrity of all historic properties including sites, buildings, structures, and objects within the project right-of-way (the Area of Potential Effects) eligible for listing or listed in the National Register of Historic Places (National Register) until completion of the Section 106 process of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470(f). As part of this condition, OEA also recommends that UP and IAIS be required to report back to OEA regarding any consultations with the SHPO and the public, and that UP and IAIS be prohibited from filing its consummation notice or beginning any salvage activities related to abandonment (including removal of tracks and ties) until the Section 106 process has been completed and the Board has removed this condition.

Comments on the EA were due by January 2, 2012. No comments were received. Accordingly, we will impose the condition recommended by OEA in the EA. Based on OEA's recommendation, we conclude that the proposed abandonment, as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

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 by UP and the discontinuance of service by IAIS, of the above-described line, subject to the employee protective conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham &

Bonneville Counties, Idaho, 360 I.C.C. 91 (1979), and subject to the condition that petitioners (or any holder of a successor interest in the rail property) shall: (1) retain their interest in and take no steps to alter the historic integrity of all historic properties including sites, buildings, structures, and objects within the Area of Potential Effects that are eligible for listing or listed in the National Register until completion of the Section 106 process of the NHPA; (2) report back to OEA regarding any consultations with the SHPO and the public; and (3) not file their consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties) until the Section 106 process has been completed and the Board has removed this condition.

2. Petitioners are directed to serve a copy of this decision on Midwest Walnut and Red Giant so that it is received within 5 days of the service date of this decision and certify contemporaneously to the Board that they have done so.

3. Petitioners' request for an exemption from the provisions of 49 U.S.C. § 10904 is denied, and its request for an exemption from the provisions of 49 U.S.C. § 10905 is denied as moot.

4. An OFA under 49 C.F.R. § 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by January 30, 2012, subject to time extensions authorized under 49 C.F.R. § 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27(c)(1). Each OFA must be accompanied by the filing fee of \$1,500. See 49 C.F.R. § 1002.2(f)(25).

5. 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.”**

6. Provided no OFA has been received, this exemption will be effective on February 19, 2012. Petitions to stay must be filed by February 6, 2012, and petitions to reopen must be filed by February 14, 2012.

7. Pursuant to the provisions of 49 C.F.R. § 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 January 20, 2013, 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 Elliott, Vice Chairman Mulvey, and Commissioner Begeman.