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SERVICE DATE – MAY 4, 2010

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 33 (Sub-No. 263X)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT EXEMPTION—IN
COOK COUNTY, ILL.

Decided: April 30, 2010

Union Pacific Railroad Company (UP) filed a notice of exemption under 49 C.F.R. § 1152 Subpart F—Exempt Abandonments to abandon the Weber Industrial Lead from milepost 5.8 near Wilson Avenue, Chicago, to milepost 9.5 near Touhy Avenue, Skokie, in Cook County, Ill., a distance of 3.7 miles. Notice of the exemption was served and published in the Federal Register on November 18, 2008 (73 Fed. Reg. 68,497). The notice was scheduled to become effective on December 18, 2008.

On December 17, 2008, a decision and notice of interim trail use or abandonment (NITU) was served in this proceeding authorizing a 180-day period for (1) the Village of Lincolnwood, Ill. (the Village) to negotiate an interim trail use/rail banking agreement with UP for a portion of UP's Weber Industrial Lead located in the Village of Lincolnwood, from approximately milepost 8.4 at Devon Avenue to the border with the Village of Skokie, Ill., at approximately milepost 9.45 near Touhy Avenue, a distance of approximately 1.05 miles, and (2) the City of Chicago (the City), acting by and through its Department of Transportation, to negotiate an interim trail use/rail banking agreement with UP for that portion of the Weber Industrial Lead from milepost 5.8 near Wilson Avenue to the border with the Village at approximately milepost 8.4 near Devon Avenue, a distance of approximately 2.6 miles.¹ The negotiating period under the NITU was scheduled to expire on June 16, 2009. By decisions served June 12, 2009 and June 18, 2009, respectively, the negotiating period under the NITU was extended until December 13, 2009, in order for the Village and the City to complete their trail plans and to continue negotiating with UP.

By letter filed on November 23, 2009, the Village seeks an extension of the negotiating period for an additional 180 days, until June 11, 2010, for that portion of the line between mileposts 8.4 and 9.45. The Village states that it has continued development plans for the right-

¹ The December 17 decision also imposed a self-executing environmental condition requiring UP, prior to commencement of any salvage activities, to consult with the U.S. Army Corps of Engineers—Chicago District regarding potential permitting requirements under section 404 of the Clean Water Act (33 U.S.C. § 1344). A public use condition, also imposed there, expired on June 16, 2009.

of-way and has been approved for an 80 percent matching grant from the Congestion Mitigation and Air Quality Improvement Program (CMAQ) administered by the Illinois Department of Transportation (IDOT), which requires that grantees follow a specified procedure in order to receive grant funding. The Village adds that its representatives have met with IDOT officials and have initiated a request for advanced acquisition approval, which would permit the Village to receive the grant and complete negotiations with UP within a shorter timeframe. However, the Village states that it does not expect to receive a decision on its request for advanced acquisition, or for approval to conduct the required Phase One engineering study, during the current negotiating period. Therefore, the Village requests an extension of the negotiating period in order to complete its trail plan to satisfy CMAQ and IDOT requirements and to continue negotiating with UP. In a response filed on November 25, 2009, UP states that it is willing to negotiate with the Village and supports the extension request.

By letter filed on December 1, 2009, the City also seeks an extension of the negotiating period for an additional 180 days, until June 11, 2010, for that portion of the line between mileposts 5.8 and 8.4. The City states that it has received proposals from consultant teams to conduct preliminary engineering and environmental studies, and has identified a source for the 20 percent matching funds needed for the CMAQ grant. The City further states that it has made progress, but needs additional time to complete its engineering plan and conclude negotiations with UP. In a response filed on December 3, 2009, UP states that it is willing to negotiate with the City and supports the extension request.

Even if a negotiating period expires, when a carrier consents to continuing negotiations and has not consummated the abandonment of the line, the Board continues to have jurisdiction to grant an extension. Under the circumstances, further extension of the negotiating period is warranted. See Birt v. Surface Transportation Board, 90 F.3d 580, 588-90 (D.C. Cir. 1996); Grantwood Village v. Missouri Pacific Railroad Co., 95 F.3d 654, 659 (8th Cir. 1996), cert. denied, 519 U.S. 1149 (1997). Accordingly, the NITU negotiating periods will be extended for 180 days, until June 11, 2010.

One additional matter requires discussion. On November 24, 2009, John J. Ress, an adjacent property owner, filed a letter opposing the extensions. Mr. Ress asserts that, in September and October 2009, all the rails and ties were removed from the line and, as a result, the railroad has consummated the abandonment. He further argues that, as a result of the alleged consummation, the Board has lost jurisdiction over the property and may not grant a further extension of the NITU negotiating period; instead, the Board must now compel UP to transfer the right-of-way back to the adjacent landowners.

Mr. Ress is incorrect that UP has consummated this abandonment. Since 1997, when the Board added a notice of consummation requirement at 49 C.F.R. § 1152.29(e)(2) and 49 C.F.R. § 1152.50(e), only the filing of such a notice has been deemed conclusive evidence of

consummation.² Here UP has not filed such a notice and, therefore, this abandonment has not been consummated and the Board's jurisdiction over this line has not been removed – for trail purposes or otherwise.

Moreover, there is also no merit to Mr. Ress' claim that UP improperly removed the tracks and ties from this line. Unless otherwise limited by a Board-imposed condition, authorization to abandon a line carries with it permission to salvage. Neither the Trails Act nor the trails use conditions imposed in this proceeding in the December 17, 2008 decision precluded salvage, nor did the public use condition imposed in that order. The public use condition, in any event, expired in June 2009.

In sum, Mr. Ress' arguments provide no basis to deny the requests to extend the negotiating periods in this proceeding. Conversely, because the Village and the City have demonstrated good cause for the extensions, they will be granted.

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

It is ordered:

1. The requests by the Village and the City to extend the NITU negotiating period are granted.
2. The NITU negotiating periods are extended until June 11, 2010.
3. This decision is effective on the date of service.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

² In support of his argument, Mr. Ress cites Becker v. Surface Transportation Board, 132 F.3d 60 (5th Cir. 1997). Becker was decided before the notice requirement was in effect. But even under the old legal standard there, i.e., an analysis of various indicia to determine the carrier's objective intent, UP, by voluntarily agreeing to continue Trails Act negotiations and extend the NITU negotiating period, made it clear that it did not intend to consummate the abandonment.