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SERVICE DATE - MARCH 7, 2003

## SURFACE TRANSPORTATION BOARD

### DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-33 (Sub-No. 197X)

#### UNION PACIFIC RAILROAD COMPANY — ABANDONMENT EXEMPTION — IN SANTA CLARA COUNTY, CA

Decided: February 27, 2003

By petition filed on November 19, 2002,<sup>1</sup> 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 portion of the San Jose Industrial Lead from milepost 19.60 near Valbrick to milepost 22.45 near Cahill, a distance of 2.85 miles in Santa Clara County, CA (the line). A request for imposition of a public use condition and issuance of a notice of interim trail use (NITU) was filed by the City of San Jose (the City). We will grant the exemption, subject to trail use, public use, environmental conditions, and standard employee protective conditions.

#### BACKGROUND

No shippers are currently using the line. According to UP, the area where the line is located is shifting away from industrial use and towards residential development. Consequently, UP does not foresee any shippers locating on the line. There is no overhead traffic, and the only local traffic in the past 2 years has been lumber shipments to Floor Service Supply Company (FSSC), located at the end of the line. FSSC received 24 carloads of lumber in 2000, 27 carloads of lumber in 2001, and 6 carloads of lumber in the first half of 2002. Service to FSSC is currently provided by UP from its Vasona Industrial Lead (VIL), which is now connected to the line just south of FSSC's facility. UP plans to reclassify that portion of the line that connects to the VIL and sell it to FSSC after the abandonment exemption is approved, and also plans to continue to provide rail service to FSSC via the VIL. FSSC has provided a letter in support of the abandonment.

#### 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

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<sup>1</sup> Notice of the filing was served and published in the Federal Register on December 9, 2002 ( 67 FR 73006).

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 from the expense of maintaining a rail line which is no longer used [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. FSSC, the only shipper on the line, will continue to have access to rail service via a connection to UP's VIL and has indicated support for the proposal. Nevertheless, to ensure that FSSC is informed of our action, we will require UP to serve a copy of this decision on the shipper 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 abandonment 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. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment. SEA served an environmental assessment (EA) on January 17, 2003.

In the EA, SEA notes that the National Geodetic Survey (NGS) has identified four geodetic station markers that may be affected by the proposed abandonment. Therefore, SEA recommends that UP provide NGS with at least 90 days' notice prior to initiation of any salvage operations that may disturb or destroy the four geodetic station markers so that plans can be made for their relocation.

Comments to the EA were due by February 14, 2003. No comments were filed by the due date. Accordingly, we will impose the condition 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.

On December 30, 2002, the City timely filed a request for the issuance of a NITU for that portion of the line between milepost 20.94 and milepost 21.9 under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act). The City submitted a statement of willingness to assume financial responsibility for the management of, for 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 payment of any and all taxes that may be levied or assessed against, the right-of-way, and acknowledged that the use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation for rail service, as required at 49 CFR 1152.29. By letter filed on January 28, 2003, UP states that it is willing to negotiate for interim trail use for the portion of the line between milepost 20.94 and milepost 21.9.<sup>2</sup> Because the City'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 as requested. 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 portion of the line between milepost 20.94 and milepost 21.9, 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 the EA that, if abandonment and salvage of the line does take place, the right-of-way may be suitable for other public use. The City requests imposition of a 180-day public use condition, for the portion of the line between milepost 20.94 and milepost 21.9, precluding UP from: (1) disposing of the corridor, other than the tracks, ties, and signal equipment, except for public use on reasonable terms; and (2) removing or destroying potential trail-related structures such as bridges, trestles, culverts, and tunnels. The City states that the rail corridor will enable it to connect the Coyote Creek Trail to the Los Gatos Creek Trail, and provides a link to a large regional park.

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. The City 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 right-of-way 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 portion of the line between milepost 20.94 and milepost 21.9 for public use. We note that a public use

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<sup>2</sup> The portion of the line between milepost 20.94 and milepost 21.9 does not include the part of the line UP intends to sell to FSSC.

condition is not imposed for the benefit of any one potential purchaser. Rather, it provides an opportunity for any interested person to acquire a right-of-way that has been found suitable for public purposes. Therefore, with respect to the public use condition, UP is not required to deal exclusively with the City, 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. An offer of financial assistance (OFA) to acquire a rail line for continued rail service or to subsidize rail operations takes priority over interim trail use/rail banking and public use.<sup>3</sup> 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 by UP of the above-described rail line, subject to the employee protective conditions set forth in Oregon Short Line R. Co. — Abandonment — Goshen, 360 I.C.C. 91 (1979), and subject to the conditions that UP shall: (1) leave intact all of the right-of-way (milepost 20.94 to milepost 21.9), including bridges, trestles, culverts, and tunnels (but not track and track material), for a period of 180 days from the effective date of this decision, to enable any state or local government agency or other interested person to negotiate the acquisition of the portion of the line for public use; (2) comply with the terms and conditions for implementing interim trail use/rail banking as set forth below; and (3) provide NGS with at least 90 days' notice prior to initiation of any salvage operations that may disturb or destroy the four geodetic station markers so that plans can be made for their relocation.

2. UP is directed to serve a copy of this decision and notice on FSSC within 5 days after the service date of this decision and notice 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 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.

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<sup>3</sup> See Trails, 2 I.C.C.2d at 608.

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 portion of the line between milepost 20.94 and milepost 21.9, 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 March 17, 2003, 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 1157.27(c)(1). Each OFA must be accompanied by the filing fee, which currently is set at \$1,100. See 49 CFR 1002.2(f)(25).

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 April 6, 2003. Petitions to stay must be filed by March 24, 2003, and petitions to reopen must be filed by April 1, 2003.

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 March 7, 2004, 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 Burkes, and Commissioner Morgan.

Vernon A. Williams  
Secretary