

SERVICE DATE – JULY 25, 2008

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-33 (Sub-No. 260X)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT EXEMPTION—IN
DOUGLAS AND SARPY COUNTIES, NE

Decided: July 23, 2008

By petition filed on April 8, 2008, Union Pacific Railway 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 3.45-mile line of its Millard Industrial Lead that extends between milepost 22.85, in Omaha, and milepost 19.4, in La Vista, in Douglas and Sarpy Counties, NE (the line). Notice of the filing was served and published in the Federal Register on April 28, 2008 (73 FR 22994). On May 12, 2008, Nebraska Trails Foundation, Inc. (NTFI), on its own behalf and that of the Papio-Missouri River Natural Resources District, filed a request for imposition of a public use condition and for issuance of a notice of interim trail use (NITU). On May 15, 2008, UP filed a partial concurrence for interim trail use, noting that it did not concur with the issuance of a NITU for the portion of the line between milepost 22.1 and milepost 22.85 in Omaha, NE (portion one). UP did express its willingness to negotiate with NTFI concerning the portion of the line between milepost 19.4, in La Vista, and milepost 22.1, in Omaha (portion two). We will grant the exemption, subject to trail use, public use, environmental, and standard employee protective conditions, as set forth below.

BACKGROUND

According to UP, it originally constructed the line in 1866 as part of the railroad's transcontinental main line. In 1908, the line lost its main line status when UP opened what is now its Omaha Subdivision, which provided a more direct route through the Omaha area. The line does not have any stations that would be closed as a result of the abandonment.

According to UP, no traffic currently moves over the line. Within the last 2 years, there have only been two shippers who have used the line, namely, Millard Lumber, Inc. (Millard Lumber), and Safety-Kleen Systems, Inc. (Safety-Kleen). Millard Lumber last moved traffic over the line in December 2007, but has since transferred its operations to a new facility in Omaha, where it receives service via a different UP line. Millard Lumber is selling its old facility. Safety-Kleen has no facility on the line, but moved traffic pursuant to an agreement with Millard Lumber to transload liquid industrial waste shipments at its facility from trucks to railcars. That agreement terminated on February 5, 2008, and Safety-Kleen is searching for a transloading location elsewhere in the Omaha area.

UP states that there is no reasonable likelihood that the line will be used in the future for rail service. UP explains that the segment of the line between mileposts 22.0 and 19.4 has not carried any traffic since 1994 and is in an advanced state of deterioration. The abandonment would allow UP to focus its resources away from an unused rail line to service on active rail lines elsewhere in its system. UP states that the abandonment would not have a limiting effect on service in the area, because the remaining portion of the Millard Industrial Lead will be kept in service, there is service provided by BNSF Railway Company in the area, and numerous city streets and highways interchange with local roads that parallel or cross the line. The Board has received no filings in opposition to UP's petition.

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 proposed abandonment from regulation under 49 U.S.C. 10903 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 an abandonment application, an exemption will expedite regulatory decisions and reduce regulatory barriers to exit [49 U.S.C. 10101(2) and (7)]. An exemption will also foster sound economic conditions and encourage efficient rail management by relieving UP of the costs of maintaining and operating a line that is no longer used and by allowing UP to apply its assets more productively elsewhere in its rail system [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be adversely affected.

Regulation of the proposed transaction is not necessary to protect shippers from an abuse of market power. Presently, no traffic is moving over the line, as Millard Lumber has moved to a different facility in Omaha that is located on a different UP rail line, and the agreement allowing Safety-Kleen to move traffic via Millard Lumber's facility on the line expired on February 5, 2008. Safety-Kleen is seeking to acquire a different transloading location in the Omaha area, and UP has offered alternative locations. Neither of these shippers has participated in this proceeding to oppose the abandonment exemption. Nevertheless, to ensure that these shippers are informed of our action, we will require UP to serve a copy of this decision on them within 5 days of the service date of the decision and certify to us that it has done so. In light of the 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 in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

As required by the Board's environmental regulations, UP 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 energy and environmental impacts of the proposed transaction. See 49 CFR 1105.11. The Board's Section of Environmental Analysis (SEA) examined the environmental and historic report, verified UP's data, analyzed the probable effects of the proposed action on the quality of the human environment, and issued an Environmental Assessment (EA) for public review and comment. The EA was served on June 6, 2008. Comments on the EA were due by July 7, 2008.

In the EA, SEA recommends that three environmental conditions be placed on any decision granting abandonment authority. First, SEA notes that the National Geodetic Survey (NGS) identified 10 geodetic station markers that may be affected by the proposed abandonment and requested at least 90-days' advance notice of any activities that would disturb or destroy the markers in order to plan for their relocation. Accordingly, SEA recommends that UP consult with NGS and notify NGS at least 90 days prior to commencement of any salvage activities that will disturb or destroy the station markers.

Second, SEA notes that the U.S. Army Corps of Engineers' Omaha District (Corps) stated that there are no concerns regarding floodplains, but did comment that, if salvage activities involved any work in the waters of the United States, a section 404 permit may be required. Because UP indicated to SEA that some of the bridges on the line might be removed as part of the proposed abandonment, SEA recommends that, prior to commencement of any salvage activities, UP consult with the Corps regarding its requirements and, if applicable, comply with any reasonable requirements of the Corps.

Third, SEA notes that the U.S. Fish and Wildlife Service's Nebraska Field Office (USFWS) indicated that there would not be any adverse effects on federally listed threatened or endangered species or their designated critical habitats. USFWS did note that under the Migratory Bird Treaty Act (MBTA) certain activities should be avoided in or around grasslands, wetlands, streams, woodland habitats, and bridges that would otherwise result in the taking of migratory birds, eggs, young, or active nests. SEA states that the migratory bird nesting activity in Nebraska occurs during the period of April 1 to July 15, and, therefore, if any proposed activity occurs during the primary nesting season or any other time that could result in the taking of nesting migratory birds, the USFWS recommends that a field survey during the nesting season of the affected habitats and structures be conducted to determine the presence of nesting migratory birds. Accordingly, SEA recommends that, prior to commencement of any salvage activities, UP consult with the USFWS in order to ensure that removal and salvage activities are conducted in a manner that avoids or minimizes impacts to migratory birds.

No comments to the EA were filed by the July 7, 2008 due date. The conditions recommended by SEA will be imposed. Based on SEA's recommendations, the Board concludes 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, NTFI has filed a request for issuance of a NITU under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act). NTFI 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 letter filed on May 15, 2008, UP states that it is only willing to negotiate with NTFI for interim trail use with regard to portion two, but not portion one, of the line. Because NTFI's request complies with the requirements of 49 CFR 1152.29, and UP is willing to enter into negotiations for portion two, a NITU will be issued for portion two of the line. The parties may negotiate an agreement during the 180-day period prescribed below. If an agreement is executed with regard to portion two, no further Board action is necessary regarding portion two. If no agreement as to portion two 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.

NTFI's interim trail use request for portion one of the line will be denied. Under the Trails Act, the trail use program is voluntary and consensual between the railroad and the trail user. See 49 CFR 1152.29; Citizens Against Rails to Trails v. STB, 267 F.3d 1144 (D.C. Cir. 2001); National Wildlife Federation v. I.C.C., 850 F.2d 694, 699-702 (D.C. Cir. 1988); Rail Abandonments—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 598 (1986) (Trails). Because UP has expressed its unwillingness to enter into trail use negotiations with NTFI regarding portion one, the Board cannot impose such an arrangement on an unwilling party. See, e.g., Consolidated Rail Corporation—Abandonment Exemption—Lancaster and Chester Counties, PA, STB Docket No. AB-167 (Sub-No. 1095X) (STB served June 3, 2004).

The imposition of a public use condition does not require a carrier's consent. See Boston and Maine Corporation—Abandonment Exemption—In Hartford County, CT, STB Docket No. AB-32 (Sub-No. 101X) (STB served Apr. 3, 2008). SEA has indicated in its EA that the right-of-way may be suitable for other public use following abandonment. NTFI also requests imposition of a 180-day public use condition, 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 trail-related structures such as bridges, culverts, ballast, and rip/rap, but not tracks, ties, and signal equipment. NTFI states that the line will provide connections between neighborhoods, schools, and parks, and create opportunities for off-street commuting. NTFI notes that the corridor would be an excellent addition to the commuter-recreational trails in the Omaha metropolitan area and, as such, the right-of-way is part of the area's master plan for trails.

The Board has determined that persons who file under the Trails Act may also file for public use under 49 U.S.C. 10905. See Trails, 2 I.C.C.2d at 609. When the need for both conditions is established, as is the case with regard to portion two of the line, it is the Board's policy to impose them concurrently, subject to the execution of a trail use agreement. NTFI 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 of the period of time requested. Accordingly, a 180-day public use condition also will be imposed, 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 negotiate 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 NTFI, but may engage in negotiations with other interested persons. Because, as noted above, public use conditions do not require the railroad's consent, the public use condition will apply to the entire line.

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.

This action 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 UP from the prior approval requirements of 49 U.S.C. 10903 for the abandonment of the above-described line, subject to the employee conditions 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 the right-of-way, including bridges, culverts, ballast, and rip/rap (except tracks, 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 other interested person, to negotiate the acquisition of the line for public use; (2) with regard to portion two of the line, comply with the interim trail use/rail banking procedures set forth below; (3) consult with NGS and notify NGS at least 90 days prior to commencement of any salvage activities that will disturb or destroy the 10 geodetic station markers; (4) consult with the Corps prior to commencement of any salvage activities regarding its requirements and, if applicable, comply with any reasonable requirements of the Corps; and (5) consult with USFWS to ensure that removal and salvage activities are conducted in a manner that avoids or minimizes impacts to migratory birds.

2. NTFI's request for a trail use/rail banking condition for portion one of the line is denied.

3. UP must serve a copy of this decision on Millard Lumber and Safety-Kleen within 5 days of the service date of this decision and certify to the Board that it has done so.

4. 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, 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 the payment of any and all taxes that may be levied or assessed against, the right-of-way.

5. 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.

6. 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.

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

8. 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 August 4, 2008, 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 of \$1,500. See 49 CFR 1002.2(f)(25).

9. 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.”**

10. Provided no OFA has been received, this exemption will be effective on August 24, 2008. Petitions to stay must be filed by August 11, 2008, and petitions to reopen must be filed by August 19, 2008.

11. 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 July 25, 2009, 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 Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary