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SERVICE DATE - SEPTEMBER 12, 2002

SURFACE TRANSPORTATION BOARD

DECISION AND CERTIFICATE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-33 (Sub-No. 170)

UNION PACIFIC RAILROAD COMPANY — ABANDONMENT — IN
POLK COUNTY, IA

Decided: September 10, 2002

By decision served on January 16, 2002 (January 16 decision), Union Pacific Railroad Company (UP) was granted authority to abandon a 3.72-mile line of railroad extending from milepost 221.10 near SE 18th Street to milepost 217.38 near SW 30th Street in Des Moines, Polk County, IA (the line).¹ On January 25, 2002, Mid-America Railroad, L.L.C. (MAR), timely filed an offer of financial assistance (OFA) under 49 U.S.C. 10904 and 49 CFR 1152.27.² On May 20, 2002, as amended on May 22, 2002, MAR requested the Board to set terms and conditions for the sale of a segment of the line between milepost 217.38 and milepost 219.05 (line segment). In a decision served on June 19, 2002, the Board set the purchase price for the line segment and established terms for its transfer. On July 2, 2002, MAR notified the Board that it was withdrawing its OFA. In a decision served on July 9, 2002 (July 9 decision), the March 22 decision was vacated and the prior abandonment authorization became effective on that date.

¹ Notice of the filing was served and published in the Federal Register on October 18, 2001 (66 FR 52970-71) (October 18 notice).

² MAR did not, however, make the required demonstration that it was financially responsible and, accordingly, its OFA was rejected in a decision served on January 30, 2002. On February 8, 2002, MAR appealed the decision, and by decision served on March 22, 2002 (March 22 decision), the Board granted the appeal and set April 22, 2002, as the deadline for either party to file a request that the Board establish the terms and conditions for the purchase if MAR and UP could not agree on the purchase price. The deadline for filing requests for the establishment of terms and conditions was extended through May 20, 2002, by decisions served on April 19, 2002, and May 3, 2002.

By facsimile received August 30, 2002,³ the City of Des Moines, IA (the City), filed a request for a certificate of interim trail use (CITU) under the National Trails System Act, 16 U.S.C. 1247(d) and 49 CFR 1152.29, for a line segment extending from milepost 220.57 to milepost 217.38 and for a 180-day public use condition for a line segment extending from milepost 219.32 to milepost 217.38. The City submitted a statement indicating its willingness to assume 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 UP against any potential liability), and for the payment of taxes for, the right-of-way, as required by 49 CFR 1152.29, and acknowledged that the use of the right-of-way for trail purposes is subject to future reactivation for rail service. By letter filed on August 20, 2002, UP states that it is willing to negotiate with the City for interim trail use of the entire line.

The October 18 notice provided that any request for a public use condition under 49 CFR 1152.28 or for trail use/rail banking under 49 CFR 1152.29 would be due no later than November 13, 2001. In revising the abandonment rules in Aban. and Discon. of R. Lines and Transp. Under 49 U.S.C. 10903, 1 S.T.B. 894 (1996) and 2 S.T.B. 311 (1997), the Board retained the policy of accepting filings after the due date when good cause is shown. Because there is no indication that the City's late-filed request for public use and trail use conditions will prejudice any party, it will be accepted. See Wheeling & Lake Erie Railway Company — Abandonment Exemption — in Stark County, OH, STB Docket No. AB-227 (Sub-No. 10X), slip op. at 1 n.1 (STB served Nov. 7, 1997). Inasmuch as UP has not consummated the abandonment and is willing to negotiate with the City for trail use, a CITU will be issued under 49 CFR 1152.29 covering the line from milepost 220.57 to milepost 217.38.

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 of the period of time requested. However, under 49 U.S.C. 10905 and 49 CFR 1152.28(b), the Board cannot impose a public use condition beyond the 180-day period after the effective date of the decision authorizing the abandonment. Because the line was subject to an OFA, the 180-day period did not begin to run until the OFA was vacated in the July 9 decision. The 180-day period thus ends on January 5, 2003, and cannot be extended. Accordingly, the City's request for a public use condition will be granted to the extent that there is time remaining in the 180-day period. 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 a right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the

³ The request was dated August 14, 2002, and a mailed copy of the letter was filed on September 4, 2002.

public use condition, UP is not required to deal exclusively with the City, but may engage in negotiations with other interested persons.

It is ordered:

1. This proceeding is reopened.
2. The late-filed request for a CITU under 49 U.S.C. 1247(d) and for a public use condition under 49 U.S.C. 10905 is accepted.
3. Upon reconsideration, the decisions served on January 16, 2002, and July 9, 2002, are modified to the extent necessary to: (1) implement interim trail use/rail banking for the portion of the line from milepost 220.57 to milepost 217.38 for a period of 180 days from the date of service of this decision; and (2) impose a public use condition for the portion of the line from milepost 219.32 to milepost 217.38 for a period of 180 days extending from July 9, 2002, until January 5, 2003.
4. UP shall leave intact all of the right-of-way, including bridges, trestles, culverts and tunnels (but not track or track materials), for a period of 180 days from July 9, 2002 (until January 5, 2003), to enable any state or local government agency or any other interested person to negotiate the acquisition of the line for public use. Additionally, UP shall comply with the interim trail use/rail banking procedures set forth below.
5. If an interim trail use/rail banking agreement is reached as to the portion of the line described above, 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.
6. 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.
7. 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 request that it be vacated on a specified date.
8. If an agreement for interim trail use/rail banking is reached by March 11, 2003 (the 180th day after service of this decision), interim trail use may be implemented. If no agreement is reached by that time, UP may abandon that portion of the line, provided the conditions imposed in the January 16 decision are met.

9. This decision is effective on its date of service.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary