

31104
EB

SERVICE DATE - SEPTEMBER 1, 2000

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-33 (Sub-No. 153X)

UNION PACIFIC RAILROAD COMPANY--ABANDONMENT EXEMPTION--
IN MONROE COUNTY, IA

Decided: August 30, 2000

By petition filed on May 15, 2000, 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 line of railroad known as the Oskaloosa Subdivision, extending between milepost 312.1 near Eddyville and milepost 322.9 near Maxon, a distance of 10.8 miles in Monroe County, IA.¹ UP also seeks to be exempted from the offer of financial assistance (OFA) requirements of 49 U.S.C. 10904 and the public use requirements of 49 U.S.C. 10905 for the northern segment of the line (between milepost 312.1 and milepost 315.1). On May 12, 2000, Cargill, Incorporated (Cargill) filed a letter in support of the proposed abandonment.

Pursuant to 49 U.S.C. 10502(b), the Board served and published a notice in the Federal Register (65 FR 35419-20) on June 2, 2000, instituting an exemption proceeding. A request for issuance of a notice of interim trail use (NITU) and for imposition of a public use condition was filed by Iowa Trails Council (Iowa Trails). We will grant the exemptions, subject to trail use and public use conditions (for part of the line), environmental conditions, and standard employee protective conditions.

BACKGROUND

The line proposed for abandonment is the southernmost extremity of the Oskaloosa Subdivision. At its northern end, the line passes directly through the Eddyville plant of Cargill at approximately milepost 313. At its southern end point, the line connects with The Burlington Northern and Santa Fe Railway Company (BNSF) at Maxon. The line is constructed primarily

¹ UP requests expedited Board action here for a variety of reasons and asks that the exemption be made effective immediately. We have handled the matter as expeditiously as possible and, as subsequently discussed, we will be granting in part the request for immediate effectiveness.

with 85-lb. track material, but has 2 miles of 112-lb. track. Track speed from mileposts 312.1 to 314 is restricted speed not to exceed 10 mph; track speed from mileposts 314 to 322.9 also is 10 mph.

Cargill, which operates a corn processing plant, is the only shipper on the line. This shipper receives corn, corn germ, and other corn mill products by rail, and ships corn syrup, corn oil, corn gluten, corn feed, ethanol, and other corn byproducts, also by rail. Cargill also uses truck service.

According to petitioner, Cargill's current rail service at Eddyville is provided solely by UP. The subject line passes directly through shipper's plant, bisecting it and causing considerable inconvenience to plant operations. UP's service is limited to 265,000-lb. gross weight cars because of track limitations on the line.² A considerable number of Cargill's shipments are destined for delivery to BNSF, but, at present, such shipments must be moved by UP to Maxon, approximately 10 miles south, for interchange.³

Petitioner asserts that Cargill's plant operations will be improved by eliminating the UP main line through its plant, thereby allowing the shipper to use both sides of the line more efficiently. According to petitioner, the best way to accomplish this is for Cargill to create a plant switching operation. This requires the abandonment of the line.

UP further points out that Cargill is constructing a 3.5-mile private rail line, built to 286,000-lb. car standards, to connect its plant with the BNSF main line approximately 3½ miles to the south. In this manner, the plant can be served directly by BNSF, eliminating the UP line haul portion from the plant to Maxon. According to petitioner, once the private track is operational there will no longer be a need for the line to Maxon. UP states that it will continue to serve the plant from the north, as it does now, but notes that it has already begun upgrading its line from Eddyville north to Marshalltown to carry 286,000-lb. cars. The end result, petitioner avers, is that Cargill will be served by two major rail carriers providing 286,000-lb. car capacity service, thus greatly enhancing competition.

To accomplish these objectives, UP seeks abandonment of the Oskaloosa Subdivision from a point just north of the shipper's plant, southwesterly to Maxon. UP will then convey the 3-mile northern portion of the abandoned line to Cargill for construction of a switching facility to be operated by a private contract switcher.

² UP estimates that it would cost over \$5.2 million to upgrade the line from Eddyville to Maxon to 286,000-lb. car capability.

³ Over the past 4 years, UP has moved an average of approximately 2,600 cars annually from Cargill's plant for interchange with BNSF.

UP notes that Cargill is the only shipper on the line and that petitioner is not aware of any prospects for new shippers. UP asserts that, in the past two years, there has been only one carload of overhead traffic on the line. In the future, petitioner says, any such traffic could easily be diverted through another junction of the system.

DISCUSSION AND CONCLUSIONS

Abandonment exemption. 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 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 this transaction 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 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 of the cost of owning and maintaining the line and allowing it to apply its assets more productively elsewhere on its system. [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be affected adversely. Under the proposed exemption, petitioner will be able to consummate the abandonment more expeditiously and transfer a segment of the right-of-way to Cargill for construction of a plant switching facility.

Regulation of the proposed transaction is not necessary to protect shippers from an abuse of market power. In fact, implementation of the proposal will result in increased rail competition between two major carriers. Abandonment of the rail line is not opposed by the sole shipper and, indeed, is strongly supported by the shipper. Overhead traffic, if any, can be rerouted. Given our market power finding, we need not determine whether the proposed abandonment is limited in scope.

Other exemptions. To expedite the post-abandonment transfer of that portion of the right-of-way needed by Cargill, UP requests that the abandonment of the northern segment of the line be exempted from the OFA requirements of 49 U.S.C. 10904 and the public use requirements of 49 U.S.C. 10905. Cargill supports the proposed abandonment and urgently requests expedited action in order that the right-of-way that underlies the track structure may be conveyed by UP as soon as possible. As to this portion of the right-of-way, UP has also requested that the abandonment be made effective on the date of service of this decision.

Exemptions from 49 U.S.C. 10904-05 have been granted from time to time when the right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service.⁴ Here, UP has agreed to transfer a portion of the right-of-way, between milepost 312.1 and milepost 315.1, to Cargill for a purpose that will result in enhanced rail competition, i.e., the construction of a plant switching facility. The segment appears to be unsuitable for public use as it runs through a large industrial facility, with switching of cars taking place on both sides of the track. The imposition of OFA procedures or a public use condition with respect to this line segment could delay its transfer to Cargill and jeopardize the timely completion of the switching facility. The only shipper on the line does not oppose the abandonment and any overhead traffic moving over the line can be rerouted. This abandonment petition, together with the petitions for exemption from the OFA process and the public use process, has been noticed in the Federal Register. Notice of the petition, including the requests for exemption from section 10904 and section 10905, has been provided to state and local officials in the environmental report. No objections have been received. Accordingly, we will exempt the proposed abandonment of the northern line segment from the OFA and public use requirements of 49 U.S.C. 10904-05.

The evidence of record establishes that the proposed exemptions from 49 U.S.C. 10904-05 meet the criteria of 49 U.S.C. 10502. Applying the OFA or public use requirements, in this instance, is not necessary to carry out the rail transportation policy. Moreover, allowing the abandonment exemption with respect to the northern segment to become effective immediately, without first being subject to these requirements, will minimize the need for Federal regulatory control over the rail system, expedite regulatory decisions, and reduce regulatory barriers to exit [49 U.S.C. 10101(2) and (7)]. We have already determined that regulation is not necessary to protect shippers from an abuse of market power.

Labor protection. 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).

⁴ See K&E Railway Company--Abandonment Exemption--In Alfalfa, Garfield, and Grant Counties, OK, and Barber County, KS, STB Docket No. AB-480X (STB served Dec. 31, 1996), slip op. at 4, citing Southern Pacific Transportation Company--Discontinuance of Service Exemption--In Los Angeles County, CA, Docket No. AB-12 (Sub-No. 172X), et al. (ICC served Dec. 23, 1994); Missouri Pacific Railroad Company--Abandonment--In Harris County, TX, Docket No. AB-3 (Sub-No. 105X) (ICC served Dec. 22, 1992); Chicago & North Western Transportation Company--Abandonment Exemption--In Blackhawk County, IA, Docket No. AB-1 (Sub-No. 226X), et al. (ICC served July 14, 1989); and Iowa Northern Railway Company--Abandonment--In Blackhawk County, IA, Docket No. AB-284 (Sub-No. 1X) (ICC served Apr. 1, 1988).

Environmental conditions. 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, analyzed the probable effects of the proposed action on the quality of the human environment, and served an environmental assessment (EA) on July 14, 2000.

In the EA, SEA stated that, following abandonment, the right-of-way may be suitable for other public use under 49 U.S.C. 10905. SEA further indicated that the U.S. Department of the Interior, Fish and Wildlife Service (FWS), has determined that the Indiana bat (*Myotis sodalis*), Prairie bush clover (*Lespedeza leptostachya*), Western prairie fringed orchid (*Platanthera praeclara*), and the Eastern prairie fringed orchid (*Platanthera leucophaea*) may be present within the proposed abandonment area. SEA also noted that the Natural Resources Conservation Service (NRCS) has expressed several concerns regarding the handling of any land being returned to agriculture production, stating that, during salvage operations, UP should avoid possible conversion of wetlands and make sure that highly erodible land is covered under an acceptable conservation plan. Finally, SEA indicated that the National Geodetic Survey (NGS) has identified eight geodetic station markers that may be affected by the proposed abandonment.

SEA, therefore, recommended that the following conditions be imposed on any decision granting abandonment authority: (1) that UP shall consult with FWS prior to engaging in any salvage activities; (2) that, during salvage operations, UP shall (a) avoid possible conversion of wetlands, (b) make sure that highly erodible land is covered under an acceptable conservation plan, and (c) contact John Freiden, NRCS District Conservationist; and (3) that UP shall notify NGS 90 days prior to any salvage activities in order to plan for the relocation of any geodetic station markers that may be affected by the proposed abandonment.

No comments to the EA have been filed by the August 14, 2000 due date. We will impose the conditions recommended by SEA. Based on SEA's recommendations, 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.

Trail use and public use. On June 19, 2000, Iowa Trails requested that interim trail use/rail banking be imposed under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act). Iowa Trails 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 June 22, 2000, UP stated that it is agreeable to negotiating with Iowa Trails for trail use, but only for that portion of the right-of-way between mileposts 315.1 and

322.9.⁵ Iowa Trails' request complies with the requirements of 49 CFR 1152.29 and UP is willing to enter into negotiations. Therefore, we will issue a NITU for the segment of line between milepost 315.1 and milepost 322.9. 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 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.

As noted, SEA has indicated in its EA that the right-of-way may be suitable for other public use following abandonment. Iowa Trails has also requested that a 180-day public use condition be imposed. Iowa Trails requests that UP be precluded from: (1) disposing of the rail corridor, other than the removal of rails and ties; and (2) removing trail related structures, bridges, trestles, culverts and ballast. Iowa Trails states that there is a serious lack of recreational facilities in Iowa and that preserving the right-of-way will also enhance the wildlife habitat and provide for greater protection of that wildlife.

We have 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, it is our policy to impose them concurrently, subject to the execution of a trail use agreement. Iowa Trails 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 also will be imposed for the segment of line between milepost 315.1 and milepost 322.9, commencing from the effective date of this decision and notice. 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 public use condition, UP is not required to deal exclusively with Iowa Trails, but may engage in negotiations with other interested persons.

The parties should note that operation of the trail use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in Rail Abandonments—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 608 (1986) (Trails), 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) for purchase or subsidy of the southern segment, the effective date of this decision and notice as to that segment will be postponed

⁵ Although Iowa Trails had originally sought public use/trail use conditions over the entire line, it has altered its request in response to UP's letter.

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 southern segment is sold under the OFA procedures, the petition for abandonment exemption will be dismissed and trail use precluded. Alternatively, if a sale under the OFA procedures does not occur, trail use may proceed.

Other matters. Having determined to exempt the abandonment of the line segment between milepost 312.1 and milepost 315.1 from 49 U.S.C. 10904-05, we have partially eliminated the need to extend the effective date of the abandonment exemption to consider OFAs under Exempt. of Rail Abandonment—Offers of Finan. Assist., 4 I.C.C.2d 164 (1987), and requests for public use conditions under 49 CFR 1152.28(a)(2). Therefore, as to this line segment, we will make the exemption effective on its date of service. We will also not provide any further opportunity for interested persons to file trail use/rail banking requests in connection with the northern segment. Under section 8(d) of the Trails Act, trail use/rail banking is voluntary and can only be implemented if an abandoning railroad agrees to negotiate an agreement. To the extent UP has already agreed to convey the northern segment of the right-of-way to Cargill, it can be expected to decline offers to negotiate interim trail use.

With respect to the remainder of the line, between milepost 315.1 and milepost 322.9, and in the absence of any demonstrated need for expedition, the exemption will be effective 30 days from the date of service.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt the abandonment of the above-described line from the prior approval requirements of 49 U.S.C. 10903, and the abandonment of the line segment between mileposts 312.1 and 315.1 also from the requirements of 49 U.S.C. 10904-10905, subject to the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979), and subject to the conditions that UP shall: (1) consult with FWS prior to engaging in any salvage activities; (2) during salvage operations, (a) avoid possible conversion of wetlands, (b) make sure that highly erodible land is covered under an acceptable conservation plan, and (c) contact John Freiden, NRCS District Conservationist; (3) notify NGS 90 days prior to any salvage activities in order to plan for the relocation of any geodetic station markers that may be affected by the proposed abandonment; (4) leave intact all of the right-of-way between milepost 315.1 and milepost 322.9, including bridges, trestles, culverts and tunnels (but not track and track materials), 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; and (5) comply with the terms and conditions for implementing interim trail use/rail banking set forth below.

2. If an interim trail use/rail banking agreement is reached as to that portion of the line between milepost 315.1 and milepost 322.9, 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.

3. 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.

4. 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.

5. 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 abandon that portion of the line, provided the conditions imposed above are met.

6. With respect to that portion of the line between milepost 315.1 and milepost 322.9, 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 September 11, 2000, 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, which currently is set at \$1,000. See 49 CFR 1002.2(f)(25).

7. 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.**"

8. Provided no OFA has been received, the exemption with respect to that portion of the line between mileposts 315.1 and 322.9 will be effective on October 1, 2000. Petitions to stay must be filed by September 11, 2000, and petitions to reopen must be filed by September 21, 2000.

9. With respect to the line segment between mileposts 312.1 and 315.1, the exemption will be effective on September 1, 2000, and petitions to reopen must be filed by September 21, 2000.

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 by September 1, 2001, 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 not later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

STB Docket No. AB-33 (Sub-No. 153X)

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams
Secretary