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SERVICE DATE - JUNE 23, 1998

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-33 (Sub-No. 119X)

UNION PACIFIC RAILROAD COMPANY--ABANDONMENT EXEMPTION--
IN ROCK, GREEN AND DANE COUNTIES, WI

Decided: June 22, 1998

On March 4, 1998, Union Pacific Railroad Company (UP) filed a petition for 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 Harvard Subdivision (herein, the Line), extending from railroad milepost 119.0 near Evansville to railroad milepost 134.0 near "MX", a crossing of Wisconsin & Southern Railroad Company (WSOR), near Madison, a distance of 15.0 miles in Rock, Green and Dane Counties, WI.¹ Pursuant to 49 U.S.C. 10502(b), the Board published a notice in the Federal Register (60 FR 14173-74) on March 24, 1998, instituting an exemption proceeding. The United Transportation Union (UTU) requests imposition of labor protective conditions. The Wisconsin Department of Transportation (WisDOT),² on behalf of the Wisconsin Department of Natural Resources (WisDNR),³ requests issuance of a notice of interim trails use (NITU). The City of Fitchburg and the Village of Oregon (Fitchburg/Oregon Partnership), requests a public use condition. In addition, the City of Evansville⁴ and Dane County⁵ lend their support to the request by Fitchburg/Oregon Partnership for the public use condition. We will grant the exemption, subject to trail use, public use, environmental conditions, and standard employee protective conditions.

¹ The Line traverses U.S. Postal Service Zip Codes 53536, 53575 and Area 537 (near Madison), and includes the non-agency rail station of Oregon at milepost 128.1.

² WisDOT is the designated state agency for rail matters in the State of Wisconsin. It is responsible for all highway and airport construction within the state and has the statutory right to acquire for present or future transportation, recreational or scenic purposes any property used in operating a railroad that is abandoned in Wisconsin.

³ WisDNR is the lead state agency for designating, acquiring, developing, and maintaining a system of state trails for public use by equestrians, bicyclists, cross country skiers or hikers.

⁴ Mayor Steven J. DiSalvo and the Evansville Common Council, on behalf of the City of Evansville, support the Village of Oregon and the City of Fitchburg in their effort to preserve the railroad line from Evansville to Madison.

⁵ Kathleen M. Falk, Dane County Executive, has expressed support on behalf of Dane County. Ms. Falk indicates that the Economic Development Committee of the Village of Brooklyn has also expressed concern about the impacts of abandonment upon Brooklyn.

BACKGROUND

UP has rail operations in 24 states including, as relevant here, Wisconsin. UP owns and operates the Line. All UP rail traffic to or from Madison is interchanged with WSOR at Janesville, WI, or Chicago, IL, and handled over WSOR's lines. There is no overhead traffic on the Line and the Line would not be needed for overhead traffic. UP's local rail traffic terminates near Evansville. (UP has trackage rights over the WSOR line between Janesville and "MX.").

UP seeks to abandon the Line because: (1) freight revenues from local traffic on the Line are insufficient to justify operations and the expenses involved in maintaining the Line; and (2) there is no reasonable prospect that traffic and revenue will ever increase sufficiently in the foreseeable future to justify operation and retention of the Line.

According to UP there has been no local traffic from or to the only shipper on the Line since May 1996. The shipper is Oregon Farm Center. The shipper received one inbound carload of fertilizer in 1995, and two in 1996. No traffic moved over the Line in 1997.

The Line has a maximum operating speed of 30 m.p.h. Rehabilitation is not required to meet Federal Railroad Administration Class 1 safety standards. The Line contains 15.00 miles of mainline track and 2.10 miles of miscellaneous sidings. The net liquidation value of the track material on the Line is \$803,515. If UP retained and operated the Line, there would be annual costs for normalized maintenance to a Class 1 level of \$103,165, due to 14 road crossings on the Line, eight of which are signalized. UP indicates that the right-of-way of the Line consists of both reversionary and non-reversionary acreage and that, based on information in its possession, the Line does not contain federally-granted rights of way.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without prior Board 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 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 costs of owning and maintaining the Line and allowing UP's assets to be used 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.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power because there has been no local traffic from or to the sole shipper on the Line, Oregon Farm Center, since May 1996. No one has protested the proposed abandonment. Nevertheless, to ensure that the shipper is aware of our action, we will require UP to serve a copy of this decision on Oregon Farm Center within 5 days of the service date of this decision and to certify to us that it has done so. Given our 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).

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 abandonment. 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 May 13, 1998.

In the EA, SEA indicated that the National Geodetic Survey (NGS) has identified 18 geodetic station markers along the rail line and requests 90 days' notice to plan relocation of any markers that may be disturbed or destroyed. Therefore, SEA recommends, and we agree, that a condition be imposed requiring UP to consult with the NGS and provide NGS with 90 days' notice prior to disturbing or destroying any geodetic markers.

No comments to the EA were filed by the June 8, 1998 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.

SEA states that, following the abandonment, the right-of-way may be suitable for other public use under 49 U.S.C. 10905.

By letter filed April 13, 1998, WisDOT requests that interim trail use/rail banking be imposed under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act). WisDOT and WisDNR have agreed to work cooperatively to acquire and use the right of way. WisDNR has submitted a statement of willingness to assume financial responsibility for the right-of-way, and 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 a faxed letter dated June 8, 1998, UP states that it is agreeable to negotiating with WisDNR for interim trail use. WisDNR's 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 described line. 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.

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 U.S.C. 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 precluded. Alternatively, if a sale under the OFA procedures does not occur, trail use may proceed.

In a letter dated April 13, 1998, the Fitchburg/Oregon Partnership (the Partnership) requests that a 180-day public use condition be imposed. The Partnership proposes to jointly develop a 230 acre business park adjacent to the tracks, which are here the subject of abandonment. The Partnership authorized a study to determine the feasibility of the joint Business Park in April 1995. With renewed interest by business prospects in 1997, the Partnership has initiated efforts to implement the project. The Partnership indicates that the 180-day period is needed in order for them to: (1) continue negotiations between the respective municipalities for a shared service agreement for the business park; (2) conduct negotiations with UP; (3) determine the rail car usage for the prospective businesses in the Fitchburg/Oregon business park; and (4) determine alternate operators such as WSOR.⁶

The Partnership requests that UP be precluded from disposing of the rail corridor, i.e., the removal or destruction of structures such as bridges, trestles, culverts, tunnels and rails, because these structures may have considerable value for the intended public use.

In a letter dated April 16, 1998, UP states that it does not object to the imposition of a public use condition on the right-of-way and bridges but does oppose any such condition on the track structure of the Line. UP states, however, that it recognizes the need for the track structure for continued rail service to the proposed business park. UP indicates that, if requested by the Partnership, it will provide information regarding the net liquidation value for the track structure and the value of the right-of-way, in the event that the Partnership desires to make an offer of financial assistance under 49 U.S.C. 10904.

⁶ In a letter dated March 24, 1998, WSOR indicates its willingness to operate the Madison to Evansville, WI line to serve the industrial park.

In a reply letter dated May 5, 1998, the Partnership states an interest in negotiating with UP to determine the feasibility of delaying the removal and salvage of the track structure. The Partnership further indicates that, if the parties cannot reach agreement, it will then seek the STB's involvement. Until then, the Partnership believes it is unnecessary for the STB to decide the issue of imposing conditions on the track structure under 49 U.S.C. 10905.

According to the Partnership, it is working in conjunction with WisDOT to acquire the 15.0 mile UP rail line. 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. The public use criteria prescribed at 49 CFR 1152.28(a)(2) has been met by the Partnership 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, commencing with 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. 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 the Partnership, but may engage in negotiations with other interested persons.

When imposing a public use condition, the Board normally does not prohibit a carrier from removing track and track materials. But here, the Partnership's public use request is based solely on the need for a rail line to serve a proposed industrial business park. Without the rail structure remaining intact there can be no rail service on this line to the business park. We will exercise our discretion and impose a public use condition that prohibits the removal of the track structure. The 180 day period will provide the parties time to negotiate and agree on the ultimate public usage of the rail line.

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 line, subject to the employee protective conditions set forth in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979), and the conditions that: (1) UP shall leave intact all of the right-of-way, including bridges, trestles, culverts, tunnels and 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 any other interested person to negotiate the acquisition of the Line for public use; (2) UP shall comply with the interim trail use/rail banking procedures set forth below; and (3) UP shall notify the NGS at least 90 days prior to engaging in any activities that would disturb or destroy the geodetic markers identified on the Line.

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

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 Line, provided the conditions imposed above are met.

7. An OFA under 49 CFR 1152.27(c)(1)⁷ to allow rail service to continue must be received by the railroad and the Board by July 6, 1998, 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 a \$1,000 filing fee. 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 July 23, 1998. Petitions to stay must be filed by July 8, 1998, and petitions to reopen must be filed by July 20, 1998.

10. Pursuant to the provisions of 49 CFR 1152.29(e)(2), UP shall file 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 June 22, 1999, 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

⁷ See Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903, STB Ex Parte No. 537 (STB served Dec. 24, 1996, and June 27, 1997).

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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.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary