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SERVICE DATE – MARCH 12, 2003

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-33 (Sub-No. 198X)

UNION PACIFIC RAILROAD COMPANY–ABANDONMENT EXEMPTION–IN ALAMEDA
COUNTY, CA

Decided: March 11, 2003

By petition filed on November 22, 2002,¹ 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 1.40-mile line of railroad, known as the Ninth Street Electric Industrial Lead, from milepost 0.00 (south of Powell Street) in Emeryville to milepost 1.40 at the end of the line (north of Heinz Avenue) in Berkeley, in Alameda County, CA. On December 30, 2002, a request for issuance of a notice of interim trail use (NITU) was filed by the City of Berkeley (the City) for the portion of the line beginning at milepost 1.05 at the Berkeley/Emeryville city line (north of 67th Street), and ending at milepost 1.40 (the Berkeley segment). We will grant the exemption, subject to a trail use condition and standard employee protective conditions.

BACKGROUND

There is currently no local rail traffic on the line and no overhead traffic. Minnesota Corn Processors (MCP) (formerly Liquid Sugars) ceased using rail service and closed its facility on the line in September 2001.² According to UP, MCP will not require rail service in the future, and UP is unaware of any other industry planning to locate along the line. UP states that the line is within 1 mile of, and parallel to, its Martinez Subdivision rail line, which will continue to serve the surrounding communities and the shippers in the area. UP also states that the abandonment of the line will permit the cities of Emeryville and Berkeley to make various planned improvements to local streets and other facilities.

¹ Notice of the filing was served on December 12, 2002, and published in the Federal Register on December 11, 2002 (67 FR 76206).

² Traffic data submitted by UP show that MCP shipped 137 carloads in 2001, and 589 carloads in 2000.

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 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 UP's proposed abandonment 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 cost of owning and maintaining a line that is no longer used and allowing it to apply its assets more productively elsewhere on its rail 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 are no active shippers on the line. The only former shipper, MCP, recently closed its facility. To ensure that MCP is informed of our action, we will require UP to serve a copy of this decision on MCP within 5 days of the service date and 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 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 government 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, and analyzed the probable effects of the proposed action on the quality of the human environment. SEA served an environmental assessment (EA) on January 21, 2003, and requested comments.

No comments on the EA were filed by the February 20, 2003 due date. Based on SEA's recommendation, we conclude that the proposed abandonment will not significantly affect either the quality of the human environment or the conservation of energy resources.

SEA has indicated in its EA that the right-of-way may be suitable for other public use following abandonment. We note that no one has sought a public use condition, and none will be imposed.

As noted, the City filed a request for issuance of a NITU under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), for the Berkeley segment, to enable it to negotiate with UP for use of this portion of the line as a trail. The City submitted a statement of willingness to assume financial responsibility for the right-of-way, and acknowledged that the use of the right-of-way for trail purposes is subject to future reconstruction and reactivation of the right-of-way for rail service as required under 49 CFR 1152.29. By facsimile received on January 22, 2003, UP states that it is willing to negotiate for interim trail use.

Because the City's request complies with the requirements of 49 CFR 1152.29, and UP is willing to enter into negotiations, we will issue a NITU for the Berkeley segment. 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 Berkeley segment. 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. 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. 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 precluded. Alternatively, if a sale under the OFA procedures does not occur, the trail use process 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 the condition that UP comply with the terms and conditions for implementing trail use/rail banking procedures set forth below with respect to the Berkeley segment.

2. UP is directed to serve a copy of this decision on MCP 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 for the Berkeley segment, 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 Berkeley line segment.

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 21, 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 1152.27(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 11, 2003. Petitions to stay must be filed by March 27, 2003, and petitions to reopen must be filed by April 7, 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 by March 12, 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