

SERVICE DATE - DECEMBER 23, 2004

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-33 (Sub-No. 220X)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT EXEMPTION—IN  
BROWN AND DONIPHAN COUNTIES, KS

Decided: December 21, 2004

By petition filed on September 13, 2004, 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 St. Joseph Industrial Lead, extending from milepost 2.52 near Elwood to milepost 33.60 near Robinson, a distance of 30.98 miles in Brown and Doniphan Counties, KS (13.9 = 14.0).<sup>1</sup> Notice of the filing was served and published in the Federal Register on October 1, 2004 (69 FR 59000-01). A request for imposition of a public use condition and issuance of a notice of interim trail use (NITU) was filed by Sunflower Recreational Trails, Inc. (SRT). We will grant the petition for exemption, subject to trail use, public use, environmental, and standard employee protective conditions.

BACKGROUND

There is currently one shipper on the line, Wathena Grain at Wathena. According to UP, the shipper utilized a track near the east end of the line for the receipt of fertilizer (2 carloads in 2002, 5 carloads in 2003, and 1 carload in the first quarter of 2004). UP states that the proposed abandonment should have minimal adverse impact on shipping activity based on the very small volume of traffic handled on the line in the base year (5 carloads) or expected in the forecast year (5 carloads). UP avers that, in the case of the shipper, the closest rail line after abandonment would be on the UP at

---

<sup>1</sup> UP submitted a clarification to the milepost equation. UP stated that, prior to 1934, the Chicago Pacific Rock Island Railroad (RIRR) and the St. Joseph and Grand Island Railway (SJ&GI), a subsidiary of UP, shared the rail line running from St. Joseph, MO, crossing the Missouri River, and extending through Wathena, KS. UP indicates that west of Wathena, at milepost 7.4, the two railroads split. In 1934, UP ceased using its line between milepost 7.4 and Troy, KS, as a separate route, and substituted via trackage rights the route over the RIRR. UP then returned to its own rail line and, rather than re-milepost the entire balance of the SJ&GI, UP did an equation so it could retain the rest of the SJ&GI mileposts as they were. UP further states that to correct for the milepost shift, UP placed the milepost equation at Troy, and then the traditional SJ&GI mileposts ran from that point.

Elwood, approximately 3.5 miles east, but adds that transportation providers located in St. Joseph, MO, approximately 10 miles east also offer rail service via The Burlington Northern and Santa Fe Railway Company. UP further notes that Wathena lies on U.S. Highway 36, an east-west highway that connects to the north-south Interstate Highway 29 in St. Joseph, and that barge service is also available there.

Petitioner states that there appears to be no economically reasonable alternative to the proposed abandonment. It argues that even prior shipments over the line by the shipper do not economically justify retention of the line, and that there are no known expected future shippers interested in using the line. UP adds that the line is not utilized for overhead traffic on any scheduled basis, and that it has an efficient parallel route from St. Joseph through Atchison, KS, to Hiawatha, KS. Petitioner indicates that, even when excluding other branch line operating costs and opportunity costs, the 2.7-mile segment of line needed to serve the shipper requires an annual normalized maintenance expense of \$29,971 and that, based on the annual income for the base year of \$3,825, the line segment conservatively incurs at least a \$26,146 annual operating loss.

#### 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 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 of the expense of maintaining a line that is only very minimally used and allowing it to use 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.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. The shipper on the line does not oppose the proposed abandonment and has other transportation alternatives available to it. Nevertheless, to ensure that the shipper is informed of our action, we will require UP to serve a copy of this decision and notice on Wathena Grain within 5 days of the service date of this decision and notice 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 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 agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed action. See 49 CFR 1105.11. The Board's 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 November 12, 2004.

In the EA, SEA states that the U.S. Army Corps of Engineers-Kansas City District (USACE) had not responded to the environmental report at the time the EA was prepared. It also notes that the Kansas Department of Agriculture (KDA) stated that the proposed abandonment would require approval by the Chief Engineer of the Division of Water Resources if abandonment and salvaging activities would alter floodplains or stream channels. SEA further states that the rail line crosses several streams and that UP has not specified the nature of any bridge salvaging activities. Therefore, SEA recommends that, prior to conducting any abandonment and salvaging activities, UP consult with: (1) USACE on permitting requirements for any abandonment and salvaging activities that may occur within waters of the United States, including, but not limited to streams, rivers, lakes and wetlands; and (2) KDA on approval requirements for any abandonment and salvaging activities that may occur within floodplains and stream channels.

SEA further states that the U.S. Fish and Wildlife Service-Kansas Field Office (USFWS) concluded that the proposed abandonment would not adversely impact fish and wildlife resources, including threatened or endangered species. In its response, USFWS encouraged UP to keep the right-of-way in a natural condition for the benefit of native wildlife, plants and the public. The Kansas Department of Wildlife and Parks (KDWP) concurred with the comments provided by USFWS. However, KDWP recommended the use of standard erosion control best management practices, temporary weed-free seeding/mulching, and native forbs and grasses to permanently revegetate areas disturbed by abandonment activities. KDWP also stated that, if abandonment activities are not initiated within one year of its response letter, or if abandonment plans change, UP must consult again with KDWP. Therefore, SEA recommends that, in response to concerns of KDWP, UP: (1) use standard erosion control best management practices, temporary weed-free seeding/mulching, and native forbs and grasses to permanently revegetate areas disturbed by abandonment activities; and (2) consult with KDWP if abandonment and salvaging activities are not initiated by August 11, 2005.

Finally, SEA states that the National Geodetic Survey (NGS) has identified 12 geodetic station markers that may be affected by the proposed abandonment. Therefore, SEA recommends a condition requiring that UP notify NGS 90 days prior to salvage activities to plan for the markers' potential removal.

Comments to the EA were due by December 10, 2004. Based on the comments received, SEA has recommended no changes to the conditions it previously recommended in the EA. Accordingly, we will impose the conditions recommended by SEA in the EA. 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.

As previously noted, SRT filed a request for the issuance of a NITU under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and for imposition of a public use condition under 49 U.S.C. 10905. SRT 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 October 28, 2004, UP states that it is willing to negotiate with SRT for interim trail use. Because SRT's request complies with the requirements of 49 CFR 1152.29, and UP is willing to enter into trail use negotiations, we will issue a NITU for the subject 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.

SEA has indicated in its EA that, following abandonment and salvage of the line, the right-of-way may be suitable for other public use. SRT requests imposition of a 180-day public use condition prohibiting UP from: (1) disposing of the corridor, other than the tracks, ties and signal equipment, except for public use on reasonable terms; and (2) barring removal or destruction of trail-related structures such as bridges, culverts, ballast and rip-rap, but not removal of tracks, ties and signal equipment. SRT states that the rail corridor offers an excellent addition to the recreation trails system in the State of Kansas and would become a portion of the Quad State Trail (a four state trail connecting Kansas, Nebraska, Iowa and Missouri). SRT adds that the corridor would offer excellent wildlife habitat and viewing as well as recreational facilities for St. Joseph and several small towns. According to SRT, the 180-day period is needed to coordinate efforts with local interest groups and to commence negotiations with UP.

We have determined that persons who file under the Trails Act may also file for public use under 49 U.S.C. 10905. See Rail Abandonments–Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609

(1986) (Trails). 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. SRT 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 will be imposed on the rail line to be abandoned, 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 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 SRT, but may engage in negotiations with other interested persons.

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 from the prior approval requirements of 49 U.S.C. 10903 the abandonment 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 UP shall: (1) prior to conducting any abandonment and salvaging activities, consult with the U.S. Army Corps of Engineers-Kansas City District on permitting requirements for any abandonment and salvaging activities that may occur within waters of the United States, including, but not limited to, streams, rivers, lakes and wetlands; (2) prior to conducting any abandonment and salvaging activities, consult with the Kansas Department of Agriculture on approval requirements for any abandonment and

salvaging activities that may occur within floodplains and stream channels; (3) use standard erosion control best management practices, temporary weed-free seeding/mulching, and native forbs and grasses to permanently revegetate areas disturbed by abandonment activities; (4) consult with KDWP if abandonment and salvaging activities are not initiated by August 11, 2005; and (5) notify the National Geodetic Survey 90 days prior to salvage activities to plan for the 12 identified geodetic station markers' potential removal.

2. UP is directed to serve a copy of this decision and notice on Wathena Grain within 5 days after the service date of this decision and notice 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 the 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) to allow rail service to continue must be received by the railroad and the Board by December 30, 2004, 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 increased to \$1,200, effective October 31, 2004. See Regulations Governing Fees for Services Performed in Connection with Licensing and Related Services—2004 Update, STB Ex Parte No. 542 (Sub-No. 11) (STB served Oct. 1, 2004).

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 January 22, 2005.<sup>2</sup> Petitions to stay must be filed by January 7, 2005; petitions to reopen must be filed by January 18, 2005.

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 December 23, 2005, 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 Mulvey, and Commissioner Buttrey.

Vernon A. Williams  
Secretary

---

<sup>2</sup> UP has asked that this exemption be effective on the date of this decision and notice, but has failed to justify the need for such action. Consequently, we will impose the customary effective date of 30 days from service.