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SERVICE DATE - LATE RELEASE FEBRUARY 9, 2001

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-33 (Sub-No. 158X)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT EXEMPTION—
IN MCPHERSON, ELLSWORTH AND RICE COUNTIES, KS

STB Docket No. AB-406 (Sub-No. 12X)

CENTRAL KANSAS RAILWAY LIMITED LIABILITY COMPANY
—DISCONTINUANCE OF SERVICE EXEMPTION—
IN MCPHERSON, ELLSWORTH AND RICE COUNTIES, KS

Decided: February 8, 2001

By a joint petition filed on October 24, 2000, Union Pacific Railroad Company (UP) and Central Kansas Railway Limited Liability Company (CKR) (collectively, petitioners) seek an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to permit UP to abandon, and CKR to discontinue service over, a 28.02-mile line of railroad: (1) between milepost 523.02, near Geneseo and milepost 495.80, near Lindsborg (Hoisington Subdivision); and (2) between milepost 531.40 and milepost 530.60, near Lindsborg (McPherson Subdivision), in McPherson, Ellsworth and Rice Counties, KS. Pursuant to 49 U.S.C. 10502(b), the Board served and published a notice in the Federal Register (65 FR 67795) on November 13, 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 the City of Lindsborg, KS (the City). We will grant the exemption, subject to trail use, public use, two environmental conditions, and standard employee protective conditions.

BACKGROUND

UP owns the line and CKR operates it pursuant to a lease.¹ Petitioners state that, since October 1997, there has been very little traffic on the line (1997, October through December - 0 carloads; 1998 - 6 carloads; 1999 - 5 carloads; and 2000, January through August - 3 carloads). According to petitioners, during the past 3 years, the line has been used exclusively for the movement of a few sporadic inbound shipments of fertilizer to the only shipper, Mid-Kansas Coop Association, which is located near the end of the line at Lindsborg. Petitioners indicate that CKR has provided service to the shipper on an “as needed” basis with one to four

¹ See Central Kansas Railway, L.L.C.—Lease Exemption—Union Pacific Railroad Company, STB Finance Docket No. 33470 (STB served Oct. 9, 1997).

locomotives and a two-man crew. They note that, since CKR leased the line, it has generated an average of less than 5 carloads a year, or approximately 0.17 cars per track-mile per year. No overheard traffic has moved over the line since 1997.

Petitioners indicate that, while CKR generated only \$2,000 in revenues in 1999,² its on-branch costs amounted to \$46,061 (\$1,452 for transportation; \$28 for freight car costs; \$42,058 for maintenance of way,³ and \$2,523 for locomotive costs). As such, they aver that CKR suffered a total avoidable on-branch loss from operations that year of \$44,061.

Petitioners assert that alternative service is available to the shipper over an extensive area highway network, as Interstate Highway 135 and U.S. Highway 81 are located near Lindsborg, and Kansas Highway 4 parallels the line. Petitioners further indicate that they will continue to operate nearby rail lines where the shipper's fertilizer traffic can be transloaded.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned and operations may not be discontinued 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 and discontinuance 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 petitioners of the costs of owning, maintaining, and operating the line [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 an abuse of market power. Very little traffic has moved over the line in recent years, alternative rail and motor carrier service is available, and no shipper has objected to the proposed abandonment and discontinuance of service. Nevertheless, to ensure that the sole shipper on the line is informed

² CKR derived revenues of \$2,400 in 1998, \$1,230 in 2000, and 0 from October through December 1997.

³ According to petitioners, this figure is not based on normalized maintenance levels because CKR has performed only essential maintenance in recent years. They assert that normalized maintenance for the line would be approximately \$154,110 annually.

of our action, we will require petitioners to serve a copy of this decision and notice on Mid-Kansas Coop Association within 5 days of the service date of this decision and notice, and to certify to us that they have 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).

Petitioners have submitted an environmental report with their petition and have 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 December 22, 2000. In the EA, SEA noted that the National Geodetic Survey (NGS) has identified 20 geodetic station markers that may be affected by the proposed abandonment. Therefore, SEA recommended that a condition be imposed requiring petitioners to notify NGS at least 90 days prior to any salvage activities that may disturb or destroy these markers so that plans can be made for their relocation.

The Kansas Department of Health & Environment submitted comments to the EA. It has requested that UP and CKR take measures to prevent surface and groundwater contamination during and after salvage operations. Therefore, SEA recommends a condition requiring petitioners, prior to any salvage activities, to consult with the Kansas Department of Health & Environment in order to determine whether the preparation of a Nonpoint Source Pollution Control Plan is necessary in order to obtain a Kansas Water Quality Certification. The contact there is Ms. Judy Scherff, Nonpoint Source Pollution, Bureau of Water, telephone (785) 296-5500.

We will impose the conditions recommended by SEA. Based on SEA's recommendations, we conclude that the proposed abandonment and discontinuance, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

The City requests issuance of a NITU for a portion of the right-of-way of the Hoisington Subdivision, between milepost 495.8 and milepost 497.4, and for the entire right-of-way of the McPherson Subdivision. The City 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 for rail service as required under our Trails Act regulations at 49 CFR 1152.29. By facsimile transmission received on January 26, 2001, UP states that it is agreeable to negotiating with the City for trail use. The City'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 and 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 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 and discontinuance exemption will be dismissed and trail use precluded. Alternatively, if a sale under the OFA procedures does not occur, trail use may proceed.

SEA has indicated in its EA that the right-of-way may be suitable for other public use following abandonment. As noted above, the City has also requested that a 180-day public use condition be imposed. The City requests that UP: (1) be prohibited from disposing of the corridor, other than the tracks, ties, and signal equipment, except for public use on reasonable terms; and (2) be barred from removing or destroying structures, such as bridges, trestles, culverts, and tunnels. The City asserts that the rail corridor will connect public parks and sports recreation areas with residential areas, and is consistent with community purposes for providing safe alternative modes of transportation. The City states that the 180-day time period is needed to conduct 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 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 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 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. 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 the City, but may engage in negotiations with other interested persons.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt the above-described abandonment/discontinuance from the prior approval requirements of 49 U.S.C. 10903, subject to the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), the conditions for trail use/rail banking set forth below, and the conditions that petitioners: (1) shall notify NGS at least 90 days prior to any salvage activities that may disturb or destroy identified geodetic station markers so that plans can be made for their relocation; (2) prior to any salvage activities, shall consult with the Kansas Department of Health & Environment in order to determine whether the preparation of a Nonpoint Source Pollution Control Plan is necessary in order to obtain a Kansas Water Quality Certification; and (3) leave intact all of the right-of-way between milepost 495.8 and milepost 497.4, and for the entire right-of-way of the McPherson Subdivision, 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.

2. Petitioners are directed to serve a copy of this decision and notice on Mid-Kansas Coop Association 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 as to that portion of the right-of-way of the Hoisington Subdivision between milepost 495.8 and milepost 497.4, and for the entire right-of-way of the McPherson Subdivision, 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 abandon that portion of the line, provided the conditions imposed above are met.

7. An offer of financial assistance (OFA) under 49 CFR 1152.27(c)(1)⁴ to allow rail service to continue must be received by petitioners and the Board by February 16, 2001, 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).

8. OFAs and related correspondence to the Board must refer to these proceedings. 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 March 11, 2001. Petitions to stay must be filed by February 26, 2001, and petitions to reopen must be filed by March 6, 2001.

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 February 9, 2002, 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.

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

Vernon A. Williams
Secretary

⁴ 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).