

44890
EB

SERVICE DATE – FEBRUARY 19, 2016

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 33 (Sub-No. 323X)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT OF FREIGHT
EASEMENT—IN ADAMS COUNTY, COLO.

Digest:¹ This decision allows Union Pacific Railroad Company to end its common carrier obligation to provide freight rail service over an 8.57-mile freight easement in Adams County, Colo., subject to standard employee protective conditions, but without requiring that it be made available for purchase to continue operations or for other public uses.

Decided: February 12, 2016

On November 2, 2015, Union Pacific Railroad Company (UP) filed a petition under 49 U.S.C. § 10502 for exemption from the provisions of 49 U.S.C. § 10903 to abandon its freight rail operating easement over an 8.57-mile portion of the Boulder Industrial Lead (Lead) extending from milepost 0.70 near Commerce City, Colo., to milepost 9.27 near Eastlake, Colo. (the Line), in Adams County, Colo. Notice of the exemption proceeding was served and published in the Federal Register on November 20, 2015 (80 Fed. Reg. 72,782). UP also seeks an exemption from the provisions of 49 U.S.C. § 10904 (offer of financial assistance (OFA) procedures) and 49 U.S.C. § 10905 (public use conditions) for reasons of overriding public need. No comments in opposition to the exemption requests were filed.

For the reasons discussed below, we will grant the exemption from 49 U.S.C. § 10903, subject to standard employee protective conditions. We will also grant UP's request for an exemption from the OFA process. We will deny as moot UP's request for an exemption from 49 U.S.C. § 10905.

BACKGROUND

According to UP, in June 2009, it sold the entire 32.97-mile Lead, right-of-way, trackage, and structures, including all bridges, from milepost 0.20 near Commerce City to milepost 33.17 near Valmont, to the Denver Regional Transportation District (RTD), a political subdivision of the State of Colorado. Reg'l Transp. Dist.—Acquis. Exemption—Union Pac. R.R. in Adams, Boulder, Broomfield, & Weld, Colo., FD 35252 (STB served June 29, 2010). UP retained an

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decision, EP 696 (STB served Sept. 2, 2010).

exclusive, perpetual freight easement over the entire Lead. UP states that following abandonment of its freight easement from milepost 0.70 to milepost 9.27 in this proceeding, the Line would continue to be owned by RTD and would be rebuilt for inclusion in RTD's integrated mass transit system known as FasTracks. UP points out that this is the same transit use as is planned for the western portion of the Lead, which was the subject of Union Pacific Railroad—Abandonment Exemption—in Adams, Weld, & Boulder Counties, Colo., AB 33 (Sub-No. 307X) (STB served Oct. 23, 2012).² Following consummation of the proposed abandonment, UP would retain its freight easement from milepost 0.20 to milepost 0.70 of the Lead.

According to UP, only one customer located on the Line, Atlas Roofing Corporation (Atlas), has moved traffic over the Line within the past two years. UP states that the last Atlas shipment moved over the Line in February 2015. UP states that RTD, Atlas, and Leroy Industries LLC (Leroy) (the owner of the facility Atlas leases for its operations) have entered into an agreement covering alternative transportation arrangements for service off the Line.³ UP further states that it does not anticipate any need for future rail service on the Line to Atlas, Leroy, or any other potential customer and that the proposed abandonment will have no adverse effect on any shippers. In the agreement, Atlas and Leroy state that they do not object to and are willing to support the proposed abandonment. UP adds that there is no overhead traffic over the Line.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10903, a rail carrier may not abandon a rail line without the prior approval of the Board. Under 49 U.S.C. § 10502, however, the Board must exempt a transaction or service from regulation when it finds that: (1) continued regulation is not necessary to carry out the rail transportation policy (RTP) 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 the proposed abandonment is not necessary to carry out the RTP in this case. By minimizing the administrative expense of the application process, an exemption in this case would reduce regulatory barriers to exit in accordance with 49 U.S.C. §§ 10101(2) and (7).⁴ An exemption would also foster sound economic conditions and encourage efficient management by permitting the rationalization of an unnecessary rail line, consistent with

² In that proceeding, UP obtained authority to abandon the freight rail operating easement for the Lead from milepost 9.27 near Eastlake to the end of the line at milepost 33.17 near Valmont. UP filed a notice stating that it consummated that abandonment authority on August 16, 2013.

³ UP provided a copy of the agreement with its petition.

⁴ E.g., The Long Island R.R.—Aban. Exemption—in Queens Cty., N.Y., AB 837 (Sub-No. 1X) (STB served Jan. 22, 2016).

49 U.S.C. §§ 10101(5) and (9).⁵ Other aspects of the rail transportation policy would not be adversely affected by the use of the exemption process.

We also find that regulation of the proposed transaction under 49 U.S.C. § 10903 is not necessary to protect shippers from the abuse of market power.⁶ Atlas, the Line's sole shipper, has been provided notice of the petition and has not opposed the proposed abandonment. (UP Pet. 5.) The record indicates that Atlas has entered into an agreement covering alternative transportation arrangements for service off the Line. (*Id.*) Nevertheless, to ensure that Atlas is informed of our action here, we will direct UP to serve a copy of this decision on Atlas within five days of the service date of this decision and to certify to the Board contemporaneously that it has done so. Further, UP has certified that there is no overhead traffic that could be adversely affected, and no party has filed in opposition to the proposed abandonment of the Line.

Under 49 U.S.C. § 10904, a financially responsible person may offer to purchase, or subsidize continued rail operations over, a rail line sought to be abandoned. The Board has granted exemptions from the OFA provisions of 49 U.S.C. § 10904 when the record shows that the right-of-way is needed for a valid public purpose and there is no overriding public need for continued freight rail service. *See, e.g., BNSF Ry.—Aban. Exemption—in Los Angeles Cty., Cal., AB 6 (Sub-No. 477X) (STB served Sept. 16, 2011).*

UP has justified an exemption from the OFA process. First, UP has demonstrated that the Line is needed for a valid public purpose—inclusion in RTD's mass transit system. (UP Pet. 6.) The Board has previously found this to be a valid public purpose in Union Pacific Railroad—Abandonment Exemption—in Adams, Weld, & Boulder Counties, Colo., AB 33 (Sub-No. 307X) (STB served Oct. 18, 2012). In addition, there is no overriding public need for continued freight rail service.⁷ Only one shipper located on the Line has moved traffic over the Line within the past two years, and that shipper has entered into an agreement covering alternative transportation arrangements for service off the Line and has stated its support for the proposed abandonment. (UP Pet. Attach. 2, Ex. B.) With regard to future rail service needs, UP explains that the development in the area of Boulder, Colo., served by the Lead is shifting away from rail-oriented industries, decreasing the likelihood that rail-oriented shippers would locate on the Lead. (UP Pet. 12.) Accordingly, we find that a valid public purpose is present, and there is no overriding public need for continued freight rail service.

⁵ *Id.*

⁶ *Id.* Given our market power finding, we need not determine whether the proposed abandonment is limited in scope.

⁷ *See Canadian Nat'l Ry.—Aban. Exemption—in Niagara Cty., N.Y., AB 279 (Sub-No. 6X), slip op. at 4 (STB served Aug. 3, 2012) (STB found no overriding need for continued freight rail service in authorizing rail freight carrier's cessation of its freight service obligation and exemption from the OFA process over line owned by bi-national commission in order to facilitate additional passenger rail service).*

We conclude that applying the OFA provisions in this situation is not necessary to carry out the RTP. Sections 10101(2) and (7) would be furthered by allowing the abandonment exemption to expeditiously become effective in furtherance of an overriding public need without the potential delay of the OFA process. Moreover, applying the OFA statute here is not necessary to protect the shipper on the Line. Thus, the record here establishes that the proposed exemption from 49 U.S.C. § 10904 meets the exemption criteria of 49 U.S.C. § 10502.

UP also seeks exemption from the public use provisions of 49 U.S.C. § 10905. Because requests for a public use condition were due by December 10, 2015, and none were received, UP's request for exemption from § 10905 will be denied as moot.

Employee Protection. Under 49 U.S.C. § 10502(g), the Board may not use its 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, the Board will impose upon UP the employee protective conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho (Oregon Short Line), 360 I.C.C. 91 (1979).

Environmental Review. Petitioner has submitted a combined environmental and historic report 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 abandonments. See 40 C.F.R. § 1105.711. The Board's Office of Environmental Analysis (OEA) has examined the environmental and historic report, investigated the record, and analyzed the probable effects of the proposed action on the quality of the human environment.

OEA served an Environmental Assessment (EA) on December 31, 2015. OEA did not recommend that any environmental conditions be imposed on a decision granting abandonment authority. Although comments to the EA were due by February 1, 2016, none were filed. Accordingly, based on OEA's recommendation, no environmental mitigation conditions will be imposed. We conclude that this decision 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 by UP of the above-described line, subject to the employee protective conditions set forth in Oregon Short Line.
2. UP's request for exemption from the provisions of 49 U.S.C. § 10904 is granted.
3. UP's request for exemption from the provisions of 49 U.S.C. § 10905 is denied as moot.
4. UP is directed to serve a copy of this decision on Atlas within five days after the service date of this decision and to certify contemporaneously to the Board that it has done so.

5. Petitions to stay must be filed by February 29, 2016. Petitions to reopen must be filed by March 10, 2016.

6. Pursuant to 49 C.F.R. § 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 19, 2017, 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 one-year period, the notice of consummation must be filed no later than 60 days after the satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.