

29688
EB

SERVICE DATE - FEBRUARY 1, 1999

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-33 (Sub-No. 128X)

UNION PACIFIC RAILROAD COMPANY--ABANDONMENT
EXEMPTION--IN SAN ANTONIO, BEXAR COUNTY, TX
(AUSTIN SUBDIVISION--"OLD MKT MAIN LINE")

Decided: January 26, 1999

By petition filed on October 14, 1998, 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 2.16-mile line of railroad (herein, the Line), known as the Austin Subdivision and formerly known as the old MKT Main Line, extending from milepost 136.47 near South St. Marys Street to the end of the line at milepost 138.63 near Durango Street, in San Antonio, Bexar County, TX. Notice of the institution of an exemption proceeding was published in the Federal Register at 63 FR 59359 on November 3, 1998. A request for a public use condition was timely filed by VIA Metropolitan Transit (VIA). The United Transportation Union (UTU) requests imposition of labor protective conditions. We will grant the petition, subject to environmental, public use, and labor protective conditions.

BACKGROUND

UP states that the Line was constructed in 1916 in downtown San Antonio, TX. UP claims that there has been only one active shipper, Judson Atkinson Candies (JAC). Allegedly, JAC received 11 carloads of corn syrup in 1996, 9 carloads in 1997, and 3 in 1998, with the last shipment moving in June 1998. UP states that, by the end of October 1998, JAC will be relocating to a new facility in an industrial park also served by UP. There is no overhead traffic. Thus, UP maintains that there is no reasonable prospect that traffic and revenue will increase sufficiently in the foreseeable future to make the Line a viable operation.

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 of the proposed abandonment is not necessary to carry out the rail transportation policy. By minimizing the administrative time and expense of abandoning this line, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(2) and (7)]. Moreover, by permitting UP to avoid the costs of retaining and operating a rail line serving no shippers and to apply the assets more productively elsewhere on its rail system, an exemption will promote a safe and efficient rail transportation system, foster sound economic conditions, and encourage efficient management [49 U.S.C. 10101(3), (5), and (9)]. Other aspects of the rail transportation policy are not affected adversely.

Because JAC will continue to have UP rail service available at its new location and no one opposes the proposed abandonment, we find that regulation is not necessary to protect shippers from an abuse of market power. Nevertheless, to ensure that shippers are informed of our decision, we will direct UP to serve a copy of this decision on JAC 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.

UTU requests imposition of labor protective conditions. Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a carrier of a statutory obligation to protect the interests of its employees. Accordingly, we will impose the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979), as a condition to granting this exemption.

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 its data, and analyzed the probable effect of the proposed action on the quality of the human environment. In the environmental assessment (EA) served on December 29, 1998, SEA indicated that the National Geodetic Survey (NGS) has identified three geodetic station markers that may be affected by the proposed abandonment. SEA, therefore, recommends that a condition be imposed requiring that UP 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. In addition, SEA indicated that the Texas State Historic Preservation Officer identified Bridge No. 137.5 (Steel girder underpass, Nogalitos Street, San Antonio, Bexar County, TX) as eligible for listing in the National Register of Historic Places. SEA recommends that a condition be imposed requiring that UP retain its interest in and take no steps to alter the historic integrity of Bridge No. 137.5 until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f.

No comments were filed in response to the EA. Based on SEA's recommendations, which we adopt, we conclude that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or conservation of energy resources.

By letter filed on November 23, 1998, VIA requests imposition of a 180-day public use condition under 49 U.S.C. 10905.¹ The full 180 days is requested to enable VIA to investigate environmental and other physical conditions of the property, evaluate the rail segment, and to negotiate with UP. VIA states that acquisition of the Line would enhance its recently adopted, long-range program for developing light rail commuter rail and bus ways in its service area. VIA also requests that the public use condition prohibit UP from selling, otherwise disposing of, or altering the rail segment, trackage and related facilities, in order to allow VIA to negotiate with UP to acquire the Line. UP maintains that the line is probably not suitable for other public purposes but concedes that the 10 road crossing parcels on the Line are suitable.

Typically, requests for public use conditions seek to delay disposal of the right-of-way underlying the rail line proposed for abandonment to allow interested persons to pursue various actions that benefit the public, such as highways, mass transit, conservation, energy production or transmission, or recreation. Thus, we usually impose the condition solely on the right-of-way underlying the track, permitting the railroad to proceed at its discretion with the removal and disposal of the track and track materials.²

We have generally denied requests to extend the public use condition to track and materials where petitioner wants to continue or restore common carrier freight service, because section 10904, not section 10905, is the proper source for that relief. Compare Chicago & North Western Transportation Company—Abandonment—Near Wisconsin Rapids and Wausau, WI, Docket No. AB-1 (Sub-No. 102F) (ICC served Oct. 7, 1981); and Chicago & North Western Transportation Company—Abandonment in Polk, Warren, Madison, Union, Ringold, and Taylor Counties, IA, and in Worth, Nodaway, Andrew, and Buchanan Counties, MO, Docket No. AB-1 (Sub-No. 159) (ICC served Sept. 12, 1984). However, an exception to the policy has been made where the party requesting the condition seeks to use the property for mass transit, scenic railroads, or other public purposes that require the use of the track. See Burlington Northern Railroad Company—Abandonment Exemption—Between Klickitat and Goldendale, WA, Docket No. AB-6 (Sub-No. 335X) (ICC served Feb. 7, 1992). Here, VIA, a Texas political subdivision responsible for providing mass transportation, seeks to acquire the entire right-of-way, including the track and related facilities, for future development of light rail commuter rail and bus ways in the San Antonio area. In view of the Line's mass transit potential and UP's lack of objection, the public use condition granted here will be extended to include the track and related facilities.

¹ Public use requests were due no later than 20 days after publication of the notice of the petition for exemption in the Federal Register, or by November 23, 1998.

² See, e.g., Providence and Worcester Railroad—Abandonment—Moshassuck Valley Industrial Track in Providence County, RI, Docket No. AB-254 (Sub-No. 5) (ICC served Oct. 18, 1991); and Springfield Terminal Railway Company—Abandonment. Exemption—In Sullivan County, NH and Windsor County, VT, Docket No. AB-355 (Sub-No. 1) (ICC served Sept. 19, 1991).

VIA has met the criteria for imposing a public use condition 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 time period. 49 CFR 1152.28(a)(2). Accordingly, a 180-day public use condition will be imposed. We note that a public use condition is not imposed for the benefit of any one potential purchaser, but rather to provide 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 VIA but may engage in negotiations with other interested persons.

The parties should note that operation of the public 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-Ways 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 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 public use precluded. Alternatively, if a sale under the OFA procedures does not occur, public use 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 2.16-mile rail line, subject to: (1) the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979); (2) the condition that UP notify NGS at least 90 days prior to any salvage activities that may disturb or destroy the three geodetic markers so that plans can be made for their relocation; (3) the condition that UP retain its interest in and take no steps to alter the historic integrity of Bridge No. 137.5 until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f; and (4) the condition that UP shall leave intact all of the underlying right-of-way, including the track and related facilities, for a period of 180 days from the effective date of this decision to enable any state or local governmental agency or any other interested person to negotiate the acquisition of the Line for public use.

2. UP must serve a copy of this decision on JAC within 5 days after the service date of this decision and certify to the Board that it has done so.

3. An OFA under 49 CFR 1152.27(c)(1)³ to allow rail service to continue must be received by the railroad and the Board by February 11, 1999, 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).

4. 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."**

5. Provided no OFA has been received, this exemption will be effective on March 3, 1999. Petitions to stay must be filed by February 16, 1999. Petitions to reopen must be filed by February 26, 1999.

6. 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 1, 2000, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If any 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 and Vice Chairman Clyburn.

Vernon A. Williams
Secretary

³ 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).