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SERVICE DATE - DECEMBER 17, 2003

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-33 (Sub-No. 208X)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT EXEMPTION—IN  
MARSHALL COUNTY, KS

Decided: December 15, 2003

Union Pacific Railroad Company (UP) filed a verified notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments and Discontinuances of Service and Trackage Rights to abandon an 8.13-mile line of railroad, from milepost 133.13 near Marysville to milepost 125.00 near Marietta, in Marshall County, KS. Notice of the exemption was served and published in the Federal Register on November 18, 2003 (68 FR 65114-15). The exemption is scheduled to become effective on December 18, 2003.

The Board's Section of Environmental Analysis (SEA) served an environmental assessment in this proceeding on November 21, 2003. Comments to the EA were due by December 8, 2003. No comments to the EA were received. In the EA, SEA stated that the National Geodetic Survey (NGS) advised that there are several geodetic station markers that have been identified that may be affected by the proposed abandonment. Therefore, SEA recommends that UP consult with NGS and provide NGS with 90 days' notice prior to disturbing or destroying any geodetic station markers in order to plan for the relocation of the markers.

On November 10, 2003, the Nebraska Trails Foundation Inc. (Commenter) filed a request for issuance of a notice of interim trail use (NITU) for the line under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and for a public use condition under 49 U.S.C. 10905,<sup>1</sup> to negotiate with UP for acquisition of the right-of-way for use as a recreational trail. Commenter requests that UP be prohibited from disposing of the corridor other than tracks, ties and signal equipment, except for public use on reasonable terms, and that UP be barred from removing or destroying any trail-related structures, such as bridges, culverts and rip/rap, for a 180-day period from the effective date of the abandonment exemption. Commenter indicates that the 180-day period is needed to coordinate efforts with local interest groups and to commence negotiations with UP.

Commenter also submitted a statement of willingness to assume financial responsibility for the management of, for any legal liability arising out of the transfer or use of (unless the user

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<sup>1</sup> A correction to the EA was served on December 10, 2003, indicating that the right-of-way may be suitable for other public use following abandonment.

is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for payment of any and all taxes that may be levied or assessed against, the right-of-way, as required at 49 CFR 1152.29, and acknowledged that the use of the right-of-way for trail purposes is subject to possible future reactivation for rail service. In a response submitted on December 4, 2003, UP indicated a willingness to negotiate with Commenter for interim trail use.

Because Commenter's request complies with the requirements of 49 CFR 1152.29 and UP is willing to negotiate for trail use, a NITU will be issued. The parties may negotiate an agreement during the 180-day period prescribed below. If the parties reach a mutually acceptable final agreement, no further Board action is necessary. If no agreement is reached within 180 days, UP may fully abandon the line. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

As an alternative to interim trail use under the Trails Act, the right-of-way may be acquired for public use as a trail under 49 U.S.C. 10905. See Rail Abandonments—Use of Rights-of-Way As Trails, 2 I.C.C.2d 591, 609 (1986). Under section 10905, the Board may prohibit the disposal of rail properties that are proposed to be abandoned and are appropriate for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment.

To justify a public use condition, a party must set forth: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be effective; and (iv) justification for the imposition of the period of time requested. See 49 CFR 1152.28(a)(2). Because Commenter has satisfied these requirements, a 180-day public use condition will be imposed, commencing from the December 18, 2003 effective date of the exemption.

When the need for interim trail use/rail banking and public use is shown, it is the Board's policy to impose both conditions concurrently, subject to the execution of a trail use agreement. 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, 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 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 Commenter, but may engage in negotiations with other interested persons.

As conditioned, this action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened.
2. Upon reconsideration, the notice served and published in the Federal Register on November 18, 2003, exempting the abandonment of the line described above is modified to the extent necessary to implement interim trail use/rail banking and to permit public use negotiations as set forth below, for a period of 180 days commencing from the December 18, 2003 effective date of the exemption (until June 15, 2004), and subject to condition that UP consult with the NGS and provide NGS with 90 days' notice prior to disturbing or destroying any geodetic station markers in order to plan for the relocation of the markers.
3. Consistent with the public use and interim trail use/rail banking conditions imposed in this decision and notice, UP may discontinue service and salvage track and related materials. UP shall keep intact the right-of-way, including bridges, culverts, ballast, and rip/rap for a period of 180 days to enable any state or local government agency, or other interested person to negotiate the acquisition of the line for public use. If an interim trail use/rail banking agreement is executed before June 15, 2004, the public use condition will expire to the extent the trail use/rail banking agreement covers the same line.
4. 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 management of, for 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.
5. 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.
6. 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.
7. If an agreement for interim trail use/rail banking is reached by June 15, 2004, interim trail use may be implemented. If no agreement is reached by that time, UP may fully abandon the line, provided the conditions imposed in this proceeding are met.

8. This decision and notice is effective on its date of service.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams  
Secretary