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SERVICE DATE - LATE RELEASE FEBRUARY 17, 1999

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-33 (Sub-No. 129X)

UNION PACIFIC RAILROAD COMPANY--ABANDONMENT
EXEMPTION--IN DALLAS AND GUTHRIE COUNTIES, IA
(PERRY BRANCH AND YALE SPUR)

Decided: February 16, 1999

By petition filed on October 30, 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 11.4 miles of continuous lines of railroad known as the Perry Branch and the Yale Spur, extending: (1) from milepost 369.0 near Dawson to the end of the line at milepost 374.2 near Herndon (the Perry Branch); and (2) from milepost 54.3 at Herndon to the end of the line at milepost 48.1 at Yale (the Yale Spur) (collectively, the Line), in Dallas and Guthrie Counties, IA. Notice of the institution of an exemption proceeding was published in the Federal Register at 63 FR 64315 on November 19, 1998. A request for issuance of a notice of interim trail use (NITU) and a public use condition was filed jointly by the Dallas County Conservation Board, the Guthrie County Conservation Board, and the Iowa Natural Heritage Foundation (INHF) (collectively, trail proponents). The United Transportation Union (UTU) requests imposition of labor protective conditions. We will grant the petition, subject to environmental, public use, and standard labor protective conditions, and we will issue a NITU.

BACKGROUND

The Line runs westward from Dawson, turns sharply at Herndon, and ends at Yale in the State of Iowa. According to UP, there were two active shippers on the Line in 1996. Farnhamville Farmers (Farnhamville), located at Herndon, shipped 7 carloads of fertilizer in 1996, but has not used the Line since that time. The second shipper, Farmers Coop (Farmers), is located at Yale and currently uses the line for shipments of fertilizer. UP reports that Farmers shipped 189 carloads of corn, 51 carloads of soybeans, and 34 carloads of fertilizer, totaling 274 carloads, in 1996; 25 carloads of soybeans and 40 carloads of fertilizer, totaling 65 carloads, in 1997; and 13 carloads of fertilizer for the period January through July, 1998. UP believes that the reason for the decline in traffic on the Line is the increased use of trucks to transport commodities to and from the area.

According to UP, service has been provided once a week on the Perry Branch by local train LWR50 out of Des Moines and on the Yale Spur on an as-needed basis. The train uses one 3,000 HP locomotive unit and a train crew consisting of an engineer and one or two conductors. For the base year (August 1, 1997 through July 31, 1998), UP indicates that the train made a total of 15 trips over the Line. UP anticipates that traffic in the forecast year (October 1, 1998 through September 30, 1999) will total 40 carloads of fertilizer, moving in 15 train trips, to Yale.

Such a low volume of traffic and resulting revenue, UP maintains, are insufficient to justify the continued expenses associated with operating the Line. UP further maintains that there is no reasonable prospect that traffic and revenue will increase sufficiently in the foreseeable future to justify its retention. As a consequence, UP asserts that motor carrier service would be a feasible alternative for Farmers, as Yale is located one mile from north-south State Highway 4. Also, UP states rail service is available at Jefferson, IA, a distance of 18 miles north of Yale on Highways 4 and 30. UP has served a copy of its petition on the two shippers.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without 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 time and expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(2) and (7)]. Moreover, an exemption will foster sound economic conditions and encourage efficient management by relieving UP of the expenses of operating and maintaining a rail line that is minimally used. [49 U.S.C. 10101 (5) and (9)]. Other aspects of the rail transportation policy are not affected adversely.

Because the only active shipper appears to have adequate motor and joint motor/rail transportation alternatives available and has not opposed 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 Farnhamville and Farmers 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.

Labor Protection. 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.

Environmental Issues. 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. SEA served an environmental assessment (EA) on December 29, 1998, which noted that the U.S. Department of Commerce, National Geodetic Survey (NGS) had identified four geodetic station markers that may be affected by the proposed abandonment. Therefore, SEA preliminarily recommended that the following condition be imposed: UP shall notify NGS at least 90 days in advance of salvage operations if survey markers K102 RESET, L102, L102 RESET, and M102 will be disturbed or destroyed by salvage operations.

No comments to the EA were received by the January 28, 1999 due date. Based on SEA's recommendation, 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.

Trail Use. The trail proponents request issuance of a NITU under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), for the right-of-way involved in this proceeding. They ask that UP be precluded from: (1) disposing of trail-related structures (e.g., bridges, trestles, culverts and tunnels) on the right-of-way that are suitable for trail use. The trail proponents submit that 180 days are required to negotiate with UP. They state that acquisition of the rail corridor would permit the preservation of important wildlife habitat and greenspace consistent with local, state and regional plans. The trail proponents submitted a statement of willingness to assume financial responsibility for the right-of-way and acknowledged that use of the right-of-way is subject to possible future reconstruction and reactivation of the right-of-way for rail service in compliance with 49 CFR 1152.29. By letter filed November 9, 1998, UP indicated its willingness to negotiate a trail use agreement with the INHF.

The criteria for imposing trail use and rail banking have been met. Accordingly, we will accept the trail use request and UP's response and issue a NITU. The parties may negotiate an agreement during the 180-period prescribed below. If the parties reach a mutually acceptable final agreement, further Board approval is not necessary. If no agreement is reached within 180 days, UP may fully abandon the line, provided the conditions imposed in this proceeding are met. 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

Public Use. SEA indicates in its EA that the right-of-way may be suitable for other public use after abandonment. The trail proponents also request imposition of a 180-day public use condition stating that the corridor is located near a state highway and would make an excellent transportation and recreation trail. Trail proponents ask that we impose conditions prohibiting UP from disposing of the corridor, including tracks, ties, and signal equipment. UP does not object to keeping intact the corridor and the trail-related structures (bridges, trestles, culverts and tunnels), but UP does object to a public use condition that would prohibit the disposing of track, ties and signal

equipment. UP states that such a condition would only delay UP from realizing alternative use or disposition of the track assets.

Typically, public use conditions seek to delay disposal of the right-of-way underlying the rail line to be abandoned to allow interested persons to pursue various actions that benefit the public, such as highways, 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.¹ We have generally denied requests to extend the public use condition to tracks, materials, etc. Where a petitioner wants to continue or restore common carrier freight service, section 10904, not section 10905, is the proper source for that relief. Compare Chicago & N. W. Transp. Co.--Aband.--WI, Docket No. AB-1 (Sub-No. 102F) (ICC served Oct. 7, 1981); and Chicago & N.W. Transp. Co.--Aband.--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 necessitating the use of the track. See Boston & Maine Corp.--Abandonment Exemption, 367 I.C.C. 688 (1983). Compare Chicago & N. W. Transp. Co.--Aband.--MN, Docket No. AB-1 (Sub-No. 113F) (ICC served Oct. 9, 1981). Here, petitioners merely state that the corridor is located near a state highway and would make an excellent "transportation" and recreational trail consistent with local, state and regional plans. Petitioners have failed to justify any specific public purpose that would necessitate the use of the track and track materials. And UP objects to the inclusion of the track, ties and signal equipment in any public use condition, stating that these assets would have no value for trail use and would unnecessarily prevent UP from disposing of them. Accordingly, the public use condition granted here will not extend to the track, ties, and signal equipment.

Persons who file under the Trails Act also may file for public use under 49 U.S.C. 10905. When the need for both is established, it is our policy to impose them concurrently, subject to the execution of a trail use agreement. See Rail Abandonments--Use of Rights-of-Ways as Trails, 2 I.C.C.2d 591, 609 (1986) (Trails). The trail proponents have 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 also will be imposed. 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

¹ See, e.g., Providence and Worcester R.--Ab.--Moshassuck Valley Ind. Track in Providence County, RI, Docket No. AB-254 (Sub-No. 5) (ICC served Oct. 18, 1991); and Springfield Term. Ry. Co.--Ab. Exemption--In Sullivan County, NH and Windsor County, VT, Docket No. AB-55 (Sub-No. 1) (ICC served Sept. 19, 1991).

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 INHF but may engage in negotiations with other interested persons.

The parties should note that operation of the trail 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 and public use precluded. Alternatively, if a sale under the OFA procedures does not occur, trail and 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 11.4-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 shall notify NGS at least 90 days in advance of salvage operations if geodetic survey markers K102 RESET, L102, L102 RESET, and M102 will be disturbed or destroyed by salvage operations; (3) the condition that UP leave intact all of the right-of-way underlying the track, including bridges, trestles, culverts, and tunnels (but not track, ties and signal equipment), for a period of 180 days from the effective date of this decision, to enable any state or local government agency or any other interested person to negotiate the acquisition of the line for public use; and (4) the requirement that UP comply with the terms and conditions for implementing interim trail use/rail banking, as set forth below.

2. UP must serve a copy of this decision on Farnhamville and Farmers within 5 days after the service date of this decision and 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 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 from 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 in this proceeding are met.

7. An OFA under 49 CFR 1152.27(c)(1)² to allow rail service to continue must be received by the railroad and the Board by February 26, 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).

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 March 19, 1999. Petitions to stay must be filed by March 4, 1999. Petitions to reopen must be filed by March 15, 1999.

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 17, 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

² 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).