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SERVICE DATE – JUNE 21, 2011

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 33 (Sub-No. 296X)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT EXEMPTION—IN  
RIVERSIDE AND SAN BERNARDINO COUNTIES, CAL.

Digest:<sup>1</sup> Union Pacific Railroad Company (UP) is permitted to terminate service over, and remove from the UP rail system, 2 segments, totaling 5.0 miles, of the Riverside Industrial Lead in Riverside and San Bernardino Counties, Cal.

Decided: June 20, 2011

By petition filed on March 3, 2011, 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 2 segments, totaling 5.0 miles, of the Riverside Industrial Lead in Riverside and San Bernardino Counties, Cal. The northern segment begins at milepost 540.15 near Colton and ends at milepost 543.88 near Riverside (North Segment), a distance of 3.73 miles, of which 2.27 miles are in San Bernardino County and 1.46 miles are in Riverside County. The southern segment begins at milepost 544.56 and extends to the end of the line at milepost 545.83 (South Segment), a distance of 1.27 miles in Riverside County (both segments collectively referred to as the Line). UP does not seek to abandon the portion of the Riverside Industrial Lead between the North Segment and the South Segment (between mileposts 543.88 and 544.56, a distance of 0.68 miles) (the Remaining Segment); rather, UP has proposed a plan for preserving its ability to carry out its common carrier obligation to serve the shippers on the Remaining Segment following abandonment of the North and South Segments.

UP also seeks exemption from 49 U.S.C. § 10904 (offer of financial assistance (OFA) procedures) and 49 U.S.C. § 10905 (public use provisions). Notice of the exemption was served and published in the Federal Register on March 23, 2011 (76 Fed. Reg. 16,474).

The Board, in a decision served on May 3, 2011, directed UP to file additional, clarifying information regarding the proposed abandonment and certain inconsistencies identified in UP's

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<sup>1</sup> 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 Decisions, EP 696 (STB served Sept. 2, 2010).

petition for exemption. On May 13, 2011, UP submitted a supplemental filing addressing the Board's concerns.

For the reasons discussed below, the Board will grant the exemption from 49 U.S.C. § 10903, thereby authorizing the abandonment, subject to environmental, historic preservation, and standard employee protective conditions, as well as a condition prohibiting UP from consummating its abandonment authority until the steps needed to preserve UP's ability to serve the Remaining Segment have been completed. UP's request for exemption from the OFA process will be granted, and its request for exemption from the public use provisions of § 10905 will be denied as moot.

## BACKGROUND

The Line originally was constructed in 1889 by the Southern California Motor Road. Subsequently, it was acquired by the Southern Pacific Railroad Company in 1898 and converted to standard gauge. The Line traverses United States Postal Zip Codes 92324, 92313, 92507, and 92506.

According to UP, there has been no local rail traffic (*i.e.*, traffic originating or terminating) on either the North Segment or the South Segment for at least 2 years. However, UP states that there are 2 active shippers, Sigma Stretch and Lehigh Cement, located on the Remaining Segment whose rail shipments traverse the North Segment of the Line as overhead traffic.<sup>2</sup> For 2009 and 2010, UP states that the combined carload traffic to these shippers' facilities averaged approximately 2.25 railcars per day.

UP asserts that the proposed abandonment would have no adverse effect on shippers, because it has developed a plan to keep the Remaining Segment connected to the UP rail network, thus permitting UP to continue to carry out its common carrier obligation to serve shippers there. UP's proposed alternative route to the Remaining Segment is as follows: UP will use its existing trackage rights over the San Bernardino Subdivision of BNSF Railway Company (BNSF) from Colton south to the BNSF Highgrove switch connection with the San Jacinto Line, which is owned by the Riverside County Transportation Commission (RCTC) and operated for freight rail purposes by BNSF. UP will receive new overhead trackage rights over the San Jacinto line from the BNSF Highgrove switch to a point approximately 1.5 miles south, where RCTC will construct a new connection between its San Jacinto Line and UP's Remaining

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<sup>2</sup> The September 29, 2010 support letter from the Riverside County Transportation Commission appended to the petition states that 5 active shippers remain on the Riverside Industrial Lead: the 2 identified by UP, as well as Alpha Industries, CEMEX, and Omega Plastics. In its May 13, 2011 supplemental filing, however, UP reaffirms that Sigma Stretch and Lehigh Cement are the only 2 active shippers on the Riverside Industrial Lead; Alpha Industries and Omega Plastics are additional waybill names used for traffic going to Sigma Stretch, and CEMEX is an additional waybill name for traffic going to Lehigh Cement.

Segment (at UP milepost 543.88) (the Marlborough Avenue Connection). Construction of the new Marlborough Avenue Connection and the grant of trackage rights to UP over that connection and the San Jacinto Line will create a clear path for UP to continue to operate between its system at Colton and the Remaining Segment. UP proposes, however, that actual service to the Remaining Segment will be conducted via BNSF haulage: traffic will be handed off between UP and BNSF at Colton and will move via the same route that UP itself would use, which is south over the BNSF San Bernardino Subdivision, to the San Jacinto Line (over which BNSF has freight operating rights) and over the to-be-constructed Marlborough Avenue Connection to the Remaining Segment. UP will contract with BNSF to give BNSF the right to conduct haulage over the Remaining Segment for UP.

UP asserts that it does not anticipate any new users of rail service located along the Line. Further, UP states that there will be no increase in rail traffic, rail yard activity, or truck traffic as a result of the proposed abandonment. UP maintains that abandonment of the Line would have no effect on regional or local transportation systems and patterns and that there will be no diversion of traffic to other transportation systems or modes.

According to UP, one major factor prompting abandonment of the Line is that Interstate Highway 215 is being substantially expanded by the California State Road Authority. UP states that, absent abandonment, the I-215 expansion would require replacing an existing railroad bridge on the North Segment of the Line at a cost of \$12.4 million to taxpayers. UP maintains that this taxpayer cost is not justified given the existing level of rail traffic and the alternative to reroute UP's overhead traffic from the North Segment to the proposed connector track. If the Line is abandoned, UP states, a new bridge would not be needed, and the cost to remove the existing bridge would be only \$1.2 million, resulting in a net savings to taxpayers of approximately \$11.2 million. Given the expansion of I-215 and the costs associated with replacing the existing railroad bridge, UP asserts that there is no reasonable alternative to the abandonment.

## DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10903, a rail line may not be abandoned without prior approval from 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 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. The segments subject to abandonment are not needed, and keeping them in place will add unnecessary expense to the important highway project. An exemption, which facilitates the highway project, does not undercut any rail transportation policy provision. To the contrary, by minimizing the administrative expense of the application process, an exemption will minimize the need for Federal regulatory control over the rail transportation system and will reduce regulatory barriers to exit, in accordance with 49 U.S.C. §§ 10101(2) and (7). An

exemption, therefore, will also foster sound economic conditions and encourage efficient management by permitting the rationalization of an unnecessary common carrier rail line, consistent with 49 U.S.C. §§ 10101(5) and (9). Other aspects of the rail transportation policy will not be adversely affected by the use of the exemption process.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. As discussed above, UP has proposed a plan for continued operations to ensure that it will retain access to the Remaining Segment as part of its rail network. The plan proposed by UP appears feasible and adequate to preserve UP's ability to carry out its common carrier obligation to serve the shippers on the Remaining Segment. Sigma Stretch and Lehigh Cement, the 2 shippers currently active on the Remaining Segment, have been advised of the plan for continued service and have not objected, and no other opposition to the abandonment has been filed. To ensure that the shippers on the Remaining Segment are protected, however, the Board will impose a condition on UP's exercise of its abandonment authority providing that abandonment cannot be consummated until all the elements of UP's alternative service plan are in place.<sup>3</sup> Additionally, to ensure that Sigma Stretch and Lehigh Cement are informed of our action, we will require UP to serve a copy of this decision on those shippers so that they receive it within 5 days of the service date of this decision and certify contemporaneously to the Board that it has done so. Given our market power finding, we need not determine whether the proposed abandonment is limited in scope.

Exemption from § 10904. UP seeks exemption from the OFA process (49 U.S.C. § 10904). Exemptions from the OFA process have been granted from time to time when the right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service. In support of its request here, UP contends that exemption from these provisions is necessary to ensure that a portion of the underlying right-of-way will be available for conveyance to the California State Road Authority for its I-215 Project. UP states that, given the desire of San Bernardino Associated Governments and RCTC to avoid substantial expense for bridge replacement on the North Segment of the Line, exemption under 49 U.S.C. § 10502 is warranted. UP argues that there is an overriding public need that will be served by authorizing the proposed abandonment in light of the anticipated alternative rail service relocation.

Here, UP has justified an exemption from the OFA process. It has demonstrated that the right-of-way is needed for a valid public purpose, expansion of I-215. See, e.g., CSX Transp., Inc.—Aban. Exemption—in Pike Cnty., Ky., AB 55 (Sub-No. 653X) (STB served Sept. 13, 2004) (highway expansion is a valid public purpose justifying exemption from § 10904); BNSF

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<sup>3</sup> This decision does not authorize the construction of the connecting track that is part of UP's alternative service plan. According to UP's petition, RCTC states that it intends to construct the connecting track. RCTC is responsible for determining whether construction authority from the Board is required (if necessary, by obtaining a determination of that question by the Board) and obtaining such authority if needed.

Railway Co.—Petition for Declaratory Order, FD 35164 (STB served May 19, 2009), aff'd, Kessler v. STB, 635 F.3d 1 (D.C. Cir. 2009) (highway relocation). Likewise, there is no overriding public need for continued rail service as there have been no shippers on the North or South Segments for at least 2 years, and the traffic for the 2 shippers located on the Remaining Segment, which currently traverses the North Segment as overhead traffic, will be rerouted as provided in UP's alternative service plan. No one has objected to the requested OFA exemption. Accordingly, the Board finds that a valid public purpose has been stated and there is no overriding public need for continued rail service. We therefore conclude that applying the OFA provisions in this situation is not necessary to carry out the rail transportation policy. Expediting the abandonment will minimize federal regulatory control over the rail system, expedite regulatory decisions, and reduce regulatory barriers to exit. 49 U.S.C. § 10101(2), (7). Other aspects of the rail transportation policy will not be affected. Because no local traffic originates or terminates on the Line and the overhead traffic on the North Segment will be rerouted before UP will be permitted to consummate the abandonment, application of § 10904 is not necessary to protect shippers from an abuse of market power. Exempting the transaction from § 10904 therefore is warranted.

Exemption from § 10905. 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 April 12, 2011, and no requests 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 the employee protective conditions set forth in Oregon Short Line—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979).

Environmental Review. UP has submitted a combined environmental and historical 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 abandonment. See 49 C.F.R. § 1105.11. The Board's Office of Environmental Analysis (OEA) has examined the environmental and historical report, verified UP's data, and analyzed the probable effects of the proposed action on the quality of the human environment.

OEA issued an environmental assessment (EA) in this proceeding on May 2, 2011. In the EA, OEA recommends that 3 conditions be imposed on any decision granting abandonment authority.

First, OEA states that the U.S. Army Corps of Engineers (Corps) has submitted a letter stating that the proposed abandonment may require a permit for bridge removal. Therefore, OEA recommends that UP, prior to commencement of any salvage activities, shall consult with the Corps regarding its requirements and, if applicable, shall comply with the reasonable requirements of the Corps.

Second, OEA states that the U.S. Department of Commerce, National Geodetic Survey (NGS) submitted comments identifying 2 geodetic station markers that may be disturbed by the proposed abandonment. Therefore, OEA recommends a condition requiring UP to consult with and notify NGS at least 90 days prior to beginning salvage activities so that NGS may plan for the possible relocation of the geodetic station markers.

In addition to environmental concerns, OEA has made a recommendation with respect to the historical background of the land affected by the proposed abandonment. OEA states that UP served the Historic Report, as required by the Board's environmental rules, on the California Office of Historic Preservation (SHPO). However, OEA has not received a response from the SHPO, and therefore has not been able to consider the SHPO's opinion before determining whether the rail line may be eligible for listing on the National Register of Historic Places (National Register). Accordingly, OEA recommends a condition that UP be required to retain its interest in and take no steps to alter the historic integrity of all historic properties, including sites, buildings, structures, and objects within the project right-of-way that are eligible for listing or are listed in the National Register until completion of the Section 106 process of the National Historic Preservation Act, 16 U.S.C. § 470f (NHPA). OEA also recommends that UP be required to report back to OEA regarding any consultations with the SHPO and the public, and that UP be prohibited from filing its consummation notice or initiating any salvage activities related to abandonment (including removal of tracks and ties) until the Section 106 process has been completed and the Board has removed this condition.

Pursuant to 36 C.F.R. § 800.2, OEA conducted a search of the Native American Consultation Database to identify Federally recognized tribes that may have ancestral connections to the project area. According to OEA, the Database indicated that there are 11 tribes that may have knowledge regarding properties of traditional religious and cultural significance within the right-of-way for the proposed abandonment.<sup>4</sup> OEA sent a copy of the EA to these tribes for review and comment.

Comments on the EA were due by June 2, 2011. No comments were received. The Board will impose the conditions recommended by OEA in the EA. Based on OEA's recommendation, the Board concludes that the proposed abandonment, as conditioned, will not

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<sup>4</sup> The Database is at: <http://home.nps.gov/nacd/>. The identified tribes are: Chemehuevi Indian Tribe of the Chemehuevi Reservation, California; Colorado River Indian Tribes of the Colorado River Indian Reservation, Arizona and California; Fort McDowell Yavapai Nation, Arizona; Fort Mojave Indian Tribe of Arizona, California & Nevada; Kaibab Band of Paiute Indians of the Kaibab Indian Reservation, Arizona; Las Vegas Tribe of the Paiute Indians of the Las Vegas Indian Colony, Nevada; Moapa Band of Paiute Indians of the Moapa River Indian Reservation, Nevada; Paiute Indian Tribe of Utah; San Manuel Band of Serrano Mission Indians of the San Manuel Reservation, California; Twenty-Nine Palms Band of Mission Indians of California; and Yavapai-Apache Nation of the Camp Verde Indian Reservation, Arizona.

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, UP is exempted from the prior approval requirements of 49 U.S.C. § 10903 for the abandonment of the above-described line, subject to the employee protective conditions set forth in Oregon Short Line—Abandonment—Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979), and subject to the conditions that UP shall: (1) prior to beginning any salvage activities, consult with the Corps regarding its requirements and, if applicable, comply with the reasonable requirements of the Corps; (2) consult with and notify NGS at least 90 days prior to beginning salvage activities so that NGS may plan for the possible relocation of the geodetic station markers; and (3)(a) retain its interest in and take no steps to alter the historic integrity of all historic properties, including sites, buildings, structures, and objects within the project right-of-way that are eligible for listing or are listed in the National Register until the Section 106 process of the NHPA, 16 U.S.C. § 470f, has been completed, (b) report back to OEA regarding any consultations with the SHPO and the public, and (c) not file its consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties) until the Section 106 process has been completed and the Board has removed this condition.

2. UP is directed to serve a copy of this decision on Sigma Stretch and Lehigh Cement so that it is received within 5 days of the service date of this decision and certify contemporaneously to the Board that it has done so.

3. UP's request for exemption from the provisions of 49 U.S.C. § 10904 is granted.

4. UP's request for exemption from the provisions of 49 U.S.C. § 10905 is denied as moot.

5. The exemption from § 10903 granted in this decision is subject to the condition that UP may not consummate abandonment of either the North Segment or South Segment until all trackage rights needed to permit UP to continue to serve the Remaining Segment have been approved and executed, construction of the proposed Marlborough Avenue Connection has been authorized, if necessary, and completed, and the Board has removed this condition. Prior to consummating abandonment, UP shall file a report with the Board in this docket describing the elements of the alternative service plan undertaken and certifying their completion.

6. Pursuant to the provisions of 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 June 21, 2012, 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 no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

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