

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 33 (Sub-No. 307X)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT EXEMPTION—IN
ADAMS, WELD, AND BOULDER COUNTIES, COLO.

Digest:¹ The Board is permitting the Union Pacific Railroad Company to abandon a line without requiring that it be made available for purchase to continue operations or for other public uses.

Decided: October 17, 2012

On June 27, 2012, Union Pacific Railroad Company (UP) filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon a 23.90-mile freight rail operating easement for the remaining portion of the Boulder Industrial Lead, extending from milepost 9.27 near Eastlake to the end of the line at milepost 33.17 near Valmont, in Adams, Weld, and Boulder Counties, Colo. (the line).

On that same date, UP filed a supplement to the notice of exemption seeking exemption from 49 U.S.C. § 10904 (offer of financial assistance (OFA) procedures) and 49 U.S.C. § 10905 (public use conditions) for the proposed abandonment.

In a petition filed on July 20, 2012, as amended on July 25, 2012, UP: (1) withdraws the supplement to the notice of exemption; (2) seeks Board approval for exemptions from 49 U.S.C. §§ 10904 and 10905 for the proposed abandonment prior to publication of the notice of exemption in the Federal Register; and (3) requests that the notice of exemption filed on June 27, 2012, be held in abeyance pending Board action on its petition.² UP also has requested expedited action. As discussed below, the exemption requests will be granted.

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).

² UP's request to hold the notice of exemption in abeyance was granted by a decision served on July 26, 2012. Union Pacific R.R.—Aban. Exemption—in Adams Weld and Boulder Cntys., Colo., AB 33 (Sub-No. 307X) (STB served July 26, 2012). While the Board accommodated the petitioner here, this is not the preferred procedural approach. Even if the abandonment is eligible for a class exemption, if a petitioner also seeks exemptions that must be ruled upon by the entire Board, the better practice is to file one petition for exemption seeking both the abandonment and any other requested exemptions.

BACKGROUND

According to UP, the entire Boulder Industrial Lead, including the 23.90-mile right-of-way over which UP is seeking to abandon its freight operating easement, along with the Lead's trackage, structures, and bridges, was sold to the Denver Regional Transportation District (RTD) in June 2009. UP retained a freight operating easement over the entire Lead. UP states that the line has been incorporated into the master plan for RTD's integrated mass transit system known as FasTracks (a regional public passenger rail and bus network for the greater Denver, Colo. area) and that it would not be suitable for other public purposes, including roads or highways, or other forms of transportation, trails, conservation, energy production or transmission, or recreation. UP also states that the area that the Boulder Industrial Lead served has now shifted away from rail oriented industries, and, as a consequence, no new shippers are expected to locate on the line.

DISCUSSION AND CONCLUSIONS

The Board will grant exemptions under 49 U.S.C. § 10502, as appropriate, from certain statutory requirements. In its petition, UP seeks exemption from the OFA provisions at 49 U.S.C. § 10904 and the public use provisions at 49 U.S.C. § 10905 with respect to its proposed abandonment that is the subject of the notice of exemption filed in this docket.

Exemption from Section 10904. 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. 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. 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., Norfolk S. Ry.—Aban. Exemption—in Norfolk & Va. Beach, Va., AB 290 (Sub-No. 293X) (STB served Nov. 6, 2007).

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. In addition, there is no overriding public need for continued freight rail service.³ No freight traffic has moved over the line for at least two years. With regard to future rail service needs, UP states that the development in the area of Boulder, Colo., served by the Lead is shifting away from rail-

³ See Can. Nat'l Ry.—Aban. Exemption—in Niagara Cnty., 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).

oriented industries, decreasing the likelihood that rail-oriented shippers would locate on the Lead. Accordingly, we find that a valid public purpose is present, and that there is no overriding public need for continued freight rail service.

We further conclude that applying the OFA provisions in this situation is not necessary to carry out the rail transportation policy. Allowing the abandonment that is the subject of the notice of exemption in this docket to become effective expeditiously, without the abandonment first being subject to these provisions, will minimize the need for Federal regulatory control over the rail transportation system, expedite the regulatory action, and reduce regulatory barriers to exit, consistent with 49 U.S.C. §§ 10101(2) and (7). Other aspects of the rail transportation policy will not be adversely affected. As discussed above, regulation is not necessary to protect shippers from an abuse of market power because there are no shippers on the line.⁴ Thus, the record here establishes that the proposed exemption from 49 U.S.C. § 10904 meets the criteria of 49 U.S.C. § 10502.

Exemption from 49 U.S.C. § 10905. UP also seeks exemption from the public use provisions of 49 U.S.C. § 10905. Section 10905 has been interpreted to promote the use of property for alternate public purposes such as roads, highways, other forms of mass transportation, conservation, energy production or transmission, or recreation. UP's justification for its request is that the entire Boulder Industrial Lead, including the 23.90-mile right-of-way, has been sold and incorporated into RTD's mass transit system, and therefore, the line is not suited for other public purposes. See, e.g., Wisconsin Cent.—Aban.—in Ozaukee, Sheboygan and Manitowoc Cntys. Wis., AB 303 (Sub-No. 27) (STB served Oct. 18, 2004).

For the same reasons discussed with respect to the § 10904 exemption above, the record here also establishes that the proposed exemption from 49 U.S.C. § 10905 meets the criteria of 49 U.S.C. § 10502. Therefore, we will exempt the abandonment that is the subject of the notice of exemption in this docket from this provision, as well.

Similarly, there will not be an opportunity for interested persons to file trail use/rail banking requests. Under Section 8(d) of the National Trail Systems Act, 16 U.S.C. § 1247(d), trail use/rail banking is voluntary and can only be implemented if an abandoning railroad agrees to negotiate an agreement. Because the right-of-way that makes up the subject portion of the Boulder Lead has already been sold and incorporated into the RTD mass transit system, UP states that it will not negotiate for trail use/rail banking. Therefore, we will not entertain such requests.

Expedited action. UP requests expedited handling for its petition. To accommodate UP's request, we will make the §§ 10904 and 10905 exemptions effective on the service date of this decision. The notice of exemption will be published in the Federal Register on October 23, 2012.

⁴ Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. UP's petition is granted.
2. UP's request to exempt the above-described abandonment proposal from the provisions of 49 U.S.C. § 10904 and 49 U.S.C. § 10905 prior to publication is granted.
3. This decision is effective on its service date.

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