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SERVICE DATE – SEPTEMBER 22, 2010

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 33 (Sub-No. 284X)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT EXEMPTION—IN KANE  
COUNTY, ILL.

Digest:<sup>1</sup> This decision allows Union Pacific Railroad Company to end its responsibility to provide rail service over a 3.17-mile line of railroad in Kane County, Illinois. It also requires UP to keep certain railroad structures in place and sets a time period for UP and interested parties to consider turning the rail line into a recreational trail.

Decided: September 21, 2010

By petition filed on June 4, 2010, 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 3.17-mile line of railroad known as the St. Charles Industrial Lead, extending from milepost 35.13 to the end of the line at milepost 38.30, near St. Charles, in Kane County, Ill. (line). Pursuant to 49 U.S.C. § 10502(b), the Board served and published in the Federal Register (75 Fed. Reg. 36,149-50) on June 24, 2010, a notice instituting an exemption proceeding. On July 14, 2010, the County of Kane, Forest Preserve District of Kane County, St. Charles Park District, and the City of St. Charles, all municipal corporations (collectively, Proponents), jointly filed a request for imposition of a public use condition and for issuance of a notice of interim trail use (NITU). We will grant the petition for exemption, subject to public use, trail use, and standard employee protective conditions.

BACKGROUND

According to UP, the 3.17-mile line it seeks to abandon was constructed in 1886 and 1887 by the Minnesota & Northwestern Railroad Company. The right-of-way is approximately 100 feet wide and passes through a highly urban area, with residential, industrial, recreational, and airport uses adjacent to the line.

UP states that there are no active shippers on the line and there is no expectation that any shippers will locate on the line in the foreseeable future. UP further states that it provided rail

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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. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

service to 2 former freight rail customers within the last 2 years. Both customers have ceased operations on the line or relocated their operations off the line. One former customer, Cardinal Industries (Cardinal), a manufacturer of laminated wood products, relocated its operations to a point off the line at the end of 2009. Before relocating its operations, Cardinal moved 28 carloads in 2008 and 1 carload in 2009. The other former customer, Stock Building Supply (Stock), a dealer in lumber products, moved 9 carloads in 2008 and terminated its operations on the line in May 2008. UP asserts that no local traffic has moved on the line since February 2009, and there is no overhead traffic or passenger service on the line.

UP believes that the proposed abandonment will permit the State of Illinois to avoid an estimated \$500,000 expenditure associated with a planned upgrade to a railroad at-grade crossing at Route 64. Following abandonment, UP will continue to provide rail service to the St. Charles area on a portion of the St. Charles Industrial Lead that is not included in this proposed abandonment. UP notes that alternative transportation is available by railroad, barge, and lake freight shipping services in the Chicago metropolitan area.

#### 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, 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 expense of the abandonment application process, an exemption will expedite regulatory action and reduce regulatory barriers to exit. See 49 U.S.C. §§ 10101(2) and (7). An exemption, therefore, will foster sound economic conditions and encourage efficient management by allowing UP to save the expenses of maintaining and operating a line that is minimally used and unprofitable. See 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 because there are no active shippers on the line and there is no known potential for future rail activity on the line. The 2 former shippers on the line, Cardinal and Stock, appear to have alternative transportation available and have not opposed the proposed abandonment. Nevertheless, to ensure that Cardinal and Stock are informed of our action, we will require that UP serve a copy of this decision and notice on Cardinal and Stock so that they receive it within 5 days of the service date of this decision and notice, and that UP certify contemporaneously to

us that it has done so.<sup>2</sup> Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

Under 49 U.S.C. § 10502(g), we may not use our exemption authority to relieve a carrier of its statutory obligation to protect the interests of its affected employees. Accordingly, as a condition to granting the exemption, we will impose the standard employee protective conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979).

UP has submitted a combined environmental and historic 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 C.F.R. § 1105.11. The Board's Office of Environmental Analysis (OEA)<sup>3</sup> 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 August 3, 2010, recommending that no conditions be placed on any decision granting abandonment authority. Comments to the EA were due by September 1, 2010, but no comments were received. Accordingly, no environmental or historic preservation conditions will be imposed. Based on OEA's recommendations, the Board concludes that the proposed abandonment will not significantly affect either the quality of the human environment or the conservation of energy resources.

As previously noted, Proponents filed a request for the issuance of a NITU for the line under the National Trails System Act, 16 U.S.C. § 1247(d) (Trails Act), and 49 C.F.R. § 1152.29, to negotiate with UP for acquisition of the right-of-way for use as a recreation trail and utility service. Proponents have submitted a statement of willingness to assume full responsibility for the 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, as required at 49 C.F.R. § 1152.29. Proponents have acknowledged that the use of the right-of-way for trail purposes is subject to future reconstruction and reactivation of the right-of-way for rail service. In a response filed on July 30, 2010, UP states that it is willing to negotiate with Proponents for interim trail use.

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<sup>2</sup> UP notes in its petition that, because Stock is no longer located in the area of the line, UP's only contact address for Stock is for Stock's corporate headquarters. Service of this decision and notice on Stock's corporate headquarters and certification of such service will satisfy this requirement.

<sup>3</sup> OEA was formerly known as the Board's Section of Environmental Analysis (SEA). The name change from SEA to OEA became effective on September 1, 2010.

Because Proponents' request complies with the requirements of 49 C.F.R. § 1152.29, and UP is willing to enter into trail use negotiations, we will issue a NITU for the subject line. The parties may negotiate an agreement during the 180-day period prescribed below. If an agreement is executed, no further Board action is necessary. If no agreement is reached within 180 days, UP may fully abandon the line, subject to the conditions imposed below. See 49 C.F.R. § 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to any future use of the property for restoration of railroad operations.

Proponents also requested imposition of a public use condition under 49 U.S.C. § 10905. Proponents request 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 the removal or destruction of potential trail-related structures, such as bridges, trestles, culverts, and tunnels, for a 180-day period from the effective date of the abandonment. Proponents' justification for their request is that the corridor crosses a scenic river and can be used to connect multiple regional trail systems: the Great Western Trail; the Fox River Trail; eventually, the Illinois Prairie Path; 4 community parks; and a forest preserve site. According to Proponents, this corridor will also provide important space for municipal utility access. Proponents state that the 180-day period is needed to assemble and review title information, to complete a trail plan, and to negotiate with UP.

The Board has determined that persons who file under the Trails Act may also file for public use under 49 U.S.C. § 10905. See Rail Aban.—Use of Rights-of-Way as Trails (49 C.F.R. pts. 1105 and 1152), 2 I.C.C.2d 591, 609 (1986). When the need for both conditions is established, it is the Board's policy to impose them concurrently, subject to the execution of a trail use agreement. Proponents have met the public use criteria prescribed at 49 C.F.R. § 1152.28(a)(2) 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 period of time requested. Accordingly, a 180-day public use condition also will be imposed on the line, commencing from the effective date of this decision and notice, to enable any state or local government agency or other interested person to negotiate the acquisition of the line for public use. 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, it should be noted that a public use condition is not imposed for the benefit of any one potential purchaser. Rather, it provides an opportunity for any interested person to negotiate 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 Proponents, but may engage in negotiations with other interested persons.

The parties should note that operation of the trail use and public use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. § 10904. As stated in Rail Aban., 2 I.C.C.2d at 608, an offer of financial assistance (OFA) to acquire rail lines for continued rail service or to subsidize rail operations takes priority over interim trail use/rail

banking and public use. Accordingly, if an OFA is timely filed under 49 C.F.R. § 1152.27(c)(1), the effective date of this decision and notice will be postponed beyond the effective date indicated here. See 49 C.F.R. § 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. See 49 C.F.R. § 1152.27(f). Finally, if the line is sold under the OFA procedures, the petition for abandonment exemption will be dismissed and trail use and public use precluded. Alternatively, if a sale under the OFA procedures does not occur, the trail use and public use processes 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 line, subject to the employee protective conditions set forth in Oregon Short Line Railroad, 360 I.C.C. 91, and the conditions that UP shall: (1) be prohibited from disposing of the corridor (other than tracks, ties, and signal equipment) and from removing or destroying potential trail-related structures (such as bridges, trestles, culverts, and tunnels) for a 180-day period from the effective date of this decision and notice to enable any state or local government agencies, or other interested person, to negotiate the acquisition of the line for public use; and (2) comply with the interim trail use/rail banking procedures set forth below.

2. UP is directed to serve a copy of this decision and notice on Cardinal and Stock so that they receive it within 5 days of the service date of this decision and notice and to certify contemporaneously 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 the 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 against 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 any future use of the property for restoration of railroad operations 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 March 21, 2010, interim trail use may be implemented. If no agreement is reached by that time, UP may fully abandon the line, provided the conditions imposed above are met. See 49 C.F.R. § 1152.29(d)(1). If an interim trail use/rail banking agreement is executed before March 21,

2010, the public use condition will expire to the extent the trail use/rail banking agreement covers the same line.

7. An OFA under 49 C.F.R. § 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by October 1, 2010, subject to time extensions authorized under 49 C.F.R. § 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27(c)(1). Each OFA must be accompanied by the filing fee of \$1,500. See 49 C.F.R. § 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 October 22, 2010. Petitions to stay must be filed by October 7, 2010. Petitions to reopen must be filed by October 18, 2010.

10. 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 September 22, 2010, 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 Mulvey, and Commissioner Nottingham.