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SERVICE DATE - JANUARY 16, 1998

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-33 (Sub-No. 114X)

UNION PACIFIC RAILROAD COMPANY--ABANDONMENT EXEMPTION--  
IN WASHBURN COUNTY, WI

Decided: January 12, 1998

By petition filed September 30, 1997, Union Pacific Railroad Company (UP)<sup>1</sup> seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a line of railroad known as the Hayward Industrial Lead, extending from milepost 83.32 near Trego to milepost 96.0 near Hayward Junction, a distance of 12.68 miles, in Washburn County, WI. Pursuant to 49 U.S.C. 10502(b), a notice was published in the Federal Register (62 FR 54504) on October 20, 1997, instituting an exemption proceeding. On November 17, 1997, a request for imposition of a public use condition was filed by Washburn County (County) and a request for issuance of a notice of interim trail use (NITU) was filed by the Wisconsin Department of Natural Resources (WisDNR),<sup>2</sup> acting through the Wisconsin Department of Transportation (WisDOT)<sup>3</sup> (collectively referred to as WisDNR/DOT).<sup>4</sup> The United Transportation Union requests

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<sup>1</sup> UP is a railroad affiliate of and is operated under common control and management with Southern Pacific Transportation Company. UP owns and operates the line proposed for abandonment.

<sup>2</sup> WisDNR is the lead state agency responsible for designating, acquiring, developing, and maintaining a system of state trails for public use by equestrians, bicyclists, cross country skiers or hikers.

<sup>3</sup> WisDOT is the designated state agency for rail matters in the State of Wisconsin. It is responsible for all highway and airport construction within the state and has the statutory right to acquire for present or future transportation, recreational or scenic purposes any property used in operating a railroad that is abandoned in Wisconsin.

<sup>4</sup> The October 20 notice provided that any request for a public use condition under 49 CFR 1152.28 or for trail use/rail banking under 49 CFR 1152.29 had to be filed no later than November 10, 1997. Although the County's request for a public use condition and WisDNR/DOT's request for issuance of a NITU were late-filed, in 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), we stated that we would retain our policy of accepting filings after the due date

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imposition of labor protective conditions. We will grant the exemption subject to trail use, public use, environmental and standard employee protective conditions.

#### BACKGROUND

UP states that the Hayward Industrial Lead previously extended from Trego in Washburn County to a location near Hayward in Sawyer County, WI. The segment between Hayward Junction and Hayward was acquired by Wisconsin Central Ltd. (WCL) pursuant to an acquisition exemption in Wisconsin Central Ltd.--Acquisition Exemption--Lines of Union Pacific Railroad Company, STB Finance Docket No. 33116 (STB served Apr. 17, 1997). WCL operates another rail line that connects to the acquired line at Hayward Junction. UP states that the line to be abandoned does not now connect to any UP rail line.

According to UP, there are no freight revenues or shippers on the line to justify the costs of operation and maintenance, which include the expense of maintaining 10 public road crossings. The only shipper on the line, Thilmany Pulp & Paper Company (Thilmany), located at Trego, ceased operations in May 1996, and no local traffic has moved over the line since that time.<sup>5</sup> There is no overhead traffic. The line is constructed of 90-pound rail, which UP intends to salvage and sell post-abandonment.

#### 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 expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will also foster sound economic conditions and encourage efficient management by permitting UP to avoid maintenance and operating costs on a line that is not being used and enabling it to deploy its assets more productively elsewhere on its system [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be affected adversely.

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<sup>4</sup>(...continued)

when good cause is shown. Because the late-filed requests have not delayed the proceeding and will not prejudice any party, we will accept the submissions.

<sup>5</sup> Thilmany used the line for shipments of pulpwood and shipped 484 carloads in 1994, 64 carloads in 1995, and 17 carloads in 1996.

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. 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 employees. Accordingly, as a condition to granting this exemption, we will impose the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979).

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 the data it contains, analyzed the probable effects of the proposed action on the quality of the human environment, and served an environmental assessment (EA) on December 5, 1997. In the EA, SEA indicated: (1) that the National Geodetic Survey (NGS) has identified one geodetic station marker that may be affected by the proposed abandonment; and (2) that the State Historical Society of Wisconsin has not completed its review of potentially historic sites and structures on the line. Therefore, SEA recommends that we impose conditions requiring UP to: (1) notify the NGS at least 90 days prior to engaging in any activities that would disturb or destroy the geodetic marker identified on the line; and (2) retain its interest in and take no steps to alter any sites and structures on the line that are 50 years old or older until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f.

No comments to the EA were filed by the January 2, 1998 due date. We will impose the conditions recommended by SEA. Based on SEA's recommendations, we conclude that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

WisDNR/DOT requests a NITU under 16 U.S.C. 1247(d) and 49 CFR 1152.29. WisDOT states that WisDNR will use or preserve the land corridor and related real property for interim public transportation and recreational purposes (including highway, pedestrian and other trail uses), subject to restoration for railroad purposes. WisDNR has 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 for rail service as required under 49 CFR 1152.29. By letter dated December 10, 1997, UP states that it is willing to negotiate for interim trail use. WisDNR/DOT's request complies with the requirements of 49 CFR 1152.29 and UP is willing to enter into negotiations. Therefore, we will issue a NITU for the described 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 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

The parties should note that operation of the trail use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in Rail Abandonments--Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 608 (1986) (Trails), 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 U.S.C. 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 use precluded. Alternatively, if a sale under the OFA procedures does not occur, trail use may proceed.

SEA has indicated in its EA that the right-of-way may be suitable for other public use after abandonment. As noted above, the County requests imposition of a 180-day public use condition precluding UP from disposing of the rail corridor and removing or destroying potential trail-related structures, such as bridges, trestles, culverts and tunnels. The County states that it is interested in acquiring the line intact for future rail use.<sup>6</sup>

We have determined that when the need for both a public use condition and a trail use condition is established, it is our policy to impose both conditions concurrently, subject to the execution of a trail use agreement. The County has met the public use criteria prescribed at 49 CFR 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, commencing with the effective date of this decision and notice. 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 potential purchaser. Rather, it provides 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 the County, but may engage in negotiations with other interested persons.

It is ordered:

1. The late-filed requests for a NITU under 49 U.S.C. 1247(d) and for a public use condition under 49 U.S.C. 10905 are accepted.

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<sup>6</sup> While the County states that it is interested in acquiring the line intact for future rail use, we do not normally prohibit a carrier from removing track and track materials in imposing a public use condition. Nor does the County make such a request. Accordingly, we will impose the standard condition which only prohibits UP from removing structures such as bridges, trestles, culverts and tunnels during the 180-day period.

2. 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 in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979), and the conditions that: (1) UP shall leave intact all of the right-of-way, including bridges, trestles, culverts and tunnels (but not track and track materials) for a period of 180 days from the effective date of this decision and notice, to enable any state or local government agency or any other interested person to negotiate the acquisition of the line for public use; (2) comply with the interim trail use/rail banking procedures set forth below; (3) notify the NGS at least 90 days prior to engaging in any activities that would disturb or destroy the geodetic marker identified on the line; and (4) retain its interest in and take no steps to alter any sites and structures on the line that are 50 years old or older until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f.

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 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 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 above are met.

7. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by January 26, 1998, 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 the filing fee, which currently is set at \$900. 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 February 15, 1998. Petitions to stay must be filed by January 26, 1998, and petitions to reopen must be filed by February 5, 1998.

10. Pursuant to the provisions of 49 CFR 1152.29(e)(2), UP shall file 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 January 16, 1999, 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 Morgan and Vice Chairman Owen.

Vernon A. Williams  
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imposition of labor protective conditions. We will grant the exemption subject to trail use, public use, environmental and standard employee protective conditions.

#### BACKGROUND

UP states that the Hayward Industrial Lead previously extended from Trego in Washburn County to a location near Hayward in Sawyer County, WI. The segment between Hayward Junction and Hayward was acquired by Wisconsin Central Ltd. (WCL) pursuant to an acquisition exemption in Wisconsin Central Ltd.--Acquisition Exemption--Lines of Union Pacific Railroad Company, STB Finance Docket No. 33116 (STB served Apr. 17, 1997). WCL operates another rail line that connects to the acquired line at Hayward Junction. UP states that the line to be abandoned does not now connect to any UP rail line.

According to UP, there are no freight revenues or shippers on the line to justify the costs of operation and maintenance, which include the expense of maintaining 10 public road crossings. The only shipper on the line, Thilmany Pulp & Paper Company (Thilmany), located at Trego, ceased operations in May 1996, and no local traffic has moved over the line since that time.<sup>5</sup> There is no overhead traffic. The line is constructed of 90-pound rail, which UP intends to salvage and sell post-abandonment.

#### 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 expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will also foster sound economic conditions and encourage efficient management by permitting UP to avoid maintenance and operating costs on a line that is not being used and enabling it to deploy its assets more productively elsewhere on its system [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be affected adversely.

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<sup>4</sup>(...continued)

when good cause is shown. Because the late-filed requests have not delayed the proceeding and will not prejudice any party, we will accept the submissions.

<sup>5</sup> Thilmany used the line for shipments of pulpwood and shipped 484 carloads in 1994, 64 carloads in 1995, and 17 carloads in 1996.

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. 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 employees. Accordingly, as a condition to granting this exemption, we will impose the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979).

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 the data it contains, analyzed the probable effects of the proposed action on the quality of the human environment, and served an environmental assessment (EA) on December 5, 1997. In the EA, SEA indicated: (1) that the National Geodetic Survey (NGS) has identified one geodetic station marker that may be affected by the proposed abandonment; and (2) that the State Historical Society of Wisconsin has not completed its review of potentially historic sites and structures on the line. Therefore, SEA recommends that we impose conditions requiring UP to: (1) notify the NGS at least 90 days prior to engaging in any activities that would disturb or destroy the geodetic marker identified on the line; and (2) retain its interest in and take no steps to alter any sites and structures on the line that are 50 years old or older until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f.

No comments to the EA were filed by the January 2, 1998 due date. We will impose the conditions recommended by SEA. Based on SEA's recommendations, we conclude that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

WisDNR/DOT requests a NITU under 16 U.S.C. 1247(d) and 49 CFR 1152.29. WisDOT states that WisDNR will use or preserve the land corridor and related real property for interim public transportation and recreational purposes (including highway, pedestrian and other trail uses), subject to restoration for railroad purposes. WisDNR has 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 for rail service as required under 49 CFR 1152.29. By letter dated December 10, 1997, UP states that it is willing to negotiate for interim trail use. WisDNR/DOT's request complies with the requirements of 49 CFR 1152.29 and UP is willing to enter into negotiations. Therefore, we will issue a NITU for the described 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 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

The parties should note that operation of the trail use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in Rail Abandonments--Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 608 (1986) (Trails), 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 U.S.C. 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 use precluded. Alternatively, if a sale under the OFA procedures does not occur, trail use may proceed.

SEA has indicated in its EA that the right-of-way may be suitable for other public use after abandonment. As noted above, the County requests imposition of a 180-day public use condition precluding UP from disposing of the rail corridor and removing or destroying potential trail-related structures, such as bridges, trestles, culverts and tunnels. The County states that it is interested in acquiring the line intact for future rail use.<sup>6</sup>

We have determined that when the need for both a public use condition and a trail use condition is established, it is our policy to impose both conditions concurrently, subject to the execution of a trail use agreement. The County has met the public use criteria prescribed at 49 CFR 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, commencing with the effective date of this decision and notice. 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 potential purchaser. Rather, it provides 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 the County, but may engage in negotiations with other interested persons.

It is ordered:

1. The late-filed requests for a NITU under 49 U.S.C. 1247(d) and for a public use condition under 49 U.S.C. 10905 are accepted.

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<sup>6</sup> While the County states that it is interested in acquiring the line intact for future rail use, we do not normally prohibit a carrier from removing track and track materials in imposing a public use condition. Nor does the County make such a request. Accordingly, we will impose the standard condition which only prohibits UP from removing structures such as bridges, trestles, culverts and tunnels during the 180-day period.

2. 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 in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979), and the conditions that: (1) UP shall leave intact all of the right-of-way, including bridges, trestles, culverts and tunnels (but not track and track materials) for a period of 180 days from the effective date of this decision and notice, to enable any state or local government agency or any other interested person to negotiate the acquisition of the line for public use; (2) comply with the interim trail use/rail banking procedures set forth below; (3) notify the NGS at least 90 days prior to engaging in any activities that would disturb or destroy the geodetic marker identified on the line; and (4) retain its interest in and take no steps to alter any sites and structures on the line that are 50 years old or older until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f.

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 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 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 above are met.

7. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by January 26, 1998, 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 the filing fee, which currently is set at \$900. 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 February 15, 1998. Petitions to stay must be filed by January 26, 1998, and petitions to reopen must be filed by February 5, 1998.

10. Pursuant to the provisions of 49 CFR 1152.29(e)(2), UP shall file 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 January 16, 1999, 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 Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary