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SERVICE DATE - AUGUST 23, 2002

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-33 (Sub-No. 167X)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT AND DISCONTINUANCE
EXEMPTION—IN COOK COUNTY, IL

Decided: August 21, 2002

By petition filed on May 7, 2002,¹ Union Pacific Railroad Company (UP) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903² to abandon a 1.04-mile portion of a line of railroad, known as the Skokie Industrial Lead (the line), extending from milepost 12.60 south of Oakton Street to the north side of Dempster Street at milepost 13.64 (South Segment), and to discontinue service over an 8.06-mile portion of the line from milepost 13.64 to milepost 21.70 near Northfield (North Segment), a total distance of 9.10 miles, in Cook County, IL.³ A request for imposition of a public use condition and issuance of a notice of interim trail use (NITU) for the South Segment was filed by the Village of Skokie (the Village). We will grant the exemption, subject to public use, trail use, environmental, and standard employee protective conditions.

¹ Notice of the filing was served and published in the Federal Register on May 24, 2002 (67 FR 36668-69).

² UP's petition states that it seeks exemption from the provisions of 49 U.S.C. 10903-05, thus evidently including exemption from the offer of financial assistance (OFA) requirements of 49 U.S.C. 10904 and the public use requirements of 49 U.S.C. 10905. UP has not submitted evidence to establish that the proposed exemptions from sections 10904 and 10905 meet the criteria of 49 U.S.C. 10502. Therefore, its request as to those two provisions will not be considered.

³ In Union Pacific Railroad Company—Discontinuance of Service—In Cook County, IL, STB Docket No. AB-33 (Sub-No. 167) (STB served Mar. 28, 2001), UP was granted a waiver of certain regulations requiring the filing of specific information in a discontinuance of service application. UP has elected instead to file this petition for exemption seeking to abandon the South Segment and to discontinue service on the North Segment. UP seeks to use the waiver only for the North Segment.

BACKGROUND

The South Segment of the line was constructed by the Chicago Northern Railway (CNR) as part of an extended freight bypass route between Mayfair in Chicago, where it connected with the Chicago and North Western Railway's (C&NW) Chicago-Harvard, IL line, and Valley, IL, where it connected with one of C&NW's lines to Milwaukee, WI. The line was placed in service in 1903, and in the same year, CNR was merged into C&NW. The North Segment of the line was constructed by the Chicago North Shore and Milwaukee Railway (CNS&M) and began service in 1926. Originally, it was a double-track line and was part of an electric route from Chicago to Milwaukee.

In 1963, the line was abandoned.⁴ Following abandonment, the North Segment was acquired by C&NW, which used it to relocate operations from its parallel freight line in Chicago (the 1903 CNR route north of Dempster Street). C&NW subsequently removed one of the CNS&M double tracks. The line was used for both local and through train service until 1988 when the through trains were rerouted. Afterwards, the line was used solely for local service to on-line industries. The portion of the freight by-pass route running south from Oakton Street was abandoned in 1989.⁵

There is only one shipper on the line, Crafty Beaver Home Centers (Crafty Beaver), which operates a hardwood and lumber store at the southern end of the South Segment at Oakton Street. Crafty Beaver does not oppose the abandonment. During the base year from November 1, 2000 through October 31, 2001 (the last month that UP served the line), UP handled 33 carloads of lumber and plywood for Crafty Beaver. UP states that in the past 2 years, there has been no overhead traffic and no revenue generated on the line, and that, in the future, any potential overhead traffic can be diverted through another junction of the system. According to UP, continued operation of the line will result in an operating loss of \$54,585 during the base year and \$51,305 for the forecast year (April 1, 2002 through March 31, 2003). UP asserts that, based on historical and current traffic, there is no prospect that traffic in the future will make the line a viable operation.

UP indicates that following abandonment and discontinuance of the respective portions of the line, it intends to salvage the track structure on the South Segment and dispose of the underlying real estate. UP intends to rail bank the North Segment, leaving the tracks and bridges in place, and retaining its interest in the underlying right-of-way. The only salvage activity contemplated on the North Segment is that grade crossings may be removed or paved over as they require replacement or repair.

⁴ See Chicago N. S. & M. Ry. Abandonment of Entire Operation, 317 I.C.C. 191 and 363 (1962).

⁵ See Chicago and North Western Transportation Company—Abandonment Exemption—In Cook County, IL, Docket No. AB-1 (Sub-No. 193X) (ICC served Oct. 11, 1989).

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned or service discontinued without our 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 of 49 U.S.C. 10101. By minimizing the administrative expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. Moreover, an exemption will foster sound economic conditions and encourage efficient management by permitting UP to avoid the need to retain and operate a rail line that is not being used [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy are not affected adversely.

Regulation is not necessary to protect shippers from an abuse of market power. The only shipper that used the line does not oppose the abandonment and discontinuance. Nevertheless, to ensure that this shipper is informed of our action, we will require UP to serve a copy of this decision on Crafty Beaver within 5 days from the service date of this decision and certify to us that it has done so. Given our market power finding, we need not determine whether the proposed abandonment and discontinuance is limited in scope.

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, 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 action. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment, and served an environmental assessment (EA) on July 5, 2002. On July 12, 2002, an amended EA was served. In the amended EA, SEA noted the concerns of the Illinois State Historic Preservation Officer (SHPO) and the U.S. Department of Commerce, National Geodetic Survey (NGS), and recommends that conditions be imposed on any decision granting abandonment authority to alleviate the concerns of the SHPO and NGS. The conditions are: (1) UP shall retain its interest in the line until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f; and (2) UP must notify

NGS at least 90 days prior to commencement of any planned activities that will disturb or destroy the geodetic station marker (M 134) identified on the line in order to plan for its relocation.

No comments on the amended EA were filed by the August 12, 2002 due date. We will impose the conditions recommended by SEA. Accordingly, based on SEA's recommendation, we conclude that the proposed abandonment and discontinuance, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

On June 10, 2002, the Village filed a request for interim trail use/rail banking for the South Segment under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and 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 as required under 49 CFR 1152.29. By letter filed on July 15, 2002, UP indicates that it is willing to negotiate with the Village for interim trail use, but only for that portion of the right-of-way between milepost 12.81 and milepost 13.64.⁶ The Village'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 line segment between milepost 12.81 and milepost 13.64. 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 abandon the portion of the line between milepost 12.81 and milepost 13.64, 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.

SEA has indicated in its EA that the right-of-way may be suitable for other public use following abandonment. The Village also requests imposition of a 180-day public use condition on the line segment between milepost 12.60 and milepost 13.64, precluding UP from:

⁶ UP states that, by letter agreement dated March 20, 2002, it agreed to sell a small portion of the property from milepost 12.60 to milepost 12.81 to HCGK Trust, the owner of the adjacent property where Crafty Beaver is located. UP indicates that all terms and conditions for this sale have been negotiated with an expected closing to occur on or about September 1, 2002, which is contingent upon receiving, on or before the closing date, abandonment authority from the Board. By letter filed on July 29, 2002, UP states that the property that it intends to sell would not be needed for a trail and that the existing Village-owned parking lot would provide public access. However, the northwest corner of the property does not abut property owned by the Village. Therefore, the owner would have to grant an easement to the Village over a portion of the northwest corner of the property in order to obtain a contiguous trail over the entire lead with public access from Oakton Street. UP states that it understands that Crafty Beaver and the Village are in discussions concerning the use of this property.

(1) disposing of the rail corridor, other than the tracks, ties and signal equipment, except for public use on reasonable terms; and (2) removing or destroying potential trail-related structures such as bridges, trestles, culverts and tunnels. The Village states that the rail corridor would make an excellent recreational and bicycle/pedestrian transportation trail that would connect a major downtown residential and employment center with a Chicago Transit Authority rail station.

We have determined that persons who file under the Trails Act may also file for public use under 49 U.S.C. 10905. See Rail Abandonments—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986) Trails. When the need for both conditions is established, it is our policy to impose them concurrently, subject to the execution of a trail use agreement. The Village 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 will be imposed on the line segment from milepost 12.81 to milepost 13.64, commencing from the effective date of this decision and notice.⁷ 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 the 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 Village, but may engage in negotiations with other interested persons.

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 Trails, 2 I.C.C.2d at 608, an 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 or subsidized under the OFA procedures, the petition for exemption will be dismissed and trail use and public use precluded. Alternatively, if a sale or subsidy under the OFA procedures does not occur, the trail use and public use processes described above may proceed.

⁷ In light of UP's agreement to sell the portion of the property from milepost 12.60 to milepost 12.81 to HCGK Trust, that portion will be excluded from the public use condition.

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 of the South Segment and discontinuance of service over the North Segment by UP of the above-described line, subject to employee protective conditions in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), and subject to the conditions that UP shall: (1) retain its interest in the South Segment of the line until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f; (2) notify NGS 90 days prior to commencement of any planned activities that will disturb or destroy the geodetic station marker identified on the South Segment of the line in order to plan for its relocation; (3) leave intact all of the right-of-way between milepost 12.81 and milepost 13.64, 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 other interested person to negotiate the acquisition of the South Segment of the line for public use; and (4) comply with the terms and conditions for implementing interim trail use/rail banking procedures set forth below.

2. UP is directed to serve a copy of this decision on Crafty Beaver within 5 days after the service date of this decision and notice and to 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 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 South Segment of 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 August 30, 2002, 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 \$1,100. 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 September 22, 2002. Petitions to stay must be filed by September 9, 2002, and petitions to reopen must be filed by September 17, 2002.

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 South Segment of the line. If consummation has not been effected by UP’s filing of a notice of consummation by August 23, 2003, 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 Burkes.

Vernon A. Williams
Secretary