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SERVICE DATE – SEPTEMBER 15, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-33 (Sub-No. 266X)

UNION PACIFIC RAILROAD COMPANY–ABANDONMENT EXEMPTION–
IN MARICOPA COUNTY, AZ

Decided: September 10, 2008

By petition filed on May 28, 2008, 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 2.91-mile line of railroad known as the Litchfield Industrial Lead, extending from milepost 889.34 (Litchfield Junction) to milepost 892.25 (Litchfield Park) in Maricopa County, AZ. Notice of the filing was served and published in the Federal Register on June 17, 2008 (73 FR 34357). A request for imposition of a public use condition and issuance of a notice of interim trail use (NITU) was filed by the City of Goodyear, AZ (the City). We will grant the petition for exemption, subject to public use, environmental, and standard employee protective conditions.

BACKGROUND

According to UP, the 2.91-mile rail line it seeks to abandon was constructed in 1920 by the Arizona Eastern Railroad. UP states that the only customer it served on the line for the past 2 years, Dietrich Metal Framing (Dietrich), ceased receiving rail service over the line in October 2007, and that Dietrich's lease of its facility on the line terminated in April 2008. Since then, Dietrich has moved to a new facility located on a different UP line, and continues to receive rail service provided by UP.

UP estimates that it would cost \$964,645 just to rehabilitate to Federal Railroad Administration Class 1 standards the 1.15-mile segment of the line extending between Litchfield Junction and Dietrich, over which traffic has moved during the last 2 years. UP states that this amount would be too costly given that no traffic currently is moving over the line and that it appears unlikely to be used in the future. UP states that the rehabilitation of the remaining 1.75 miles of rail line that extends between Dietrich and Litchfield Park is not even included in that cost. UP notes that this portion of the line has not generated any traffic for more than 2 years and is in an advanced stage of deterioration. According to UP, there is no overhead traffic on the line, and there is no reasonable likelihood of a demand for service within the foreseeable future. Dietrich has not opposed the abandonment.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned 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. 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 foster sound economic conditions and encourage efficient management by relieving UP from the expense of maintaining a line that is no longer used and allowing UP to apply its assets more productively elsewhere on its rail system [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be adversely affected.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. Dietrich, the only shipper that has used the line in the recent past, has relocated its facility on a different UP line. There are no other prospects for future rail traffic. Nevertheless, to ensure that Dietrich is informed of our action, we will require UP to serve a copy of this decision on Dietrich within 5 days from its service date and to certify to us that it has done so. Given our market power finding, we need not determine whether the proposed abandonment 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 set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 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 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.

SEA served an environmental assessment (EA) on July 25, 2008, requesting comments by August 25, 2008. In the EA, SEA recommended that three conditions be imposed on any decision granting abandonment authority.

In the EA, SEA stated that the Arizona Department of Environmental Quality, Water Quality Division (AZ-DEQ), has indicated that the proposed abandonment would not result in adverse environmental impacts if the rail line remains or if it continues to operate under another company or as a public trail. However, if UP intends to physically remove the rail line, then the AZ-DEQ believes that the State's water quality laws and regulations would apply. The AZ-DEQ has requested that, if the rail line is to be salvaged, UP download the appropriate Construction

General Permit, Storm Water Pollution Prevention Plan checklist, and associated forms from AZ-DEQ's website. Accordingly, SEA has recommended that, prior to salvage, UP be required to consult with AZ-DEQ regarding the applicability of its water quality permitting requirements.

SEA also stated that the U.S. Department of Commerce, National Geodetic Survey (NGS), has advised that one geodetic station marker may be located in the area of the proposed abandonment. Therefore, SEA also recommended that UP be required to notify the NGS at least 90 days prior to beginning salvage activities in order to plan for the possible relocation of the geodetic station marker by NGS.

SEA stated that the Arizona State Parks, State Historic Preservation Officer (SHPO), has advised that UP's report should be revised to include National Register of Historic Places (National Register) evaluation of this historic property and a determination of effect for the proposed abandonment. The SHPO also has requested that UP complete a form required by its office for review. Because of the issues raised by the SHPO, SEA stated that further consultation should be required to determine if the line and/or any of its associated structures may be potentially eligible for listing on the National Register. Accordingly, SEA recommended that UP 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 (the Area of Potential Effect) eligible for listing or listed in the National Register until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f (NHPA). SEA also recommended that UP be required to report back to SEA 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 track and ties) until the section 106 process has been completed and the Board has removed this condition.

No comments on the EA were received by the August 25, 2008 due date. Therefore, we will impose the conditions recommended by SEA. Accordingly, based on SEA's recommendation, 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.

On July 15, 2008, the City submitted requests for issuance of a NITU and a public use condition for the 2.91-mile line. On August 6, 2008, UP submitted a response objecting to the City's requests. UP points out that the line abuts the eastern perimeter of the Phoenix Goodyear Airport, and also runs through an agricultural and industrial area, making trail use impractical. UP indicates that one potential purchaser has already expressed interest in acquiring a portion of the line's right-of-way and expects that additional parties will also seek to acquire segments. UP states that it is unwilling to negotiate for possible trail use. UP also contends that the City has not established the public importance of its requested public use condition. UP maintains that the line is not suitable for public use, but will negotiate with the City if required to do so by the Board.

The City's NITU's request will be denied. Rail banking/trail use is provided for under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act). Under the Trails Act, however, the trail use program is voluntary and consensual between the railroad and the trail user. See

49 CFR 1152.29; Citizens Against Rails to Trails v. STB, 267 F.3d 1144 (D.C. Cir. 2001); National Wildlife Federation v. I.C.C., 850 F.2d 694, 699-702 (D.C. Cir. 1988); Rail Abandonments—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 598 (1986) (Trails). Because UP has made it clear that it is unwilling to negotiate for possible trail use, the Board cannot impose such an arrangement on an unwilling party. See, e.g., Consolidated Rail Corporation—Abandonment Exemption—Lancaster and Chester Counties, PA, STB Docket No. AB-167 (Sub-No. 1095X) (STB served June 3, 2004).

The imposition of a public use condition does not require the carrier's consent. SEA found in its EA that, following abandonment and salvage of the line, the right-of-way may be suitable for other public use. The City requests imposition of a 180-day public use condition precluding UP from: (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 City states that the corridor would be used for recreational trails in accordance with local plans and that the corridor also would provide an important habitat for local wildlife. The City adds that it needs the entire 180 days from the effective date of the abandonment authorization because it has not had the opportunity to gather and review title information, complete a trail plan or begin negotiations with UP.

The City 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, commencing from the effective date of this decision, will be imposed on the line to be abandoned to enable any state or local government agency or other interested person to negotiate the acquisition of the line for public use. 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 negotiate to acquire the right-of-way that has been found suitable for public purposes. Therefore, with respect to the public use condition, UP is not required to deal exclusively with the City, but may engage in negotiations with other interested persons.

The parties should note that operation of the public 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, offers of financial assistance (OFA) to acquire rail lines for continued rail service or to subsidize rail operations take priority over public use. Accordingly, if an OFA is timely filed under 49 CFR 1152.27(c)(1), the effective date of this decision 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 public use precluded. Alternatively, if a sale under the OFA procedures does not occur, the public use processes may proceed.

It is ordered:

1. The City's request for issuance of a NITU is denied.

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 set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), and subject to the conditions that UP shall (1) leave intact all of the right-of-way, including bridges, trestles, culverts tunnels, and other potential trail-related structures (except track, ties, and signal equipment), for a period of 180 days from the effective date of this decision, to enable any state or local government agency or any other interested person to negotiate the acquisition of the line for public use; (2) prior to salvage, consult with AZ-DEQ regarding the applicability of its water quality permitting requirements; (3) notify the NGS at least 90 days prior to beginning salvage activities in order to plan for the possible relocation of the geodetic station marker by NGS; and (4)(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 listed in the National Register until completion of the section 106 process of the NHPA, (b) report back to SEA regarding any consultations with the SHPO and the public, and (c) be prohibited from filing its consummation notice or initiating any salvage activities related to abandonment (including removal of track and ties) until the section 106 process has been completed and the Board has removed this condition.

3. UP is directed to serve a copy of this decision on Dietrich within 5 days after the service date of this decision and to certify to the Board that it has done so.

4. 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 September 25, 2008, 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 \$1,500. See 49 CFR 1002.2(f)(25).¹

5. 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.”**

6. Provided no OFA has been received, this exemption will be effective on October 15, 2008. Petitions to stay must be filed by September 30, 2008, and petitions to reopen must be filed by October 10, 2008.

7. 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 line. If consummation has not been effected by UP's filing of a notice of

¹ Effective July 18, 2008, the filing fee for an OFA increased to \$1,500. See Regulations Governing Fees for Services Performed in Connection with Licensing and Related Services – 2008 Update, STB Ex Parte No. 542 (Sub-No. 15) (STB served June 18, 2008).

consummation by September 15, 2009, 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 Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary