

SERVICE DATE – JUNE 26, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 33 (Sub-No. 255)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT—IN CARVER AND
SCOTT COUNTIES, MINN.

Digest:¹ This decision denies a petition filed by the National Association of Reversionary Property Owners to reopen this proceeding and revoke the certificate of interim trail use covering a rail line of Union Pacific Railroad Company in Carver and Scott Counties, Minn.

Decided: June 25, 2019

On February 28, 2019, the National Association of Reversionary Property Owners (NARPO) filed a petition to reopen this proceeding and revoke the certificate of interim trail use (CITU) covering a rail line of Union Pacific Railroad Company (UP) for which an interim trail use/rail banking agreement was reached in 2011. On March 20, 2019, UP filed a reply in opposition to NARPO's petition. This decision denies NARPO's petition to reopen this proceeding and revoke the CITU.

BACKGROUND

On December 13, 2007, UP filed an application under 49 U.S.C. § 10903 to abandon its Chaska Industrial Lead, extending from milepost 38.6, in Merriam, to milepost 33.0, on the east side of Chaska, a distance of 5.6 miles, in Carver and Scott Counties, Minn. (the Line). Notice of the application was served and published in the Federal Register on January 2, 2008 (73 Fed. Reg. 224).

By decision served on April 1, 2008, the Board granted UP's application for abandonment of the Line, subject to trail use, public use, environmental, historic preservation, and standard employee protective conditions. For the trail use condition, that decision issued a CITU, authorizing a 180-day period to negotiate an interim trail use/rail banking agreement for the Line, which was subsequently extended several times. The public use condition expired in October 2008. By decision served on September 2, 2010, the Board removed the historic

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

preservation condition and authorized UP to remove the Minnesota River Bridge and the Main Street Bridge (collectively, the bridges), both located near milepost 36.17.² In addition, the Board authorized UP to abandon the portion of the right-of-way between milepost 38.6 and milepost 38.0,³ subject to meeting the outstanding conditions imposed in the April 2008 decision. In the same decision, the Board extended the CITU negotiating period for the portion of the Line between milepost 38.0 and milepost 33.0, excluding the bridges. By letter filed on September 9, 2010, UP stated that it had consummated the abandonment of the portion of the right-of-way between milepost 38.6 and milepost 38.0, as well as the portion of the right-of-way where the bridges are located, near milepost 36.17.

By letters filed on November 4, 2011, and November 7, 2011, UP and Carver County, Minn., respectively, notified the Board that they had reached an interim trail use/rail banking agreement on October 21, 2011, for the remaining segment of the Line.

In its petition to reopen this proceeding and revoke the CITU, NARPO argues that, because the Line was stub-ended with no rail link at milepost 33.0, UP's abandonment of the segment between mileposts 38.6 and 38.0 disconnected the remaining segment of the Line from the national rail system. (NARPO Pet. 2.) According to NARPO, for a CITU to be valid, the rail line subject to the CITU must be connected to the national rail system. (NARPO Pet. 2 (citing RLTD Ry. v. STB, 166 F.3d 808, 814 (6th Cir. 1999)).)

On March 20, 2019, UP filed its reply in opposition to NARPO's petition, arguing that NARPO failed to meet the Board's standard for reopening. (UP Reply 2, March 20, 2019.) UP argues that NARPO failed to present any new evidence, substantially changed circumstances, or material error that would mandate a different result in the decision being challenged. (Id. at 3.) UP also argues that, even though it consummated abandonment from milepost 38.6 to milepost 38.0, UP maintains a connection between milepost 38.0 and its main line track via property and track still owned and operated by UP. (Id. at 4-5.) UP argues that the 0.6 miles of track from milepost 38.6 to milepost 38.0 is excepted track under 49 U.S.C. § 10906, and UP uses that 0.6-mile segment for storing cars and switching activities. (Id. at 2, 4-5.) According to UP, the 0.6-mile segment would connect the remaining segment of the Line to the national rail network if rail service were to be reactivated. (Id. at 4.) With respect to the abandonment near milepost 36.17, the location of the bridges, UP asserts that, under the interim trail use/rail banking agreement, UP included a provision explicitly reserving the ability to replace the bridges in the event rail service were reactivated on the remaining segment of the Line. (Id. at 5.) UP

² As the Board explained, UP had argued that the bridges, if left in place, exposed the surrounding area to flooding hazards in the spring thaw season. Additionally, certain of the potential trail sponsors informed the Board that the bridges were structurally deficient and in danger of collapse, and represented that a future trail use agreement with UP would address replacement of the bridges should rail service be reactivated in the future.

³ This portion of the Line was not included in an August 17, 2010 request to extend the CITU negotiating period.

argues that the Board recognized the validity of such a provision when it modified the CITU to allow for abandonment of the bridges. (Id.)

Also on March 20, 2019, NARPO filed a reply to UP's reply, arguing that the Board's alleged failure to note how UP's abandonment of the segment between mileposts 38.6 and 38.0 affected the CITU constitutes changed circumstances and new evidence.⁴ (NARPO Reply 3.)

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 1322(c) and 49 C.F.R. § 1115.4, the Board may reopen a proceeding because of "material error, new evidence, or substantially changed circumstances." The alleged grounds must be sufficient to convince the Board that its prior decision in the case would be materially affected in order for reopening to be granted. See Montezuma Grain v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003); Canadian Nat'l Ry.—Control—EJ&E W. Co., FD 35087 (Sub-No. 8), slip op. at 4 (STB served Dec. 21, 2018).

NARPO has failed to present any new evidence or changed circumstances that would require reopening this proceeding. Furthermore, although not specifically raised by NARPO, the Board finds no material error.

The Board's role under the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d), is limited. See Citizens Against Rails to Trails v. STB, 267 F.3d 1144, 1149-50 (D.C. Cir. 2001); Goos v. ICC, 911 F.2d 1283 (8th Cir. 1990). The Board's responsibility when a request for a CITU is filed is to confirm that the trail sponsor agrees to assume, during the interim trail use, full responsibility for the management of the rights-of-way and for any associated legal liability and taxes and acknowledges that the rights-of-way are subject to possible future restoration or reconstruction for railroad purposes. 16 U.S.C. § 1247(d); 49 C.F.R. § 1152.29(a)(3). The Board has authority to revoke a trail condition upon a showing that the statutory requirements are not being met (e.g., the Trails Act was not available or the trail sponsor is not meeting its financial obligations for the property and its use as a trail). See Norfolk & W. Ry.—Aban. Exemption—Between Kokomo & Rochester in Howard, Miami, & Fulton Ctys., Ind., AB 290 (Sub-No. 168X), slip op. at 5 (STB served May 4, 2005); see also Goos, 911 F.2d at 1295-96.

The Board disagrees with NARPO's claim that the CITU is not valid because the remaining segment of the Line is allegedly no longer connected to the national rail network as a result of UP's abandonment of the segment between mileposts 38.6 and 38.0. While NARPO argues that the remaining segment of the Line has been disconnected from the national rail network as in RLTD Railway, the Board finds that NARPO has not made such a showing in this

⁴ Under 49 C.F.R. § 1104.13(c), a reply to a reply is not permitted. However, in the interest of a more complete record, the Board will accept NARPO's March 20, 2019 reply into the record.

case, as the facts in this matter differ significantly from RLTD Railway. Here, UP states that, although it consummated abandonment over the segment of the Line between mileposts 38.6 and 38.0, UP retains ownership of that segment, reclassified as excepted track, and uses it for storing cars and switching activities. See 49 U.S.C. §§ 10501(b), 10906 (providing that while the Board does not have licensing authority over “spur, industrial, team, switching, or side tracks,” the Board’s jurisdiction over such excepted track remains “exclusive”). If rail service were to be reactivated on the remaining segment of the Line, the segment between mileposts 38.6 and 38.0 would provide access to the national rail network. See Norfolk & W. Ry., slip op. at 10-11 (“[T]he reclassification of this track as industrial track would not mean that the track would be removed from the interstate rail network or placed beyond the Board’s regulatory reach, nor that it could not be used in the future as a link for [a railbanked] segment to tie into the national rail system.”)

UP has also stated that, under the interim trail use/rail banking agreement, UP explicitly retained the ability to replace the bridges in the event rail service is reactivated on the remaining segment of the Line. Moreover, UP has provided for a connection of the remaining segment of the Line to the national rail network via the 0.6-mile segment. Therefore, the Board is not persuaded by NARPO’s argument that the CITU is not valid.⁵ See Burlington N. R.R.—Aban. Exemption—Between Klickitat & Goldendale, Wash., AB-6 (Sub-No. 335X), slip op. at 3-5 (STB served June 8, 2005) (finding that, despite the railroad selling certain property within the right-of-way for a portion of line authorized for abandonment, both the railroad and trail sponsor retained sufficient property interests to “serve as a link to the interstate rail network if active rail service on [the] rail banked line were to be restored”); cf. Norfolk & W. Ry., AB 290 (Sub-No. 168X), slip op. at 12 (noting the possibility that rail service could be restored over an abandoned segment should the property owner agree to “provide a connection . . . to the interstate rail network in the event rail service is restored”).

The Board will deny NARPO’s petition to reopen this proceeding. NARPO has not shown any material error, new evidence, or substantially changed circumstances. Furthermore, there is nothing in the record to suggest that the statutory requirements for interim trail use are not being met.

⁵ The Board’s findings here are based on the particular circumstances of this case. The Board need not, and does not, decide here whether any other connection between a line authorized for abandonment and the rest of the national rail system would suffice, or whether any connection is needed at all, to permit rail banking under the Trails Act.

It is ordered:

1. NARPO's March 20, 2019 reply is accepted into the record.
2. NARPO's petition to reopen this proceeding and revoke the CITU is denied.
3. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.