

SERVICE DATE – LATE RELEASE MARCH 29, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 33 (Sub-No. 336X)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT
EXEMPTION—IN DOUGLAS COUNTY, NEB.

Digest:¹ This decision allows Union Pacific Railroad Company to end its common carrier obligation to provide freight rail service over approximately 0.28 miles of rail line in Douglas County, Neb., subject to environmental conditions and standard employee protections.

Decided: March 29, 2019

On November 27, 2018, Union Pacific Railroad Company (UP) filed a petition under 49 U.S.C. § 10502 for an exemption from the prior approval requirements of 49 U.S.C. § 10903 to abandon an approximately 0.28-mile rail line known as the Omaha Belt Industrial Lead (the Line). The Line extends from milepost 485.55 near Grover Street to milepost 485.27, the point switch on the Wimmer Wye just west of Dahlman Avenue, all in Omaha, Douglas County, Neb. On December 17, 2018, the Board served and published notice of UP's petition in the Federal Register (83 Fed. Reg. 64,631).² No comments were filed in response to UP's petition. The Board will grant the exemption, subject to environmental and standard employee protective conditions.

BACKGROUND

UP seeks to abandon the Line and sell the track and property to Darling Ingredients (Darling), the only shipper on the Line. (Pet. 2.) Darling supports the proposed abandonment and plans to use the track and property to support an expansion of its facility. (*Id.* at 2-3 & Ex. 2.) Following the proposed abandonment, UP will continue to provide common carrier rail service to the Darling facility, as the track will still connect directly with UP. (*Id.* at 3, 5 & Ex. 2.) UP states that it will continue to access the track to pick up loaded trains and drop off

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

² The Board's notice provided that a final decision would be issued by March 15, 2019, 110 days after the petition was filed. However, because of the partial shutdown of the Federal government from December 22, 2018, to January 25, 2019, the Board's environmental review process and the issuance of a final decision were delayed.

empty cars. (*Id.* at 5.) UP also represents that it will retain an easement over the property to maintain connectivity with a right of way currently under a notice of interim trail use issued in Missouri Pacific Railroad—Abandonment Exemption—in Douglas County, Neb., Docket No. AB 3 (Sub-No. 138X).³ (*Pet.* 3; see also *id.* at Ex. 4, Combined Env'tl. & Historic Report, at 2.)

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10903, a rail line may not be abandoned without the Board's prior approval. Under 49 U.S.C. § 10502, however, the Board must exempt a transaction or service from regulation when it finds that: (1) continued regulation is not necessary to carry out the rail transportation policy (RTP) 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 of the proposed abandonment under 49 U.S.C. § 10903 is not necessary to carry out the RTP in this case. Darling, the Line's only shipper, supports the proposed abandonment and plans to use the property to support an expansion of its plant. Granting an exemption would expedite regulatory decisions and reduce regulatory barriers to exit. See 49 U.S.C. § 10101(2), (7). Other aspects of the RTP would not be adversely affected.

Regulation of the proposed abandonment is also not necessary to protect shippers from the abuse of market power.⁴ As previously stated, Darling, the only shipper on the Line, supports the proposed abandonment and is working towards an agreement to purchase the track and property from UP. Once UP has abandoned the Line, UP will continue to have a common carrier obligation to provide rail service to the Darling facility. (See *Pet.* 5 & Ex. 2.)

The Board will not consider offers of financial assistance (OFA) in this case because no formal expressions of intent to file an OFA were filed by the February 4, 2019 deadline.⁵ See 49 C.F.R. § 1152.27(c)(1)(i).

³ UP refers to the right of way as being "currently under a Certificate of Interim Trail Use arising out of [Docket No. AB 3 (Sub-No. 138X)]." (*Pet.* 3.) A notice of interim trail use was issued in that docket on October 2, 1996. At the time, parties were not required to notify the Board when a trail use agreement was reached. That requirement, currently at 49 C.F.R. § 1152.29(h), was adopted by rule effective May 30, 2012. See Nat'l Trails Sys. Act & R.R. Rights-of-Way, EP 702 (STB served Apr. 30, 2012).

⁴ Because regulation of the proposed abandonment is not necessary to protect shippers from the abuse of market power, the Board need not determine whether the proposed abandonment is limited in scope.

⁵ The deadline for filing formal expressions of intent would have been December 27, 2018, but was extended to February 4, 2019, because of the partial shutdown of the Federal government. See Filings Submitted or Due to Be Submitted During Partial Fed. Gov't Shutdown, EP 751 (STB served Jan. 28, 2019).

Employee protection. Under 49 U.S.C. § 10502(g), the Board may not use its 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, the Board will impose on UP the employee protective conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho (Oregon Short Line), 360 I.C.C. 91 (1979).

Environmental review. UP submitted a combined environmental and historic report with its petition and notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the environmental impacts of the proposed abandonment. See 49 C.F.R. §§ 1105.7, 1105.8, 1105.11. The Board's Office of Environmental Analysis (OEA) has examined the report, verified the data it contains, and analyzed the potential effects of the proposed action on the quality of the human environment.

OEA issued an Environmental Assessment (EA) on February 15, 2019. Because UP states that Darling will continue to use the Line, and UP will provide service to Darling, OEA concluded that there would be no environmental impacts to transportation and safety, land use, energy, air, noise, biological resources, or water from any salvage-related activities. Nevertheless, OEA recommended that the Board impose two conditions on any decision granting abandonment authority, in the event that UP decides to salvage the Line. First, OEA recommended that UP be required to consult with the Nebraska Department of Environmental Quality (NDEQ) and comply with NDEQ's reasonable permitting requirements prior to salvage. Second, OEA recommended that UP be required to consult with the National Geodetic Survey (NGS) and notify NGS at least 90 days prior to beginning any salvage activities that will disturb or destroy any geodetic station markers. If Darling purchases the Line, these conditions would apply to Darling.⁶

Comments to the EA were due by March 18, 2019. In its Final EA, issued March 19, 2019, OEA notes that it received one comment from the Nebraska Regulatory Office of the U.S. Army Corps of Engineers (USACE). USACE commented that it is not presently involved in the proposed abandonment because there are no impacts to the waters of the United States. However, should future impacts to the waters of the United States be proposed, USACE requests that a permit application be submitted. OEA does not recommend any additional conditions and continues to recommend the two conditions discussed above. The Board agrees with OEA's analysis and recommendations and will, therefore, impose the conditions.

This action, as conditioned, will not significantly impact the quality of the human environment or the conservation of energy resources.

⁶ The Board has explained that salvage conditions remain in place as conditions that attach to the property and apply to salvage activities whenever they occur, even if salvage is conducted years later by a successor in interest. See, e.g., BNSF Ry.—Aban. Exemption—in L.A. Cty., Cal., AB 6 (Sub-No. 477X), slip op. at 8 n.13 (STB served Sept. 16, 2011); Union Pac. R.R.—Aban. Exemption—in Shelby Cty., Tenn., AB 33 (Sub-No. 258X), slip op. at 2 (STB served May 3, 2010).

It is ordered:

1. Under 49 U.S.C. § 10502, the Board exempts from the prior approval requirements of 49 U.S.C. § 10903 UP's abandonment of the Line, subject to the employee protective conditions set forth in Oregon Short Line and the conditions that UP: (1) consult with NDEQ and comply with NDEQ's reasonable permitting requirements prior to commencing salvage activities; and (2) consult with and notify NGS at least 90 days prior to beginning salvage activities that will disturb or destroy any geodetic station markers.

2. This exemption will be effective on April 28, 2019.

3. Petitions to reopen and stay the effectiveness of the exemption must be filed by April 15, 2019.

4. Pursuant to 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 March 29, 2020, 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 one-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, Board Members Begeman, Fuchs, and Oberman.