

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 33 (Sub-No. 297X)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT EXEMPTION—IN
LAFAYETTE COUNTY, MO.

Decided: March 29, 2011

In this decision, the Board is reopening the proceeding to impose environmental conditions and a public use condition.

Union Pacific Railroad Company (UP) filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon 2.91 miles of a line of railroad known as the Lexington Industrial Lead extending from milepost 246.49 near Myrick to milepost 243.58 near Lexington, in Lafayette County, Mo. Notice of the exemption was served and published in the Federal Register on February 18, 2011 (76 Fed. Reg. 9,634-35). The exemption was scheduled to become effective on March 22, 2010, unless stayed by the Board or unless a formal expression of intent to file an offer of financial assistance (OFA) under 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27(c)(2) was filed by February 28, 2011.

On February 28, 2011, Robert Alan Kemp, d/b/a Nevada Central Railroad (NCR), timely filed a formal expression of intent to file an OFA, in which NCR also requested UP to provide NCR with certain information regarding the line, including information prescribed in 49 C.F.R. § 1152.27(a).¹ The filing of the expression of intent automatically stayed the effective date of the exemption for 10 days, until April 1, 2011.²

Under the Board's regulations, OFAs are due 30 days after publication of the notice of exemption in the Federal Register (in this case, by March 18, 2011).³ However, the Board will entertain petitions to toll that 30-day deadline if a railroad fails to provide a potential OFA offeror promptly with the information the offeror has requested under 49 C.F.R. § 1152.27(a).⁴ In this case, any petition to toll was due by March 15, 2011.⁵ Here, no OFA or petition to toll

¹ On March 1, 2011, NCR filed corrections to its February 28 filing, and, on March 14, 2011, it filed a "Notice of Oral Stipulation" to its March 1 filing.

² 49 C.F.R. § 1152.27(c)(2)(i).

³ 49 C.F.R. § 1152.27(c)(2)(ii)(B). Because day 30 was Sunday, March 20, OFAs were due on Friday, March 18. See 49 C.F.R. § 1152.25(d)(4).

⁴ 49 C.F.R. § 1152.27(c)(2)(ii)(C).

⁵ See id.

has been filed. Therefore, the exemption in this proceeding is scheduled to become effective on April 1, 2011.

The Board's Office of Environmental Analysis (OEA) served an environmental assessment (EA) in this proceeding on February 25, 2011. In the EA, OEA notes that the Missouri Department of Transportation (MoDOT) commented that the railroad track within the area of the proposed abandonment is outdated and in need of replacement. MoDOT believes that the railroad is not likely to upgrade its track any time soon and therefore supports the proposed abandonment, particularly the City of Lexington's (City) public use and trail use requests, which will be discussed further below. MoDOT states that, to ensure safety, UP should be required to remove all rail appurtenances (warning devices, lights, paved road surfaces associated with grade crossings, and the bell system at crossing number 442627G) within the area of the proposed abandonment, particularly in the areas associated with at-grade crossings. MoDOT seeks to ensure that grade crossing warning devices are removed so that the public is not hampered or confused by rail crossing devices that are only partially removed. Accordingly, OEA recommends a condition requiring UP to consult with MoDOT regarding salvage and abandonment procedures prior to commencement of any salvage activities.

OEA also notes in the EA that the U.S. Department of Commerce, National Geodetic Survey (NGS) commented that there is 1 geodetic marker in the area of the proposed abandonment. Therefore, OEA recommends a condition requiring UP to consult with NGS and notify NGS at least 90 days prior to beginning salvage activities that could disturb or destroy any geodetic station marker.

Comments to the EA were due on March 14, 2011. No comments were received. Accordingly, the conditions recommended by OEA in the EA will be imposed.

In the EA, OEA states that the right-of-way might be suitable for other public use following abandonment and salvage of the line. On November 29, 2010, the City of Lexington (City) filed a letter dated November 22, 2010, requesting the issuance of a notice of interim trail use (NITU) for the entire line under the National Trails System Act, 16 U.S.C. § 1247(d) (Trails Act), and 49 C.F.R. § 1152.29, to negotiate with UP for acquisition of the right-of-way for use as a recreational trail. The letter included a statement of willingness to assume financial responsibility. See 49 C.F.R. § 1152.29(a).

The City's request for imposition of a NITU will be denied, for two reasons. First, UP has not filed any response indicating its willingness to negotiate for interim trail use. Because interim trail use negotiations under the Trails Act are consensual between the potential trail sponsor and the railroad, Rail Abans.—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 598 (1986), a NITU will not be issued absent the railroad's agreement. Second, the City's statement of willingness does not conform to the requirements of the Trails Act and the Board's regulations at 49 C.F.R. § 1152.29. Specifically, it includes a caveat that limits the City's assumption of legal liability "to the extent permissible by law" and fails to provide for the City's

indemnification of the railroad against potential liability. Those limitations are inconsistent with the Trails Act, which requires the potential trail sponsor to assume “full” responsibility for “any” legal liability arising out of the use of the right-of-way as a trail,⁶ and with the Board’s regulations, which require a sponsor that is immune from legal liability to indemnify the railroad against any potential liability.⁷ See Chesapeake R.R.—Certificate of Interim Trail Use and Termination of Modified Rail Certificate, FD 32609 (STB served Feb. 24, 2011).

In the same November 22 letter, the City also requested imposition of a public use condition under 49 U.S.C. § 10905. The City requests that UP be prohibited from disposing of the corridor, other than tracks, ties, and signal equipment, except for public use on reasonable terms, and that UP be barred from the removal or destruction of potential trail-related structures, such as bridges, trestles, culverts, and tunnels, for a 180-day period from the effective date of the exemption. The City’s justification for the 180-day period is that the corridor would make an excellent recreational trail and that conversion of the property to trail use is in accordance with local plans. The City states that the 180-day period is needed to review title information, complete a trail plan, and to complete negotiations with UP.

As an alternative to interim trail use under the Trails Act, the right-of-way may be acquired for public use as a trail under 49 U.S.C. § 10905. See Rail Abans.—Use of Rights-of-Way As Trails—Supplemental Trails Act Procedures, 2 I.C.C.2d 591, 609 (1986). Under § 10905, the Board may prohibit the disposal of rail properties that are proposed to be abandoned and are appropriate for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment.

To justify a public use condition, a party must set forth: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be effective; and (iv) justification for the imposition of the period of time requested. See 49 C.F.R. § 1152.28(a)(2). Because the City has met these requirements, a 180-day public use condition will be imposed, requiring UP to keep intact the right-of-way (including bridges, trestles, culverts, and tunnels) and to refrain from disposing of the corridor (other than tracks, ties, and signal equipment), commencing from the April 1, 2011 effective date of the exemption (until September 28, 2011).

A public use condition is not imposed for the benefit of any one potential purchaser, but rather to provide 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 City, but may engage in negotiations with other interested persons.

⁶ 16 U.S.C. § 1247(d).

⁷ 49 C.F.R. § 1152.29(a).

As conditioned, this decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened.
2. The effective date of the exemption in this proceeding is April 1, 2011.
3. The City's request for issuance of a NITU is denied.
4. Upon reconsideration, the notice served and published in the Federal Register on February 18, 2011, exempting the abandonment of the line described above, is modified to the extent necessary to permit public use negotiations for a period of 180 days commencing from the April 1, 2011 effective date of the exemption (until September 28, 2011), to enable any state or local government agency, or other interested person, to negotiate the acquisition of the line for public use. It also is subject to the conditions that UP shall: (1) consult with MoDOT regarding salvage and abandonment procedures prior to commencement of any salvage activities; and (2) consult with and notify NGS at least 90 days prior to beginning salvage activities that could disturb or destroy any geodetic station marker.
5. This decision is effective on its date of service.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.