

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

309014

DOCKET NO. FD 36501

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Public Record

**UNION PACIFIC RAILROAD COMPANY
CONSTRUCTION AND OPERATION EXEMPTION –
IN MARICOPA COUNTY, AZ**

**COMMENTS OF COMMERCIAL METALS COMPANY
ON “ANTICIPATORY DEMOLITION”**

In its decision served November 14, 2024, the Board solicited comments from interested parties on whether Union Pacific Railroad Company (“UP”) engaged in “anticipatory demolition” in violation of Section 110(k) of the National Historic Preservation Act (NHPA), 54 U.S.C. §306113. This question has been raised in the exemption proceeding initiated by UP for the proposed Pecos Industrial Rail Access and Train Expansion (PIRATE) rail line. Commercial Metals Company (“CMC”) recognizes, respects, and supports adherence to all federal regulations as the Board evaluates this issue, and CMC appreciates the opportunity to submit these comments.

“Anticipatory demolition” generally is established only if there is evidence of intentional destruction of historic or cultural resources designed to circumvent the historic review process.¹ Based upon CMC’s review of the publicly available documents, CMC is not aware of any evidence that UP intentionally destroyed historic resources or allowed such activities for the purposes of avoiding the historic review process. However, in the event the Board does find that UP engaged in anticipatory demolition, it should not be fatal to the proposed exemption. The Board can and

¹ See *Protect Our Parks, Inc. v. Buttigieg*, 2021 U.S. Dist. LEXIS 151806, *61-63, *aff’d* 39 F.4th 389 (7th Cir. 2022).

should issue the exemption and allow the project to proceed if it “determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant.” 36 C.F.R. § 800.9(c). Credible evidence of “anticipatory demolition,” would not justify a denial of the proposed exemption or an indefinite suspension of the environmental review process because such actions would indefinitely perpetuate the current lack of rail service and the associated adverse impacts on CMC, its workforce, and the surrounding community, none of which were involved in the construction activities of concern to the Board, and all of which have a pressing need for rail service. This new rail line will strengthen CMC’s operations in Arizona and will lower its inbound and outbound transportation costs, while also substantially reducing truck traffic and greenhouse gas emissions in the entire area. In the end, the community will be stronger economically and likely healthier if cargo can be shifted from the local roads and highways to the new rail line. Under 49 U.S.C. §10101(3), (4) and (7), these are all benefits that the Board should consider. Accordingly, given the significant benefits that the rail project will generate, CMC urges the Board to allow the project to proceed regardless of whether the Board finds that UP engaged in anticipatory demolition.

Additionally, in determining the magnitude of the “adverse effect” created by an applicant, the applicable mitigation measures must be taken into account. *See United States DOI v. FERC*, 876 F.3d 360, 366 (1st Cir. 2015). The Board must account for any avoidance, minimization, or mitigation of adverse effects when deciding how to proceed. *Id.*; *see also* 36 C.F.R. § 800.5(d)(2); 36 C.F.R. § 800.6(a) (directing agencies to “consult with [numerous parties] to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.”). CMC believes that UP has demonstrated that it is ready, willing, and able to implement reasonable mitigation measures.

CONCLUSION

CMC appreciates the opportunity to inform the Board of CMC's views on the anticipatory demolition question. In the end, CMC and the surrounding community will reap the greatest benefits from this new rail line. CMC respectfully requests that the Board avoid taking any action that blocks this needed project and thereby inflicts substantial harm on CMC and the community. CMC also respectfully requests that the Board allow the remainder of the environmental and historic review process for the rail project to proceed, regardless of whether the Board finds that UP engaged in anticipatory demolition.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December, 2024, a copy of the foregoing Comments Of CMC Metals Company On Anticipatory Demolition was served by email or first class mail on all parties of record on the service list in Finance Docket No. 36501.



Emily Guillaume