

SERVICE DATE – JANUARY 21, 2020

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 33 (Sub-No. 342X)

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

Digest:¹ This decision permits the abandonment of a 17.7-mile rail line in Jackson County, Mo., subject to environmental, trail use, and standard employee protective conditions.

Decided: January 17, 2020

On October 4, 2019, Union Pacific Railroad Company (UP) and Jackson County, Mo. (the County) (collectively, Petitioners), jointly filed a petition under 49 U.S.C. § 10502 for exemption from the prior approval requirements of 49 U.S.C. § 10903 to abandon the railroad line extending between milepost 288.3 and milepost 270.6 in Jackson County, Mo. (the Line). Notice of the petition was served and published in the Federal Register on October 24, 2019 (84 Fed. Reg. 57,143). As discussed below, the Board will grant the exemption, subject to environmental, trail use, and standard employee protective conditions.

BACKGROUND

In 2016, the County received authority through the Board's class exemption process at 49 C.F.R. § 1150.31 to acquire the Line from UP and operate it. See Jackson Cty., Mo.—Acquis. & Operation Exemption—Union Pac. R.R., FD 35982 (STB served Feb. 4, 2016). At that time, the County indicated that it planned to construct a recreational trail along the right-of-way but asserted that the trail would not be inconsistent with the provision of freight rail service, that numerous recreational trails run adjacent to active rail lines, and that the County had no plans to remove track for the trail. County Reply 4, 9, Jan. 19, 2016, Jackson Cty., Mo.—Acquis. & Operation Exemption—Union Pac. R.R., FD 35982.

In 2018, certain landowners, who own property adjacent to the Line, filed a petition to revoke the County's acquisition and operation exemption, claiming that the County's sole purpose in acquiring the Line was to build a recreational trail and circumvent the Board's procedures at 49 C.F.R. § 1152.29, which implement § 8(d) of the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d). Landowners Pet. 2-4, Oct. 22, 2018, Jackson Cty., Mo.—

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).

Acquis. & Operation Exemption—Union Pac. R.R., FD 35982. The Board granted the petition to revoke in July 2019, explaining that the County’s subsequent actions in removing track from the Line and constructing the trail directly on portions of the railbed itself were “no longer consistent with the acquisition exemption it invoked to acquire the Line.” Jackson Cty., Mo.—Acquis. & Operation Exemption—Union Pac. R.R. (July 2019 Decision), FD 35982, slip op. at 6 (STB served July 31, 2019).

Subsequently, the same landowners filed a “Motion for Adverse Abandonment and Injunctive and Declaratory Relief,” in which they noted that the County was continuing construction inside the right-of-way. See Landowners’ Mot. 1, Aug. 12, 2019, Jackson Cty., Mo.—Acquis. & Operation Exemption—Union Pac. R.R., FD 35982; id. at Ex. A. In November 2019, the Board directed the County to cease construction of any trail in the right-of-way, noting that unless and until the Board authorized the Line’s abandonment, a trail condition was imposed, and the Board was notified that an interim trail use/rail banking agreement had been reached, construction activities were unlawful. The Board also found the landowners’ motion for adverse abandonment to be procedurally improper and denied that request. See Jackson Cty., Mo.—Acquis. & Operation Exemption—Union Pac. R.R. (November 2019 Decision), FD 35982 (STB served Nov. 7, 2019).²

Prior to issuance of the Board’s November 2019 Decision, on October 4, 2019, the County and UP filed a petition in this docket seeking an abandonment exemption under 49 U.S.C. § 10502.³ Petitioners state that there are no shippers on the Line and that there has not been any rail traffic on the Line in more than 20 years. (Joint Pet. 6.) The County and UP indicate that, if the petition is granted, they intend to enter into an interim trail use/rail banking agreement pursuant to the Trails Act and 49 C.F.R. § 1152.29. (Id. at 8.) On October 11, 2019, Community Oversight Partner Services (COPS) filed a reply objecting to the petition on the grounds that the County and UP erred in seeking abandonment authority jointly.

On November 13, 2019, the County submitted a request for issuance of a notice of interim trail use or abandonment (NITU) providing time to negotiate an agreement for interim trail use/rail banking.⁴ COPS commented on the NITU request on November 12, 2019. On November 19, 2019, UP stated that it agrees to negotiate for interim trail use with the County.

² The same landowners, joined by other landowners, filed a motion for declaratory and injunctive relief on January 6, 2020, in Docket No. FD 35982. The motion, among other things, seeks a finding that UP’s late-2015 agreement to sell the Line to the County is null and void and that the County had no rights to assign to the Kansas City Area Transportation Authority. As the landowners concede, (Landowners’ Mot. 7), that motion has no bearing on this decision. Accordingly, the motion has been placed in a new sub-docket, Docket No. FD 35982 (Sub-No. 1), and will be addressed in a future decision.

³ Petitioners state that, in light of the July 2019 Decision, to avoid doubt on how to proceed, they filed the petition jointly. (Joint Pet. 4.)

⁴ In their petition for exemption, Petitioners indicate that the County would seek a certificate of interim trail use (CITU), (see Joint Pet. 8), but, because the parties are requesting an exemption, the proper mechanism is to seek a NITU.

COPS filed additional comments questioning the NITU request on November 21, 2019, and November 22, 2019.

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 needed 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. There have been no shippers on the Line for more than 20 years. (Joint Pet. 6.) There has also been no overhead traffic on the Line during that period. (*Id.* at 8.) Granting an exemption would expedite regulatory decisions, foster sound economic conditions in transportation, reduce regulatory barriers to exit, encourage efficient management of railroads, and provide for the expeditious handling of this proceeding. *See* 49 U.S.C. § 10101(2), (5), (7), (9), (15). Other aspects of the RTP would not be adversely affected.

Similarly, regulation of the proposed abandonment is not needed to protect shippers from the abuse of market power because, as discussed above, there are no shippers on the Line and no overhead traffic moves over the Line.⁵

In its October 11, 2019 objection to the petition, COPS notes that, in light of the Board's July 2019 Decision, the County and UP do not jointly own the Line. Here, UP is appropriately a party to the abandonment proceeding because it is the carrier of record on the Line following the Board's revocation of Jackson County's acquisition authority. *See Land Conservancy of Seattle & King Cty.—Acquis. & Operation Exemption—Burlington N. & Santa Fe Ry.*, FD 33389 et al., slip. op at 11 (STB served May 13, 1998) (substituting railroad for trail sponsor as party to abandonment proceeding following Board's revocation of trail sponsor's acquisition exemption). That Jackson County joined UP on the petition is no grounds for denial, as UP is properly before the Board as it is seeking authority to abandon the Line.

Offers of Financial Assistance. 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 November 4, 2019 deadline. *See* 49 C.F.R. § 1152.27(c)(1)(i).

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 the employee

⁵ Because regulation of the proposed abandonment is not needed to protect shippers from the abuse of market power, the Board need not determine whether the proposed transaction is limited in scope. *See* 49 U.S.C. § 10502(a)(2).

protections set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979).

Environmental Review. Petitioners submitted a combined environmental and historic report and notified the appropriate federal, state, and local agencies of the opportunity to submit information concerning the potential 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) issued a Draft Environmental Assessment (EA) for public review and comment on December 6, 2019, analyzing the potential environmental effects of the proposed abandonment. The Draft EA recommended that the Board impose three environmental conditions on any decision granting abandonment authority.

First, to address a concern of the Missouri State Historic Preservation Office (SHPO) about unanticipated discoveries of cultural resources during salvage activities, OEA recommended a condition requiring that, in the event that any unanticipated archaeological sites, human remains, funerary items or associated artifacts are discovered during salvage activities, Petitioners immediately cease all work and notify OEA, interested federally recognized tribes, and the SHPO pursuant to 36 C.F.R. § 800.13(b). OEA would then consult with the SHPO, interested federally recognized tribes, Petitioners, and other consulting parties, if any, to determine whether appropriate mitigation measures are necessary. (Draft EA 5.) Second, OEA determined that potential tree removal related to the culvert and bridge construction proposed by Petitioners could adversely affect three endangered or threatened bat species and recommended a condition requiring Petitioners, pursuant to Section 7 of the Endangered Species Act, 16 U.S.C. § 1535, to consult with OEA and the U.S. Fish and Wildlife Service (Missouri Ecological Services Field Office in Columbia, Mo.) to develop appropriate mitigation measures, if necessary. (Id. at 2-3.) The recommended condition provided that Petitioners may not file a consummation notice or initiate any salvage or construction activities related to abandonment (including removal of tracks and ties) until the Section 7 consultation process is complete and the Board has removed the condition. (Id. at 5.) Third, because salvage might entail bridge and culvert construction within waters of the United States, OEA recommended that, prior to commencement of any salvage activities, Petitioners be required to consult with the U.S. Army Corps of Engineers, Kansas City District (Corps) under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, and Section 10 of the Rivers and Harbor Act of 1899, 33 U.S.C. § 403, and comply with the Corps' reasonable requirements. (Id. at 3, 5.) Comments on the EA were due by January 3, 2020.

OEA issued its Final EA on January 10, 2020, noting that it received one comment from the Miami Tribe of Oklahoma (Miami Tribe). To address the Miami Tribe's concern about unanticipated discoveries, OEA recommends that the historic condition in the Draft EA be modified to specifically: (1) include Native American cultural items falling under the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001-3013, and (2) require that the Tribal Historic Preservation Officer of the Miami Tribe be notified. OEA recommends that the conditions recommended in the Draft EA, as modified in the Final EA, should be imposed upon any decision granting abandonment authority. OEA finds that, if the conditions are imposed, the proposed abandonment would not significantly affect the quality of the human environment. (Final EA 2.)

The Board's Analysis of Environmental Issues. The Board adopts the analysis and conclusions made by OEA. As such, the Board adopts the Draft EA (as modified by the Final EA) and Final EA, including the final recommended mitigation measures. The Board is satisfied that OEA has taken the requisite hard look at the potential environmental impacts associated with the Petitioners' proposed abandonment and properly determined that, with the recommended environmental mitigation in the Final EA, the proposed project will not have potentially significant environmental impacts, and that preparation of an EIS is unnecessary.

Interim trail use. As indicated above, the County filed a request for the issuance of a NITU for the Line under the Trails Act and 49 C.F.R. § 1152.29. The County has submitted a statement of willingness to assume full responsibility for the management of the right-of-way, for any legal liability arising out of the transfer or use of the right-of-way, and for the payment of any and all taxes that may be levied or assessed against the right-of-way, as required by 49 C.F.R. § 1152.29. The County has also provided a map and acknowledged that the use of the right-of-way for trail purposes is subject to the trail sponsor's continuing to meet its responsibilities described above and subject to possible future reconstruction and reactivation of the right-of-way for rail service. In its November 19, 2019 response, UP states that it agrees to negotiate for rail banking and interim trail use with the County.

In its November 12, 2019 comment, COPS suggests that Jackson County Executive Frank White, Jr., lacks authority to submit the statement of willingness on behalf of the County, but COPS does not substantiate that claim. Furthermore, to the extent that COPS' submission suggests that the request for interim trail use/rail banking is improper because it is not accompanied by a request for a public use condition under 49 U.S.C. § 10905, COPS is incorrect. There is nothing in the statute or regulations suggesting that a public use condition must be sought when a trail use request is filed; although sometimes sought together, the two processes arise from different statutory provisions, have their own distinct requirements, provide distinct relief, and may be requested independent of each other. See 16 U.S.C. § 1247(d); 49 U.S.C. § 10905; 49 C.F.R. §§ 1152.28, 1152.29; see also CSX Transp., Inc.—Aban. Exemption—in Cobb Cty., Ga., AB 55 (Sub-No. 784X) (STB served Nov. 5, 2019) (imposing trail condition where no public use condition sought); CSX Transp., Inc.—Aban. Exemption—in Fulton Cty., Ga., AB 55 (Sub-No. 777X) (STB served Feb. 6, 2018) (same).

COPS also claims that UP cannot consent to negotiate for interim trail use/rail banking because the County is the owner of the Line. (COPS Comment, Nov. 21, 2019.) However, because the Board revoked the County's acquisition and operation exemption in the July 2019 Decision, UP is the proper party to negotiate with a prospective trail sponsor (here, the County) under a NITU.

Because the County's request complies with the requirements of 49 C.F.R. § 1152.29 and UP agrees to negotiate, the Board will issue a NITU for the Line. The parties may negotiate an

agreement during the 180-day period prescribed below.⁶ If an interim trail use/rail banking agreement is reached (and thus interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. See 49 C.F.R. § 1152.29(d)(2) & (h). If no agreement is reached within 180 days, UP may fully abandon the Line, subject to any outstanding conditions. See 49 C.F.R. § 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service and to the trail sponsor's continuing to meet its responsibilities for the right-of-way.

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

It is ordered:

1. Under 49 U.S.C. § 10502, the Board exempts from the prior approval requirements of 49 U.S.C. § 10903 Petitioners' abandonment of the Line, subject to the employee protective conditions set forth in Oregon Short Line and the conditions set forth in the Final EA.

2. If an interim trail use/rail banking agreement is reached, it must require the trail sponsor to assume, for the term of the agreement, full responsibility for: (i) managing the right-of-way; (ii) any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability); and (iii) the payment of any and all taxes that may be levied or assessed against the right-of-way.

3. Interim trail use/rail banking is subject to possible future reconstruction and reactivation of the right-of-way for rail service and to the trail sponsor's continuing to meet its responsibilities for the right-of-way described in paragraph 2, above.

4. If an interim trail use/rail banking agreement is reached (and thus, interim trail use/rail banking is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. See 49 C.F.R. § 1152.29(d)(2), (h).

5. If interim trail use/rail banking is implemented, and subsequently the trail sponsor intends to terminate trail use on all or any portion of the right-of-way covered by the interim trail use/rail banking agreement, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

6. If an agreement for interim trail use/rail banking is reached by July 19, 2020, for the portion of the right-of-way subject to the NITU, interim trail use/rail banking may be implemented. If no agreement is reached, the Line may be fully abandoned, subject to any outstanding conditions.

⁶ The Board has modified its rules, effective February 2, 2020, regarding the number and duration of, and standard for granting, extensions of the NITU negotiating period, as well as the duration of the initial NITU negotiating period. See Limiting Extensions of Trail Use Negotiating Periods, EP 749 (Sub-No. 1) et al. (STB served Dec. 4, 2019).

7. The exemption will be effective February 20, 2020.

8. Petitions for stay are due by January 31, 2020, and petitions to reopen must be filed by February 10, 2020.

9. Pursuant to 49 C.F.R. § 1152.29(e)(2), Petitioners shall file a notice of consummation with the Board to signify that they have exercised the authority granted and fully abandoned the Line. If consummation has not been effected by Petitioners' filing of a notice of consummation by January 21, 2021, 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 the satisfaction, expiration, or removal of the legal or regulatory barrier.

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