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SERVICE DATE – APRIL 16, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 6 (Sub-No. 482X)

BNSF RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN COOK COUNTY,
ILL.

Docket No. AB 6 (Sub-No. 493X)

BNSF RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN COOK COUNTY,
ILL.

Docket No. AB 33 (Sub-No. 284X)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT EXEMPTION—IN KANE
COUNTY, ILL.

Docket No. AB 33 (Sub-No. 262X)¹

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT EXEMPTION—IN
FULTON AND PEORIA COUNTIES, ILL.

Digest:² This decision grants requests to extend notice of interim trail use or abandonment (NITU) negotiating periods in the above dockets by establishing an additional one-year transitional extension for certain existing NITUs.

Decided: April 15, 2021

In this decision, the Board will grant pending requests for extensions of the negotiating periods under the notices of interim trail use or abandonment (NITUs) in the four captioned dockets and will also establish, in light of the unprecedented disruptions caused by the COVID-19 pandemic, a new, one-year transitional extension that will be available, without a specific showing of “extraordinary circumstances,” in other cases where the next extension of a NITU or

¹ These proceedings are not consolidated. A single decision is being issued for administrative convenience.

² 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 Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

certificate of interim trail use (CITU) after the service date of this decision would otherwise require such a showing.

BACKGROUND

In each of the four captioned cases, the Board has received a request to extend a NITU negotiating period: Requests in Docket Nos. AB 6 (Sub-No. 482X) and AB 6 (Sub-No. 493X) were submitted on February 25, 2021, by the City of Chicago, Ill., acting by and through the Chicago Department of Transportation; a request in Docket No. AB 33 (Sub-No. 284X) was submitted by the City of St. Charles, Ill., on February 16, 2021; and a request in Docket No. AB 33 (Sub-No. 262X) was submitted by the Illinois Department of Natural Resources (IDNR) on April 1, 2021. In each case, the railroad that owns the line at issue—BNSF Railway Company in the two cases involving the City of Chicago and Union Pacific Railroad Company in the other two cases—has filed a reply stating that it consents to the extension request.

Effective February 2, 2020, the Board amended its rules regarding the number and duration of, and standard for granting, extensions of a NITU or CITU negotiating period. See Limiting Extensions of Trail Use Negotiating Periods (Limiting Extensions), EP 749 (Sub-No. 1) et al. (STB served Dec. 4, 2019). Under the new rules, parties wishing to extend their negotiating period are now limited to three one-year extensions beyond the initial one-year term, absent a showing of “extraordinary circumstances.” Id. at 11. For parties engaged in negotiations under an existing NITU or CITU that was originally issued before February 2, 2017 (i.e., more than three years before the effective date of the amended rules), the Board adopted a transitional measure, under which the potential trail sponsor could request one additional extension of one year (beyond the four-year anniversary of the issuance of the NITU or CITU) without having to show extraordinary circumstances. Id. Under the new rules, parties that requested a NITU or CITU before the new rules took effect but that are not eligible for the transitional measure would have to show extraordinary circumstances for any request that would extend the negotiating period to a date after the four-year anniversary of the issuance of the CITU or NITU. Id.

Each of the parties before the Board here previously qualified for, and was granted, the transitional one-year extension. In each case, the Board explained that, under the new rules, “any further extension request will require a showing of extraordinary circumstances.” Union Pac. R.R.—Aban. Exemption—in Fulton & Peoria Cntys., Ill., AB 33 (Sub-No. 262X), slip op. at 2 (STB served Apr. 22, 2020); BNSF Ry.—Aban. Exemption—in Cook Cnty., Ill., AB 6 (Sub-No. 482X), slip op. at 2 (STB served Mar. 24, 2020); BNSF Ry.—Aban. Exemption—in Cook Cnty., Ill., AB 6 (Sub-No. 493X), slip op. at 2 (STB served Mar. 19, 2020); Union Pac. R.R.—Aban. Exemption—in Kane Cnty., Ill., AB 33 (Sub-No. 284X), slip op. at 2 (STB served Mar. 3, 2020).

DISCUSSION AND CONCLUSIONS

At the time the Board granted the transitional one-year extension to the parties in these cases, the COVID-19 pandemic was in its early stages in the United States. Since then, and throughout the past year, the Board has received various filings seeking procedural extensions on the basis of the disruptions caused by the pandemic, which have been granted. See, e.g., Seven Cnty. Infrastructure Coalition—Constr. & Operation—in Utah, Carbon, Duchesne, & Uintah Cntys., Utah, FD 36284, slip op. at 1 (STB served Dec. 9, 2020); R.J. Corman R.R. Prop. LLC—Aban. Exemption—in Scott, Campbell, & Anderson Cntys. Tenn., AB 1296X, slip op. at 3-4 (STB served May 26, 2020). In the context of NITU negotiations specifically, IDNR, for example, states that complications arising from the pandemic have delayed grant awards by over six months and has caused “incredible difficulty in coordination of matters” such as finalizing a trail use agreement. (IDNR Extension Request 3-4, AB 33 (Sub-No. 262X).)

The Board finds that the unprecedented widescale economic and social disruptions caused by the pandemic over the past year warrant establishing an additional one-year transitional extension before parties will need to make a specific showing of “extraordinary circumstances” under the new rules. The Board acknowledges that not all cases, and certainly not all trail use negotiations, have been impacted by the pandemic such that an extension would be required.³ Nevertheless, given that the disruptions caused by the pandemic may be more acutely felt by local governments, which are frequently potential trail sponsors in NITU and CITU negotiations, the Board finds it appropriate to provide for an additional transitional one-year extension.⁴

³ For example, over the past 12 months, trail use agreements have been reached in over 10 proceedings. See, e.g., Notice, Feb. 12, 2021, Union Pac. R.R.—Aban. Exemption—in Kootenai Cnty., Idaho, AB 33 (Sub-No. 346X); Notice, Nov. 4, 2020, BNSF Ry.—Aban. Exemption—in Flathead Cnty., Mont., AB 6 (Sub-No. 495X).

⁴ Although the City of Chicago, in each of its requests, asserts that the pandemic and “episodes of social unrest” are extraordinary circumstances that have impaired its efforts to finalize a trail use agreement, (City of Chicago Request 2, AB 6 (Sub-No. 482X); City of Chicago Request 2, AB 6 (Sub-No. 493X)), it did not provide any specific evidence or explanation of how the pandemic or episodes of social unrest have delayed the negotiating process or the degree to which they have caused delays. See Limiting Extensions, EP 749 (Sub-No. 1), slip op. at 11. The City of St. Charles’ request does not even refer to the extraordinary circumstances standard. (City Extension Request 1, AB 33 (Sub-No. 284X).) Because the Board concludes that it is appropriate to provide an additional transitional year in this decision where parties to existing NITUs or CITUs would otherwise need to make a specific showing of “extraordinary circumstances” under the new rules, the Board is not requiring the City of Chicago or the City of St. Charles to now provide any additional information but emphasizes that

Accordingly, as discussed further below, the Board will grant the one-year extensions requested by the parties in these four cases. In addition, in light of the unprecedented effects of the pandemic over the past year, the Board will grant, upon request and with the consent of the involved railroad, one additional one-year extension of an existing NITU or CITU without a showing of “extraordinary circumstances” in cases involving a NITU or CITU for which the **very next** extension after the effective date of this decision would otherwise require a showing of “extraordinary circumstances.”⁵

The Board emphasizes that the additional one-year transitional extension does not apply to any cases other than those where the parties’ very next extension request would normally require a showing of “extraordinary circumstances” under the new rules. Thus, any other future extension request that would normally be required to demonstrate “extraordinary circumstances” under the new rules would have to meet that standard, as explained in Limiting Extensions. This standard will apply even where parties argue that the lingering effects of the pandemic have delayed completion of a trails use agreement. In its decision adopting changes to 49 C.F.R. § 1152.29, the Board explained that under the extraordinary circumstances standard, requests to extend the NITU or CITU negotiating period beyond four years “will not be favored.” Limiting Extensions, EP 749 (Sub-No. 1), slip op. at 8, 10; see also 49 C.F.R. § 1152.29(c)(1)(ii), (d)(1)(ii). The Board also provided examples of situations that might constitute extraordinary circumstances: in particular, “specific evidence that necessary financing is imminent or specific evidence of problems or complications demonstrably beyond the negotiators’ control that arise in connection with an unusually lengthy, multi-jurisdictional trail.” Limiting Extensions, EP 749 (Sub-No. 1), slip op. at 10-11. The Board further stated that issues within negotiators’ control, “such as insurance coverage, title review, appraisal issues, or personnel turnover,” would not likely constitute extraordinary circumstances. Id. at 11.

Where, as in the cases here, the carrier has not consummated the abandonment and is willing to continue trail use negotiations, the Board retains jurisdiction and the NITU negotiating period may be extended. Accordingly, and for the reasons explained above, the Board will grant the additional one-year extension requested in each of the four captioned dockets. The extensions granted here constitute the additional transitional one-year extension described above. The NITUs in these cases will not be eligible for any additional extensions absent a showing of “extraordinary circumstances” in accordance with the Board’s new rules. To be clear, “extraordinary circumstances” must be established by “specific facts” showing why the parties have been unable to finalize an agreement within the time previously allotted. Id. at 7, 10. Conclusory statements will not suffice. Accordingly, the Board emphasizes that any future

a showing of extraordinary circumstances would be required in any future extension request, as explained further below.

⁵ The Board waives 49 C.F.R. § 1152.29(c)(1)(ii) and 49 C.F.R. § 1152.29(d)(1)(ii) to the extent necessary to grant the additional one-year transitional extension in the four cases here and in future cases.

extension request in these dockets must provide specific evidence and argument to demonstrate why further extension would be warranted under the Board's rules.

It is ordered:

1. The City of Chicago's request for an extension of the NITU negotiating period in Docket No. AB 6 (Sub-No. 482X) is granted; the negotiating period is extended until February 19, 2022.
2. The City of Chicago's request for an extension of the NITU negotiating period in Docket No. AB 6 (Sub-No. 493X) is granted; the negotiating period is extended until March 6, 2022.
3. The City of St. Charles' request for an extension of the NITU negotiating period in Docket No. AB 33 (Sub-No. 284X) is granted; the negotiating period is extended until February 15, 2022.
4. IDNR's request for an extension of the NITU negotiating period in Docket No. AB 33 (Sub-No. 262X) is granted; the negotiating period is extended until March 30, 2022.
5. This decision is effective on its service date.

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