

SERVICE DATE – JULY 29, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 3 (Sub-No. 137X)

MISSOURI PACIFIC RAILROAD COMPANY—ABANDONMENT
EXEMPTION—IN RED RIVER AND BOWIE COUNTIES, TEX.

Digest:¹ The Board clarifies that a portion of the width of a railbanked right-of-way in Texas, which is not needed to permit the reactivation of rail service, is no longer part of the notice of interim trail use or abandonment.

Decided: July 27, 2021

BACKGROUND

By decision served and published in the Federal Register (61 Fed. Reg. 66,748) on December 18, 1996, the Board granted an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10903, authorizing the Missouri Pacific Railroad Company (MP) to abandon a rail line extending from milepost 23.0 at New Boston, in Bowie County, Tex., to the end of the track at milepost 61.5 near Clarksville, in Red River County, Tex., a distance of approximately 38.5 miles (the Line).² The exemption became effective on January 17, 1997.

By decision and notice of interim trail use or abandonment (NITU) served February 14, 1997, a 180-day period was authorized for the Rails-to-Trails Conservancy (RTC), as proposed trail sponsor, to negotiate with UP for interim trail use/rail banking of the Line's right-of-way under the National Trails System Act, 16 U.S.C. § 1247(d), and 49 C.F.R. § 1152.29. In a letter filed on July 16, 1997, UP notified the Board that it had conveyed the Line's right-of-way to RTC for interim trail use/rail banking effective July 3, 1997.

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

² MP subsequently merged with and into its corporate affiliate, Union Pacific Railroad Company (UP). See Union Pac. R.R.—Corp. Fam. Exemption—Mo. Pac. R.R., FD 33320 (STB served Jan. 15, 1997). In this decision, the abandoning railroad will be referred to as either MP or UP.

On July 1, 2005, at the joint request of RTC and Bowie County (County), a replacement NITU was issued substituting the County as the trail sponsor for the segment of the Line's right-of-way from milepost 23.0 to milepost 42.59 at the Red River County line.³

On July 27, 2011, the County filed a petition to partially vacate the NITU served on July 1, 2005, to terminate interim trail use/rail banking over a 50-foot-wide portion of the Line's right-of-way (measured from the northernmost edge of the right-of-way) between milepost 25.139 and milepost 34.429, a distance of 9.29 miles. (County Pet. 1, 4, July 27, 2011.) The County also requested authority to abandon the same 50-foot-wide portion of the Line's right-of-way. (*Id.* at 4.) According to the County, it planned to convey the 50-foot-wide portion to the Texas Department of Transportation (TxDOT) to improve a segment of U.S. Highway 82, which parallels the Line's right-of-way.⁴ (*Id.*, V.S. Goodwin 1-2.) On August 11, 2011, UP responded to the petition, stating that it concurred with the County's request and that the portion of the rail corridor scheduled to be sold to TxDOT would not adversely affect nor conflict with UP's ability to operate the remaining width of the corridor as a rail line, should the need arise. (UP Reply 2, Aug. 11, 2011.)

A decision served October 6, 2011 (2011 Decision), found that the County had demonstrated with adequate specificity that the remaining 50-foot-wide right-of-way would be adequate to permit future rail operations and noted that the County did not need to seek abandonment authority to sell the property. 2011 Decision, AB 3 (Sub-No. 137X), slip op. at 2

³ RTC continued as the trail sponsor for the remainder of the Line's right-of-way between milepost 42.59 and milepost 61.5. On April 18, 2007, at the joint request of RTC and the cities of Avery, Annona, and Clarksville in Red River County, a replacement NITU was issued substituting (1) Avery as the trail sponsor for the segment of the Line's right-of-way from milepost 42.59 to approximately milepost 49 (Engineering Station 2587+20); (2) Annona as the trail sponsor for the segment from approximately milepost 49 (Engineering Station 2587+20) to approximately milepost 56 (Engineering Station 2956+80); and (3) Clarksville as the trail sponsor for the segment from approximately milepost 56 (Engineering Station 2956+80) to milepost 61.5.

⁴ The County previously filed a petition to partially vacate the NITU served on July 1, 2005, to terminate interim trail use/rail banking over a 50-foot-wide portion of the Line's right-of-way from milepost 23.0 to milepost 42.59, a distance of 19.59 miles. By decision served May 16, 2007, the County was directed to provide a more detailed discussion of why the remaining 50 feet of right-of-way would be adequate to accommodate trail use and permit future rail service, as the County's petition included only a "conclusory statement" to that effect. Mo. Pac. R.R.—Aban. Exemption—in Red River & Bowie Cntys., Tex., AB 3 (Sub-No. 137X), slip op. at 2 (STB served May 16, 2007). After the County filed a supplement to the petition, by decision served November 5, 2010, the petition was denied because the County did not provide information sufficient to explain why a 50-foot-wide right-of-way would be adequate to support rail operations. Mo. Pac. R.R., AB 3 (Sub-No. 137X), slip op. at 3 (STB served Nov. 5, 2010) ("[T]he County again offers only a bare, conclusory assertion inadequate to permit the Board to grant the relief sought.").

(STB served Oct. 6, 2011).⁵ Given the circumstances, the 2011 Decision found it unnecessary to vacate the NITU under 49 C.F.R. § 1152.29 but clarified that the 50 feet of right-of-way transferred to TxDOT was no longer part of the NITU. Id. at 3.

On May 24, 2021, the County filed the petition at issue in this decision. The petition seeks clarification that another 50-foot-wide portion of the Line's 100-foot-wide right-of-way, extending from milepost 34.429 in De Kalb to milepost 42.59 at the Bowie County/Red River County border, a distance of approximately 8.16 miles (the Parcel), can be removed from railbanked status under the NITU and conveyed to TxDOT to widen another segment of U.S. Highway 82. (County Pet. 1, 4, May 24, 2021.) The County asserts that the remaining 50-foot-wide right-of-way that would continue to be subject to the NITU is sufficient to permit the future reestablishment of rail service. (Id. at 1.)

In support, the County states that TxDOT retained the engineering firm of Johnson, Mirmiran & Thompson, Inc. (JMT), to analyze whether the 50-foot right-of-way that the County would retain would be adequate for the potential reinstitution of rail service. (Id. at 4.) The County submitted a verified statement from Justin W. Seal, a licensed professional engineer at JMT and the project manager for TxDOT's U.S. Highway 82 widening project in Bowie County. (Id., Ex. A, V.S. Justin W. Seal 1.) According to Mr. Seal, JMT's field evaluation concluded that "rail service could be reestablished for a rail facility within the proposed remaining 50-foot railbanked right-of-way applying commonly-used design criteria, including specifically those of UP." (Id. at 2.) The County also provided a letter from UP noting that UP had received JMT's engineering report from the County and stating that UP concurs that rail service could be reestablished on the 50-foot railbanked right-of-way. (County Pet., Ex. B, May 24, 2021.)

The County requests relief similar to that granted in the 2011 Decision. (County Pet. 5-8, May 24, 2021.) According to the County, the Board has not always been consistent in the form of relief granted in circumstances where rights-of-way subject to NITUs are narrowed rather than shortened. Therefore, in the alternative, the County requests that the Board vacate the NITU with respect to the Parcel to be conveyed to TxDOT and issue a replacement NITU for the remainder of the railbanked right-of-way under 49 C.F.R. § 1152.29(d)(2). (County Pet. 8, May 24, 2021.)

DISCUSSION AND CONCLUSIONS

The Board has employed differing approaches in cases where a trail sponsor proposes to narrow the width of a right-of-way subject to a NITU or a certificate of interim trail use or abandonment (CITU) where the remaining width of the right-of-way would be sufficient to

⁵ The County had supported its request by providing an engineering evaluation showing that retaining the southern 50 feet of the 100-foot-wide corridor in that segment of the Line's right-of-way would be sufficient to permit the possible reestablishment of rail service. (County Pet. 2, V.S. Goodwin 2, July 27, 2011.)

support the reactivation of rail service.⁶ Compare Union Pac. R.R.—Aban.—in Harris, Fort Bend, Austin, Wharton & Colo. Cntys., Tex., AB 33 (Sub-No. 156), slip op. at 1-2 (STB served Dec. 1, 2006) (vacating a CITU under 49 C.F.R. § 1152.29(c)(2) with respect to a portion of a right-of-way so it could be conveyed to a municipal authority for construction of a toll road where the remaining width of the right-of-way would permit the future restoration of rail service), and Union Pac. R.R.—Aban. Exemption—Whittier Junction-Colima Junction Line in L.A. Cnty., Cal., AB 33 (Sub-No. 93X), slip op. at 2-3 (STB served July 21, 2006) (vacating a NITU under 49 C.F.R. § 1152.29(d)(2) with respect to property along the edge of the right-of-way that would not affect the continuity of the line so the property could be conveyed to adjacent landowners), with Idaho N. & Pac. R.R.—Aban. & Discontinuance Exemption—in Wash. & Adams Cntys., Idaho, AB 433 (Sub-No. 2X), slip op. at 2 (STB served Dec. 27, 2012) (finding it unnecessary to vacate the NITU under 49 C.F.R. § 1152.29 but clarifying that a portion of the width of right-of-way not needed to permit the reestablishment of rail service was no longer part of the NITU), and 2011 Decision, AB 3 (Sub-No. 137X), slip op. at 3 (same).⁷

In light of this differing precedent, the Board clarifies here that in cases where a trail sponsor proposes to narrow the width of a right-of-way subject to a NITU/CITU, the Board finds it unnecessary to vacate a NITU/CITU and issue a replacement NITU/CITU under 49 C.F.R. § 1152.29(d)(2) or (c)(2) if the trail sponsor has demonstrated with adequate specificity that the remaining width of the right-of-way would be sufficient to support the reactivation of rail service. See 2011 Decision, AB 3 (Sub-No. 137X), slip op. at 3; see also Idaho N. & Pac. R.R., AB 433 (Sub-No. 2X), slip op. at 2. In such cases, the Board will instead issue a decision clarifying that the width of the right-of-way that the trail sponsor has demonstrated is not needed to reactivate rail service is no longer part of the NITU/CITU.

Here, the County has demonstrated with adequate specificity that, if the Parcel is conveyed to TxDOT, the remaining 50-foot-wide right-of-way is sufficient to support the reactivation of rail service on the Line. The County provided an engineering report from JMT, supported by Mr. Seal's verified statement, that rail service could be reestablished within the remaining 50-foot-wide right-of-way. (See County Pet., Ex. A, V.S. Seal & Attach. 1, May 24,

⁶ The Board issues CITUs in abandonment application proceedings, whereas NITUs are issued in abandonment exemption proceedings. There is no functional difference between a NITU and a CITU or the implementing regulations at § 1152.29(d) (applicable to NITUs) and § 1152.29(c) (applicable to CITUs).

⁷ Despite the 2011 Decision finding it unnecessary to vacate the NITU, in more recent cases NITUs have nevertheless been vacated and replacement NITUs issued under 49 C.F.R. § 1152.29(d)(2) to narrow the width of rights-of-way subject to NITUs. See, e.g., Idaho N. & Pac. R.R., AB 433 (Sub-No. 2X) (STB served May 4, 2021); Greenville Cnty. Econ. Dev. Corp.—Aban. Exemption—in Greenville Cnty., S.C., AB 490 (Sub-No. 2X) (STB served Mar. 25, 2019); Union Pac. R.R., AB 33 (Sub-No. 93X) (STB served July 20, 2018); Union Pac. R.R., AB 33 (Sub-No. 93X) (STB served Jan. 27, 2016).

2021.)⁸ Therefore, the Board clarifies that that the Parcel is no longer part of the NITU served on July 1, 2005.

It is ordered:

1. The County's petition is granted as described herein.
2. This decision is effective on its service date.

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

⁸ In addition, the County also provided a letter from UP, the rail carrier with the right to reactivate service on the Line, concurring that rail service could be reestablished on the remaining 50-foot-wide railbanked right-of-way. (See County Pet., Ex. B, May 24, 2021.)