

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36501

UNION PACIFIC RAILROAD COMPANY—CONSTRUCTION AND OPERATION
EXEMPTION—IN MARICOPA COUNTY, ARIZ.

Decided: March 25, 2024

Digest:¹ The Board places a briefing schedule for submissions in abeyance and directs Union Pacific Railroad Company to provide a sworn verification and affidavit as specified in the Board’s December 2023 decision.

As discussed in the decision served on December 11, 2023, in connection with the environmental and historic review for the rail line construction project proposed in this docket, it was discovered that there had been significant ground disturbance and damage to National Register of Historic Places-eligible archaeological resources within the project’s Area of Potential Effects, including within the proposed right-of-way.² See generally Union Pac. R.R.—Constr. & Operation Exemption—in Maricopa Cnty., Ariz. (Dec. 2023 Decision), FD 36501 (STB served Dec. 11, 2023).

To obtain additional information about this matter, in the December 2023 Decision the Board directed petitioner Union Pacific Railroad Company (UP) to provide certain information and documents by January 25, 2024, and set a briefing schedule for submissions addressing whether UP has engaged in “anticipatory demolition” of historic properties in violation of Section 110(k) of the National Historic Preservation Act and whether the Board should take any further action. Id. at 5-6.

By decision served January 24, 2024, the Board granted a motion by UP to permit a rolling production through February 15, 2024, and extended the briefing schedule to make opening submissions due April 1, 2024, and replies due April 30, 2024.

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 After the ground disturbance and damage was discovered, the Board’s Office of Environmental Analysis (OEA) announced that issuance of the Final Environmental Assessment would be delayed until further notice. OEA Notice, FD 36501 (STB served Aug. 31, 2023).

UP thereafter made three submissions between January 25 and February 15, 2024, which included written responses to eight information requests (each containing multiple subparts, and many of which call for information pertaining to each of the five separate Damage Areas identified in the December 2023 Decision), and the production of over 10,000 pages of documents.³

In light of the volume and complexity of the material in question, additional time is needed to permit the Board and interested parties to review the record and assess the substance and sufficiency of UP's responses to the Board's information and document requests. The Board notes that upon its preliminary review of the information submitted, several of UP's responses to the information requests appear to be non-responsive, and the Board may be required to issue further orders to obtain full compliance with its December 2023 Decision. Accordingly, the briefing schedule will be held in abeyance pending further order of the Board.

The information and document requests attached as Appendix 2 to the December 2023 Decision required that (i) all information provided in response to the requests "shall be provided under oath," and (ii) UP provide an affidavit affirming that a reasonable search was made to locate all responsive material and certifying whether the production is complete. See December 2023 Decision, FD 36501, slip op. at 13. In violation of that order, UP's responses were not accompanied by a sworn verification, and its final production was not accompanied by an affidavit containing the affirmation and certification specified in the December 2023 Decision. UP will be directed to comply with these requirements by April 1, 2024.

It is ordered:

1. The briefing schedule is held in abeyance pending further order of the Board.
2. UP is directed to file the sworn verification and the affidavit specified in the December 2023 Decision by April 1, 2024.
3. This decision is effective on its date of service.

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

³ UP also submitted indices of the documents that were produced and a five-page log listing over 60 responsive documents that UP withheld from its production to the Board based on a claim of privilege, as well as additional documents that were redacted based on a privilege claim.