

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 33 (Sub-No. 257X)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT AND DISCONTINUANCE
OF TRACKAGE RIGHTS EXEMPTIONS—IN BENTON COUNTY, OR.

Docket No. AB 986 (Sub-No. 1X)

WILLAMETTE & PACIFIC RAILROAD, INC.—DISCONTINUANCE OF SERVICE AND
DISCONTINUANCE OF TRACKAGE RIGHTS EXEMPTIONS—IN BENTON COUNTY,
OR.

Digest:¹ This decision allows Union Pacific Railroad Company (UP) to abandon a 17.86-mile rail line in Benton County, Or., and relieves Willamette & Pacific Railroad, Inc. (WPRR), from its duty to serve shippers on that line. In addition, this decision authorizes UP's and WPRR's relinquishment of rights to utilize another railroad's connecting line. It also requires UP to keep certain railroad structures in place and sets a time period for UP to negotiate with parties interested in turning the rail line into a recreational trail.

Decided: September 9, 2011

By petition filed on May 23, 2011, Willamette & Pacific Railroad, Inc. (WPRR), and Union Pacific Railroad Company (UP) (together, petitioners) jointly filed a petition under 49 U.S.C. § 10502 for exemption from the provisions of 49 U.S.C. § 10903 for WPRR to discontinue service over, and for UP to abandon, 17.86 miles of rail line in Benton County, Or. Notice of the exemptions was served and published in the Federal Register on June 10, 2011 (76 Fed. Reg. 34,141). The rail line is described as follows: (1) from milepost 682.25 near Greenberry, Or., to milepost 671.58 near Monroe, Or., on the Bailey Branch; and (2) from milepost 673.21 near Alpine Junction, Or., to milepost 680.06 near Dawson, Or., on the Hull Oakes Lead (together, the Line).² In addition, WPRR and UP seek to discontinue their

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).

² Petitioners state that the mileage of the proposed abandonment and discontinuance has been updated since the combined environmental and historic report was filed on March 29, 2011. Petitioners state that further review of UP's engineering documents indicates that, although the milepost where the Hull Oakes Lead connects to the Bailey Branch at Alpine Junction is correct, (continued...)

respective reserved limited overhead trackage rights over Albany & Eastern Railroad Company's line between milepost 687.6 south of Corvallis, Or., and milepost 682.25 near Greenberry, a distance of 5.35 miles.³ On June 29, 2011, Benton County, Or. (Benton County) filed a request for imposition of a public use condition under 49 U.S.C. § 10905 and issuance of a notice of interim trail use (NITU) under 16 U.S.C. § 1247(d) to provide time to negotiate interim trail use/rail banking.⁴ On June 30, 2011, Benton County filed a correction to its June 29 pleading.⁵ UP responded on July 5, 2011, indicating that it is willing to negotiate with Benton County.

BACKGROUND

The Line is owned by UP (as successor to Southern Pacific Transportation Company), and has been leased to and operated by WPRR since 1993. Willamette & Pac. R.R.—Lease & Operation Exemption—S. Pac. Transp. Co., FD 32245 (ICC served Feb. 26, 1993). The Line has 20 bridges that are 50 years old or older. According to petitioners, the Line historically has been difficult to maintain because of the light weight rail and poor subsurface conditions. Specifically, UP and WPRR claim that there are a number of soft spots that make it difficult to keep the track in gauge. After a number of derailments, WPRR determined that the Line was not safe to operate, and accordingly, in June 2007, the Line was embargoed. Subsequently, WPRR determined that the traffic on the Line does not justify the cost of the required rehabilitation to repair the Line for continued safe operations and the costs of continued operation and maintenance.

Prior to the June 2007 embargo, there were 3 active shippers on the Line. According to petitioners, all of those shippers are able to receive service by truck and have shifted all of their traffic to truck since the June 2007 embargo. None of the shippers have filed comments in this proceeding.

(...continued)

an adjustment needs to be made that makes the line 0.34 miles longer than indicated by the mileposts. Accordingly, on the legend of the map attached as Exhibit A to the Petition, the mileage of the Hull Oakes Lead has been changed from 6.85 miles (the mileage originally shown on the map attached to the Combined Environmental and Historic Report) to 7.19 miles.

³ Petitioners state that the trackage rights were intended to allow UP and WPRR to reach the Line pending receipt of abandonment and discontinuance authority. See Albany & E. R.R.—Acquis. & Operation Exemption—Union Pac. R.R. & Willamette & Pac. R.R., FD 35355 (STB served Mar. 10, 2010).

⁴ Benton County states that its pleading “should be treated as a protest or a petition for reconsideration,” but it does not take a position on the merits of the abandonment.

⁵ The corrections were to the description of the Line and Benton County's Statement of Willingness to Assume Financial Responsibility.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10903, a rail line may not be abandoned, nor service or trackage rights discontinued, without prior approval from the Board. Under 49 U.S.C. § 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny of UP and WPRR's proposal under 49 U.S.C. § 10903 is not necessary to carry out the rail transportation policy in this case. Petitioners have provided evidence that revenues from operation of the Line are insufficient to cover the costs of maintenance and necessary rehabilitation of the Line. Exemption, therefore, will foster sound economic conditions and encourage efficient management by allowing UP and WPRR to avoid significant costs associated with retaining and operating the Line. See 49 U.S.C. §§ 10101(5) & (9). An exemption of the discontinuance of the incidental trackage rights over the Albany & Eastern Railroad Company's line is likewise appropriate, as those trackage rights were only acquired to support operations over the Line. Because there is so little call for rail service on the Line, exempting the abandonment of, and discontinuance of service over, the Line and exempting the discontinuance of the carriers' trackage rights similarly will expedite regulatory action and reduce regulatory barriers to exit. See 49 U.S.C. §§ 10101(2) & (7). Other aspects of the rail transportation policy will not be adversely affected by the use of the exemption process.

Regulation of the proposed transactions is not necessary to protect shippers from the abuse of market power because the 3 active shippers on the Line prior to the June 2007 embargo, Van Beek Dairy, Hull Oakes Lumber, and Wilbur Ellis, have shifted the transportation of their product to truck. Three other shippers had utilized the Line as recently as 2006: Lauren Smith Farms; Goracke Brothers; and Nussbaum Farms. None of those shippers has filed in opposition to the proposed abandonment, nor has any other party. Nevertheless, to ensure that the 6 shippers noted above are informed of our action, we will require UP to serve a copy of this decision and notice on those shippers so that it is received within 5 days of the service date of this decision, and to certify contemporaneously to the Board that it has done so. Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

Employee protection. Under 49 U.S.C. § 10502(g), we may not use our exemption authority to relieve a carrier of its statutory obligation to protect the interests of its affected employees. Accordingly, as a condition to granting the exemptions, we will impose the standard employee protective conditions 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 have filed a Combined Environmental and Historic Report with respect to the proposed transactions and have notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the potential environmental impacts of the proposed transactions. See 49 C.F.R. § 1105.11. Our Office of Environmental Analysis (OEA) has examined the report, verified the data it contains, and analyzed the probable effects of the proposed actions on the quality of the human environment.

OEA served an Environmental Assessment (EA) in this proceeding on July 22, 2011, recommending that 3 conditions be imposed on any decision granting abandonment and discontinuance authority. In the EA, OEA states that the National Geodetic Survey (NGS) identified approximately 10 geodetic station markers located in the area of the proposed abandonment. Therefore, OEA recommends that UP be required to consult with NGS at least 90 days before beginning any salvage activities that will disturb or destroy any geodetic station markers.

Also in the EA, OEA states that the Oregon Department of Environmental Quality, Western Region Eugene Office (OR-DEQ), states that if ballast is removed and excavation of native soil is to occur, UP would need to obtain a National Pollutant Discharge Elimination Systems Permit. This permit is required for any construction projects that would disturb over 5 acres of land and could result in storm water runoff into waters of the state. OEA notes that the project area here is approximately 132.6 acres; therefore, OEA recommends a condition requiring UP to consult with the OR-DEQ regarding the need to obtain a National Pollutant Discharge Elimination Systems Permit prior to the commencement of salvage activities and to comply with all reasonable requirements of that agency.

The EA states that UP served the Historic Report on the Oregon Parks and Recreation Department, State Historic Preservation Office (SHPO), as required by the Board's environmental rules at 49 C.F.R. § 1105.8(c). The SHPO has advised that if UP demolishes any of the structures on the Line, the SHPO would find that an adverse effect to eligible resources has occurred. Because UP states that it would salvage the Line, including the bridges, OEA recommends a condition requiring UP to retain its interest in and take no steps to alter the historic integrity of all historic properties, including the Line itself, within the project right-of-way (the Area of Potential Effect) eligible for listing or listed in the National Register of Historic Places until completion of the Section 106 process of the National Historic Preservation Act, 16 U.S.C. § 470f, and until the Board has removed this condition.

Pursuant to 36 C.F.R. § 800.2, OEA conducted a search of the Native American Consultation Database to identify Federally recognized tribes that may have ancestral connections to the project area. According to OEA, the Database indicated that 3 tribes may

have knowledge regarding properties of traditional religious and cultural significance within the right-of-way for the proposed abandonment.⁶ OEA sent a copy of the EA to these tribes for review and comment.

Comments on the EA were due by August 22, 2011. No comments were received. Accordingly, we will impose the conditions recommended by OEA in the EA. Based on OEA's recommendation, we conclude that the proposed abandonment and discontinuances, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

Interim trail use. Benton County filed a request for the issuance of a NITU under the National Trails System Act, 16 U.S.C. § 1247(d) (Trails Act), and 49 C.F.R. § 1152.29, to provide time to negotiate with UP for use of the right-of-way as a recreational trail and for rail banking. Benton 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 (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), 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. Benton County has acknowledged that the use of the right-of-way for trail purposes will be subject to future reactivation of the right-of-way for rail service. In a response filed on July 5, 2011, UP states that it is willing to negotiate interim trail use with Benton County.

Because Benton County's request complies with the requirements of 49 C.F.R. § 1152.29 and UP is willing to enter into interim trail use negotiations, we will issue a NITU for the subject right-of-way. The parties may negotiate an agreement during the 180-day period prescribed below. If an agreement is executed, no further Board action is necessary. If no agreement is reached within 180 days, UP may fully abandon the Line, subject to the conditions imposed below. See 49 C.F.R. § 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to any future use of the property for reactivation of railroad operations.

Public use. Benton County has also requested imposition of a public use condition under 49 U.S.C. § 10905. Benton County requests that UP be prohibited from disposing of the corridor, other than tracks, ties, and signal equipment, except for public use on reasonable terms, and that UP be barred from the removal or destruction of potential trail-related structures, such as bridges, trestles, culverts, and tunnels, for a 180-day period from the effective date of the abandonment authorization. Benton County states that the corridor will make an excellent recreational trail and wildlife corridor and that conversion of the property will be in accordance

⁶ The Database is at: <http://home.nps.gov/nacd/>. The identified tribes are: Confederated Tribes and Bands of the Yakima Nation, Washington; Confederated Tribes of the Colville Reservation, Washington; and Confederated Tribes of the Umatilla Reservation, Oregon.

with longstanding local plans. Benton County states that the 180-day period is needed to assemble and review title information, complete a trail plan, and negotiate with UP.

The Board has determined that persons who request a NITU under the Trails Act may also seek a public use condition under 49 U.S.C. § 10905. See Rail Abans.—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986). When the requirements for both conditions are met, it is the Board's policy to impose them concurrently, subject to the execution of a trail use agreement. Benton County met the public use criteria prescribed at 49 C.F.R. § 1152.28(a)(2) by specifying: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) the justification for the period of time requested. Accordingly, a 180-day public use condition will be imposed on the Line, commencing from the effective date of this decision and notice, to enable any state or local government agency or other interested person to negotiate the acquisition of the Line for public use. If a trail use agreement is reached on a portion of the right-of-way, UP must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. It also should be noted that a public use condition is not imposed for the benefit of any one potential purchaser. Rather, it provides an opportunity for any interested person to negotiate to acquire a right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, UP is not required to deal exclusively with Benton County but may engage in negotiations with other interested persons.

The parties should note that operation of the trail use and public use procedures could be delayed, or even foreclosed, by the offer of financial assistance (OFA) process under 49 U.S.C. § 10904.⁷ As stated in Rail Abandonments, 2 I.C.C.2d at 608, an OFA to acquire rail lines for continued rail service or to subsidize rail operations takes priority over interim trail use/rail banking and public use. Accordingly, if an OFA is timely filed under 49 C.F.R. § 1152.27(c)(1), the effective date of this decision and notice will be postponed. See 49 C.F.R. § 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. See 49 C.F.R. § 1152.27(f). Finally, if the Line is sold under the OFA procedures, the petition for exemptions will be dismissed and interim trail use and public use precluded. Alternatively, if a sale under the OFA procedures does not occur, the interim trail use and public use processes may proceed.

It is ordered:

1. Under 49 U.S.C. § 10502, we exempt from the prior approval requirements of 49 U.S.C. § 10903 the abandonment by UP of the Line, subject to the employee protective conditions set forth in Oregon Short Line Railroad, 360 I.C.C. 91 (1979), and the conditions that

⁷ On June 6, 2011, the Oregon Pacific & Eastern Railroad Company filed a notice of intent to file an OFA in this proceeding.

UP shall: (1) consult with the NGS at least 90 days prior to the beginning of salvage activities that will disturb or destroy any geodetic station markers; (2) consult with the OR-DEQ regarding the need to obtain a National Pollutant Discharge Elimination Systems Permit prior to the commencement of salvage activities, and comply with all reasonable requirements of that agency; (3)(a) retain its interest in and take no steps to alter the historic integrity of all historic properties, including the rail line itself, within the project right-of-way eligible for listing or listed in the National Register of Historic Places until completion of the Section 106 process of the National Historic Preservation Act, 16 U.S.C. § 470f, (b) report to OEA regarding any consultations with the SHPO and the public, and (c) not file its consummation notice or initiate any salvage activities (including removal of tracks and ties) until the Section 106 process has been completed and the Board has removed this condition; (4) be prohibited from disposing of the corridor (other than tracks, ties, and signal equipment) and from removing or destroying potential trail related structures (such as bridges, trestles, culverts, and tunnels) for a 180-day period from the effective date of this decision and notice to enable any state or local government agencies, or other interested person, to negotiate the acquisition of the Line for public use; and (5) comply with the interim trail use/rail banking procedures set forth below.

2. Under 49 U.S.C. § 10502, we exempt from the prior approval requirements of 49 U.S.C. § 10903 the discontinuance of service by WPRR over the Line, subject to the employee protective conditions set forth in Oregon Short Line Railroad, 360 I.C.C. 91 (1979).

3. Under 49 U.S.C. § 10502, we exempt from the prior approval requirements of 49 U.S.C. § 10903 the discontinuance of WPRR's and UP's reserved limited overhead trackage rights over Albany & Eastern Railroad Company's line between milepost 687.6 south of Corvallis and milepost 682.25 near Greenberry, subject to the employee protective conditions set forth in Oregon Short Line Railroad, 360 I.C.C. 91 (1979).

4. UP is directed to serve a copy of this decision and notice on Van Beek Dairy, Hull Oakes Lumber, Wilbur Ellis, Lauren Smith Farms, Goracke Brothers, and Nussbaum Farms, so that it is received within 5 days of the service date of this decision and notice, and to certify contemporaneously to the Board that it has done so.

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

6. Interim trail use/rail banking is subject to any future use of the property for restoration of railroad operations and to the user's continuing to meet the financial obligations for the right-of-way.

7. If interim trail use is implemented and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

8. If an agreement for interim trail use/rail banking is reached by March 7, 2012, interim trail use may be implemented. If no agreement is reached by that time, UP may fully abandon the Line, provided the conditions imposed above are met. See 49 C.F.R. § 1152.29(d)(1). If an interim trail use/rail banking agreement is executed before March 7, 2012, the public use condition will expire to the extent the trail use/rail banking agreement covers the same portion of the Line.

9. An OFA under 49 C.F.R. § 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by September 19, 2011, subject to time extensions authorized under 49 C.F.R. § 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27(c)(1). Each OFA must be accompanied by the filing fee of \$1,500. See 49 C.F.R. § 1002.2(f)(25).

10. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **“Office of Proceedings, AB-OFA.”**

11. Provided no OFA has been received, this exemption will be effective on October 9, 2011. Petitions to stay must be filed by September 26, 2011. Petitions to reopen must be filed by October 4, 2011.

12. Pursuant to the provisions of 49 C.F.R. § 1152.29(e)(2), UP shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the Line. If consummation has not been effected by UP’s filing of a notice of consummation by September 9, 2012, 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 1-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.