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SERVICE DATE – NOVEMBER 14, 2024

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36501

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

Digest:¹ The Board directs Union Pacific Railroad Company to cure certain deficiencies in its responses to Board-ordered document requests and reinstates a schedule for submissions placed in abeyance earlier this year.

Decided: November 13, 2024

This decision reinstates the schedule for submissions addressing whether Union Pacific Railroad Company (UP) engaged in “anticipatory demolition” of historic properties in violation of Section 110(k) of the National Historic Preservation Act (NHPA) in connection with the project involved in this proceeding.² As discussed below, the Board also has concerns about the way in which UP responded to Board-ordered document requests and directs UP to remedy certain deficiencies.

BACKGROUND

UP has petitioned for an exemption from the prior approval requirements of 49 U.S.C. § 10901 to construct a 6-mile rail line (known as the PIRATE project, or the project) to connect the Pecos Advanced Manufacturing Zone to UP’s mainline at the border between Maricopa County and Pinal County, Ariz. (Pet. 2.)

Last year, while preparing the Final Environmental Assessment (Final EA) for the project, the Board’s Office of Environmental Analysis (OEA) discovered that there had been significant ground disturbance and damage to National Register of Historic Places (NRHP)-eligible archaeological resources within the proposed right-of-way and within the Area of

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 As discussed below, submissions should be limited to issues relating to Section 110(k) of NHPA, 54 U.S.C. § 306113, at this time.

Potential Effects (APE).³ On August 31, 2023, following meetings with and requests by the Tribal Historic Preservation Officer of the Tohono O’odham Nation and other affected Tribes, OEA issued a notice delaying issuance of the Final EA until further notice.⁴ OEA Notice, FD 36501 (STB served Aug. 31, 2023).

To obtain additional information about the circumstances surrounding the damage, which occurred in five different areas, the Board (1) directed UP to provide information responsive to eight requests and to produce documents relating to several topics, and (2) set a schedule for submissions on whether UP engaged in “anticipatory demolition” of historic properties in violation of Section 110(k) of NHPA and whether the Board should take any further action. See Union Pac. R.R.—Constr. & Operation Exemption—in Maricopa Cnty., Ariz. (December 2023 Decision), FD 36501, slip op. at 5-6 (STB served Dec. 11, 2023).

Pursuant to a Board-granted extension, UP made rolling submissions, ending on February 15, 2024, which included written responses to the information requests, and the production of just over 1,000 documents totaling more than 10,000 pages. UP also submitted indexes of the documents it produced and a five-page log listing more than 60 responsive documents it withheld from the production based on claims of privilege and 10 documents (all PDF email files) that it produced but redacted—often extensively—based on a claim of privilege. The log also has 11 entries stating that the responsive document associated with the privilege claim is redacted; however, these entries fail to list production bates numbers for these redacted documents and, as far as Board staff can determine, they were not produced.

Due to the volume and complexity of the material in question, the Board placed the schedule for submissions in abeyance because additional time was needed to review the record and assess the substance and sufficiency of UP’s responses. Union Pac. R.R.—Constr. & Operation Exemption—in Maricopa Cnty., Ariz., FD 36501, slip op. at 2 (STB served Mar. 26, 2024). Commercial Metals Company (CMC), whose new steel facility would be served by the PIRATE project, and members of the Arizona Congressional delegation have filed letters requesting the Board to expedite and prioritize decisions related to the project.⁵

³ The APE is defined as “the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist.” 36 C.F.R. § 800.16(d).

⁴ Among the issues raised by the Tribes were concerns as to whether a violation of Section 110(k) of NHPA had occurred.

⁵ (CMC Letter, June 26, 2024; Letter signed by U.S. Sen. Mark Kelly and U.S. Reps. Greg Stanton, Debbie Lesko, Juan Ciscomani, Andy Biggs, Elijah Crane, David Schweikert, and Paul Gosar, Sept. 27, 2024.) On October 1, 2024, UP’s chief executive officer also submitted a letter asserting that “for six months” UP has been “waiting for the agency” to “provide a clear path forward to resolve the harms” that UP acknowledges occurred. The unauthorized ground disturbances and damage to NRHP-eligible cultural resources within the proposed right-of-way and within the APE—which should not have occurred and only came to light on the eve of OEA’s issuance of the Final EA—delayed this proceeding. Moreover, after the damage was discovered, the deficiencies in UP’s responses to the Board’s document requests have hampered

DISCUSSION AND CONCLUSIONS

The Board has completed its assessment of UP's responses. The Board's ability to efficiently review UP's responses was hindered by several deficiencies in UP's document production, including but not limited to an improper and inadequate privilege log (discussed below), and the production of emails without dates.⁶ As discussed above, UP's production did not fully comport with the Board's production instructions. UP missed the noted information and provided its production in a format that made review and analysis by the Board more cumbersome and time-consuming. The Board will direct UP to file a corrected privilege log and to produce copies of 11 documents UP has listed in its privilege log as having been redacted (rather than withheld) but that, as far as Board staff can determine, UP failed to produce. UP will be required to rectify these deficiencies by November 29, 2024. Because this information should have been provided with the original production and UP's conduct thus far has already caused delays in this proceeding, no extensions of that deadline will be granted absent extraordinary circumstances that are outside of UP's control.

More generally, the Board notes its disapproval of the deficiencies in the material UP produced in response to the directives in the Board's December 2023 Decision.⁷ Nevertheless, the Board concludes that it has sufficient information to reinstate the submissions schedule for purposes of determining whether UP engaged in "anticipatory demolition" of historic properties in violation of Section 110(k) of NHPA, which will be resolved before the environmental and historic review in this docket proceeds. Accordingly, the Board will reinstate the schedule and invite submissions limited to the Section 110(k) issue.

the agency's investigation of this matter, adding further delay. UP should provide a proper privilege log and the missing documents by the deadline established in this decision, as discussed below, to avoid any further impediments to the Board's ability to move forward with this proceeding.

⁶ The index entries for a number of emails produced by UP have no date information in the "Email sent" cell and/or state that the author is "unknown" (or, in some instances, list a code). Correspondingly, the documents associated with these entries are missing information in the "From" and "Sent" [date] lines of the top email. The Board notes that where an email's "From" line is blank and the index entry for "Author" states "Unknown name" (or lists a code), the name of the person who appears to have sent the email is generally shown below its text. Additionally, emails contained within the PDF files produced by UP sometimes refer to attachments that are not identifiable in the production. Because the Board finds it has sufficient information to reinstate the schedule for submissions pertaining to the Section 110(k) issue in this proceeding, it will not now require UP to address these shortcomings.

⁷ UP is cautioned to respond with greater clarity and accuracy to any such future orders in Board proceedings.

Privilege Log Deficiencies.

The December 2023 Decision directed UP to provide a log that (a) identifies, for any responsive document withheld under a claim of privilege, (i) the privilege or immunity invoked; (ii) the date of the document; and (iii) the author(s), sender(s), and recipient(s) of the document; and (b) describes the nature, purpose, and contents of the document with sufficient specificity to demonstrate that the privilege or immunity was properly invoked. December 2023 Decision, FD 36501, slip op. at 13. The five-page log provided by UP lists 21 documents that were redacted based on a claim of privilege, and 64 responsive documents that were withheld from production altogether. In many instances, the log entries omit basic information (e.g., author/sender, recipient(s), date, and general subject matter of the material being withheld) needed to substantiate the claim and show that privilege was properly invoked.⁸ Many entries do not contain the name of any identifiable attorney associated with UP's claim that the communication or document in question is privileged.⁹ Finally, as noted above, the log has 11 entries stating that the responsive document associated with the privilege claim is redacted; however, these entries fail to list a production bates number for the redacted document,¹⁰ and, as far as Board staff can determine, UP failed to produce these redacted documents.

In light of these deficiencies, the Board directs UP to:

- File an amended privilege log containing the information specified in the December 2023 Decision for each document (or redacted portion thereof) over which a privilege or immunity is invoked. That information must include the date of the specific communication or document that is being withheld; the names (and—where not otherwise clear from the document, information provided in the log, or UP's responses to information requests—affiliations) of the author, sender, and all recipients; and (where not otherwise apparent from the log or the face of the document) the identity of the attorney in question. UP must also describe the nature, purpose, and contents of the document with sufficient specificity to demonstrate that

⁸ Examples involving produced but redacted documents include those bearing beginning bates numbers UP-Pirate-0009669, UP-Pirate-0009900, UP-Pirate-0009934, and UP-Pirate-0009939. In each instance, the log provides sender, recipient, and date information for the top, *unredacted* email in a document that otherwise contains substantial block redactions (sometimes spanning multiple pages), but *no information pertaining to the redacted sections*, making it impossible to understand or assess the validity of the privilege being claimed with respect to the redacted text.

⁹ In many cases, the attorney associated with UP's claim that the communication or document in question is privileged cannot be identified based on the information in UP's privilege log or otherwise provided by UP.

¹⁰ (See log entries for documents numbered UP-0017660, UP-0017737, UP-0026271, UP-0026307, UP-0029393, UP-0029420, UP-0029754, UP-0038783, UP-0048505, UP-0049553, and UP-0049598 (all listing the document as "redacted" but providing no corresponding bates stamp numbers in the production columns).)

the privilege or immunity was properly invoked. See December 2023 Decision, FD 36501, slip op. at 13.

- File the documents listed in its log as redacted but for which no corresponding documents were produced, and include the bates numbers of these documents on the documents themselves and in its corrected privilege log.

UP will be required to file these materials by November 29, 2024.

Schedule for Submissions Addressing Section 110(k).

As noted above, the Board has concluded that it has sufficient information to proceed with submissions addressing whether UP engaged in “anticipatory demolition” of historic properties in violation of Section 110(k) of NHPA, and accordingly will reinstate the schedule. Submissions should be limited to issues pertaining to whether there has been a violation of Section 110(k) of NHPA, which will be resolved before any further environmental and historic review in this docket proceeds.¹¹ Opening submissions regarding Section 110(k) issues will be due December 16, 2024, and replies will be due January 13, 2025.¹²

It is ordered:

1. UP is directed to rectify the deficiencies in its privilege log and file the documents discussed above, in compliance with the requirements stated in the corresponding bullet points above, by November 29, 2024.

2. The Board invites submissions from UP and interested persons, including all Section 106 consulting parties in this proceeding, on whether UP engaged in “anticipatory demolition” of historic properties in violation of Section 110(k) of NHPA. Submissions are due by December 16, 2024, and replies are due by January 13, 2025.

3. This decision is effective on its date of service.

By the Board, Board Members Fuchs, Hedlund, Primus, and Schultz. Board Member Primus concurred with a separate expression.

¹¹ In the December 2023 Decision, the Board indicated that it would also accept comments on whether the Board should take any further action. Consideration of further action outside of the Section 110(k) issue will be addressed later in the proceeding, if warranted.

¹² Submissions should be filed in the formal docket for this proceeding, *not* as environmental comments. Filing instructions can be found on the Board’s website at www.stb.gov/resources/need-assistance/how-to-file. The Board’s Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC) is also available to provide assistance with filing and/or service questions. OPAGAC may be contacted at (202) 245-0238 or at RCPA@stb.gov.

BOARD MEMBER PRIMUS, concurring:

This decision serves as another example of UP's inability to adhere to the Board's guidelines and instructions and to provide timely and appropriate responses to Board orders. Make no mistake, the sole reason for today's decision, and ultimate delay in moving the PIRATE project forward, falls squarely in the lap of UP.

Railroads cannot alter the project area for a proposed rail line construction until environmental and historic review has been completed and the Board has authorized the project. Common sense, right? Apparently not, for UP, through third-party actions, allowed this to happen. Not once, not twice, but several times. This despite the fact that UP was told by OEA, in September of 2022, that there were a number of significant archaeological sites, located within the project's Area of Potential Effect (APE), that were eligible for listing in the National Register of Historic Places, and that the PIRATE project would have an adverse effect on historic resources. Moreover, on October 3, 2022, and again on November 3, 2022, UP participated in meetings with OEA and the Section 106 consulting parties about the project's adverse effect to cultural resources and the need to develop a Memorandum of Agreement setting out a process to mitigate adverse effects to historic resources.

It is painfully obvious that these notifications and discussions fell on deaf ears, as UP ultimately failed to protect the culturally sensitive resources on UP-owned property and within the PIRATE project's APE. To make matters worse, OEA was never informed in advance by UP about any of the construction activities that took place in the project area, nor was it informed by UP after known, significant, archaeological sites on its property were heavily disturbed. In fact, OEA first learned of the significant ground disturbance and damage to National Register-eligible archaeological resources in late July of 2023, after it had reviewed aerial photography of the project area. Incredibly, this was eight months after the initial ground disturbance occurred in December of 2022. Subsequent construction disturbances, also unbeknownst to OEA, occurred in the May, June, and July 2023 timeframe.

On August 1, 2023, three days after learning about all the ground disturbance, OEA sent a letter directing UP to immediately cease and desist from any further construction activities and to secure the entire PIRATE right-of-way to prevent further damage. However, significant cultural damage had already been done. UP allowed over nineteen acres of sacred lands connected to the Gila River Indian Community and the Salt River Pima-Maricopa Indian Community to be heavily disturbed, including the removal of over 40,000 cubic yards of soil containing important cultural material. It is likely that thousands of artifacts were removed with the soil, including potential Native American ancestral remains. In light of the significant damage done to the APE, the Board appropriately delayed issuance of the Final EA until a thorough investigation could take place.

Fast forward to October 1, 2024, and my receipt of a rather obtuse and misguided letter from UP CEO Jim Vena. In it, Vena laments that UP's growth is being held up by the Board and further bemoans that "for six months, Union Pacific and all other stakeholders have been waiting for the [A]gency to provide a clear path forward to resolve the harms and gain the Agency's

approval for this exciting growth opportunity.” I would again remind Vena that we are where we are solely due to UP’s irresponsibility and recklessness. Furthermore, Vena purports to “accept and support the necessity of the Agency’s investigations into the circumstances that led to the entirely unacceptable harms on cultural resources.” But it’s not just investigating the circumstances that led to the harm. It’s assessing the severe damage rendered to culturally significant resources and harm to the affected Tribes. UP’s insensitive and casual malfeasance has resulted in desecration of Tribal ancestral grounds. The Tribes describe the disruption of their culturally sacred land this way:

“We are intensely saddened to know that our religious and culturally significant *O’Odham* heritage has been desecrated and destroyed by modern human ground disturbing activity.

Destructive actions with heavy earth-moving machinery is unconscionable to the *O’Odham* spiritual connections with our Huhugam ancestors. We are dismayed that there are people who believe that destruction of this nature is considered a casual mishap and do not have any idea what spiritual harms have occurred due to the desecration of our ancestor’s eternal resting places. The *O’Odham* of Southern Arizona experience a significant emotional loss as our spiritual being are cut and scraped away every time an ancestral site is obliterated by unlawful actions by various entities.”

The Board takes disturbing and desecrating ancestral sacred lands extremely seriously and will not compromise the time needed to thoroughly investigate this matter. That said, if Vena needs another reason why this matter has been delayed, he, again, has only his organization to blame, this time for its sloppy responses to the documents requested in the December 2023 Decision, which the Board needed at the time to determine whether UP violated Section 110(k) of the National Historic Preservation Act. UP produced 1,000 documents totaling over 10,000 pages, as well as a privilege log, but astonishingly still failed to fully comport with the Board’s document requests, as explained in today’s decision.

To sum it up, UP’s negligence caused the initial delay of this project, and its ineptitude further exacerbated it. In Vena’s letter he declares UP has “a strong mindset to engage our customers, identify new opportunities to grow, and find innovative solutions to help our customers.” If only UP had applied that strong mindset to the Board’s environmental review process two years ago, this decision and my concurrence would not be necessary. Moreover, the Final EA might have already been completed. Perhaps instead of writing to me, Vena should have written a letter to stakeholders, the Commercial Metals Company, members of the Arizona delegation and the affected Tribes, apologizing for setting the PIRATE project back two years by not following Board guidelines and allowing the desecration of ancestral Tribal land, and then slow footing the investigation process, hindering the Board’s efforts to issue a Final EA, and ultimately delaying the Board’s consideration of whether to approve the project. He should also explain that there was a clear path forward and a reasonable timetable for final approval of this project before UP commenced its tragic comedy of errors. If he and UP want a new clear path forward, my advice would be simple: follow our guidelines and orders.

It is surely disappointing, and I guess that’s the only thing Vena’s letter got right.