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EXPEDITED CONSIDERATION REQUESTED

November 18, 2013

BY E-FILING

Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

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ENTERED
Office of Proceedings
November 18, 2013
Part of
Public Record

Re: Union Pacific Railroad Company – Operation Exemption –
In Bexar and Wilson Counties, TX, Finance Docket No. 35776

Dear Ms. Brown:

Enclosed, please find Union Pacific Railroad Company's Reply to BNSF's Petition to Reject Notice of Exemption and Request for Stay of Effective Date of Exemption.

Union Pacific respectfully requests that the Board give expedited consideration to this reply, which requests that the Board vacate immediately the housekeeping stay imposed in this matter on November 15, 2013, and allow the exemption in this proceeding to take effect as scheduled on November 20, 2013.

Sincerely,



Michael L. Rosenthal

cc: Adrian L. Steel, Jr., Esq. (Counsel for BNSF Railway Co.)

EXPEDITED CONSIDERATION REQUESTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35776

UNION PACIFIC RAILROAD COMPANY
– OPERATION EXEMPTION –
IN BEXAR AND WILSON COUNTIES, TX

**UNION PACIFIC RAILROAD COMPANY'S REPLY TO
BNSF'S PETITION TO REJECT NOTICE OF EXEMPTION
AND REQUEST FOR STAY OF EFFECTIVE DATE OF EXEMPTION**

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AND REQUEST FOR STAY OF EFFECTIVE DATE OF EXEMPTION**

UP urges the Board to vacate immediately the housekeeping stay entered on November 15, 2013, and allow the exemption in this proceeding to take effect as scheduled on November 20, 2013. UP planned to begin serving a new customer, Frac Resources, immediately once the exemption took effect. The stay has thrown its plans into disarray. Unless UP obtains authority to operate over the new line that it acquired to serve Frac Resources and other future customers in the Mission Rail Park, UP cannot commence service without the risk that it will be found in violation of 49 U.S.C. § 10901.¹

Leaving the stay in place or rejecting the notice of exemption would be particularly inappropriate because the exemption UP invoked was adopted to comply with the “legislative directive” to “grant exemptions and rely on ‘after the fact’ remedies, including revocation, to correct any abuses.” *Class Exemption—Acq. & Oper. of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810, 811 (1995) (quoting H.R. Rep. No. 96-1430, at 105 (1980) (Conf. Rep.)).

¹ The factual statements in this Reply are verified by Daniel P. Hartmann, Senior Director Interline Marketing in UP’s Marketing & Sales department.

BNSF filed its Petition because it believes the exemption will provide UP with some sort of advantage in a potential dispute over BNSF's rights to access the Mission Rail Park under the Restated and Amended Settlement Agreement in the UP/SP merger proceeding (the "RASA").² If UP and BNSF cannot resolve their dispute privately, UP is willing to address BNSF's access claims in arbitration, as provided in the RASA, or at the Board. However, there is no merit to BNSF's claims that UP's use of the notice of exemption process was improper and that UP's Notice was misleading. Nor is there any merit to BNSF's claims that it faces irreparable harm and that a stay is in the public interest. However, UP and Frac Resources will be harmed if the exemption does not take effect as scheduled.

BACKGROUND

UP's Notice of Exemption was fully in accord with the law. On October 17, 2013, UP acquired 1.42 miles of track that Frac Resources constructed within a UP-owned right-of-way south of Elmendorf, Texas, extending past the end of UP's existing rail line. No one has yet operated the new track.³

The intended use of the track determines whether the operation of track requires prior approval under § 10901. See *United Transp. Union v. STB*, 183 F.3d 606, 613 (7th Cir. 1999); *Nicholson v. ICC*, 711 F.2d 364, 367-68 (D.C. Cir. 1983). "Under this test, track is railroad line if it extends into new territory not served by the carrier or already served by another carrier."

² The "UP/SP merger proceeding" refers to the proceeding in Finance Docket No. 32760, *Union Pacific Corp., Union Pacific R.R., & Missouri Pacific R.R.—Control & Merger—Southern Pacific Rail Corp., Southern Pacific Transportation Co., St. Louis Southwestern Ry., SPCSL Corp., & The Denver & Rio Grande Western R.R.*

³ SP's former mainline had once run over the right-of-way, but SP abandoned the line in 1994, prior to the UP/SP merger. See *S. Pac. Transp. Co. —Abandonment Exemption—In Bexar, Karnes, & Wilson Counties, TX*, AB-12 (Sub-No. 163X) (ICC served May 3, 1994).

United Transp. Union, 183 F.3d at 613. “New or proposed track is an extension of the railroad, and so constitutes railroad line, as long as the purpose and effect of the new track[] is to extend substantially the line of a carrier into new territory, even if the track is short and the character of the service contemplated [is] commonly rendered . . . by means of spur[] tracks.” *Id.* (internal quotations omitted) (alterations in original).

UP acquired the new track to extend its current line into new territory, so it can provide common carrier service to Frac Resources and other future customers in the Mission Rail Park.⁴ The new line extends UP’s existing mainline to reach Frac Resources and the Mission Rail Park. Before UP acquired the track, it could not serve Frac Resources or the Mission Rail Park. UP plans to use its new line to provide continuous transportation service to Frac Resources and the Mission Rail Park.⁵ Other transportation activities, such as loading, unloading, and switching, will take place on separate tracks that are owned by Frac Resources. UP expects that future shippers in the Mission Rail Park will provide similar facilities. UP’s new line essentially reactivates a portion of what historically had been a regulated line of railroad.⁶

⁴ *Cf. Swanson Rail Transfer, LP—Declaratory Order—Swanson Rail Yard Terminal*, FD 35424, slip op. at 3 (STB served June 14, 2011) (“A railroad may undertake to upgrade or relocate an existing line in order to carry out its common carrier obligation under its existing license on that line without additional authority from the Board. These actions may be contrasted with a carrier’s expanding the scope of its service, which requires an additional license.”); *GWI Switching Servs., L.P.—Operation Exemption—Lines of S. Pac. Transp. Co.*, FD 32481, slip op. at 5 (STB served Aug. 7, 2001) (transaction was subject to § 10901 where rail carrier “held itself out to perform common carrier service for any shippers”).

⁵ *Cf. Swanson Rail Transfer*, slip op. at 4 (“Typically, spur track is used for loading, unloading, storage, or switching operations that are incidental to the movement of trains.”).

⁶ *See supra* note 3; *cf. Sierrapine—Lease & Operation Exemption—Sierra Pac. Indus.*, FD 33679, slip op. at 3 (STB served Nov. 27, 2001) (class exemption was properly invoked where “[h]istorically, this line has been operated as a regulated, common carrier line of railroad”).

Under the circumstances, UP would be at serious risk if it commences service over the new line without obtaining approval or exemption from the Board. A rail carrier may “provide transportation over, or by means of, an extended or additional railroad line . . . only if the Board issues a certificate authorizing such activity.” 49 U.S.C. § 10901(a)(3). UP filed its notice under the Board’s class exemption that “applies to all transactions under section 10901,” 49 C.F.R. § 1150.31, to comply with the law.

ARGUMENT

I. THERE IS NO BASIS FOR REJECTING UP’S NOTICE OF EXEMPTION

BNSF offers no substantive objection to UP’s use of the class exemption, nor could it. The Board has allowed a carrier to use the class exemption process under similar circumstances in a decision that was upheld on appeal.⁷ BNSF does not assert that UP could provide common carrier service over the new line without Board authority. Nor does it assert that greater scrutiny might reveal that UP’s provision of transportation over the line would be “inconsistent with the public convenience and necessity.” 49 U.S.C. § 10901(c). Indeed, BNSF never refers to the statutory standard for authorizing operation of an extended railroad line.

Rather, BNSF’s objection is that UP’s need for Board authority to operate over the track that it acquired will affect the arguments BNSF thinks it has under the RASA to gain access to Frac Resources and other future shippers in the Mission Rail Park. BNSF believes its arguments would be stronger if Frac Resources operated the new track as private track. UP disagrees.⁸ But

⁷ See *Effingham R.R.—Operation Exemption—Line Owned by Total Quality Warehouse*, FD 33528, slip op. at 5 (STB served Sept. 18, 1998) (acquisition of track constructed by non-railroad), *aff’d sub nom. United Transp. Union*, 183 F.3d at 614-15.

⁸ BNSF fails to identify any loss of pre-merger competition. BNSF asserts that if a shipper had built and operated the new track as private track prior to the UP/SP merger, “the shipper could have sought through negotiation with UP and SP to obtain service from both carriers.” BNSF (continued...)

both parties' musings about hypothetical outcomes under different conditions are irrelevant. The new line will not be operated as private track. UP acquired the track to extend its existing rail line and provide common carrier service to Frac Resources and other future customers in the Mission Rail Park.⁹

BNSF also asserts that use of the exemption process is inappropriate because this is a controversial case. But there is no controversy relating to the underlying transaction or to UP's use of the exemption process. BNSF is not challenging the legitimacy of UP's acquisition of the track from Frac Resources, and it does not assert that UP is improperly seeking authority under § 10901. Nor has BNSF identified any factual dispute that requires the development of a more detailed record. This case is controversial only in that BNSF is trying to manufacture a controversy.¹⁰

Petition at 7. But nothing prevented Frac Resources from negotiating to obtain service from BNSF prior to locating in the Mission Rail Park, and nothing prevents future shippers in the Mission Rail Park from seeking to negotiate for access to BNSF.

⁹ "Private tracks constitute a narrow, limited category of rail operations." *B. Willis, C.P.A., Inc.—Petition for Declaratory Order*, FD 34013, slip op. at 2 (STB served Oct. 3, 2001). They are "typically built and maintained by a shipper (or for a shipper at the shipper's expense) and operated by the shipper (or its contractor) to serve only that shipper, moving the shipper's own goods, so that there is no 'holding out' to serve other shippers for compensation." *Id.*

¹⁰ This case is thus nothing like the cases BNSF cites in support of its Petition. None of those cases involved the routine use of the notice of exemption process to commence operation of common carrier service. *See, e.g., James Riffin & Eric Strohmeyer—Acquisition & Operation Exemption—In Rio Grande & Mineral Counties, Colo.*, FD 35705, slip op. at 3 (STB served Jan. 11, 2013) (rejecting notice because "the nature of the rights being sought was unclear" and the parties were proposing "to limit their common carrier obligation"); *Saratoga & N. Creek Ry., LLC—Operation Exemption—Tahawus Line*, FD 35559, slip op. at 3 (STB served Nov. 23, 2011) (rejecting notice because of claim that exemption was being sought "for purposes other than for providing common carrier service"); *Winamac S. Ry. Trackage Rights Exemption—A & R Line, Inc.*, FD 35208, slip op. at 2 (STB served Jan. 9, 2009) (denying exemption because of question "whether a key component of the trackage rights exemption—that trackage rights be based on a written agreement—is met"); *James Riffin d/b/a The N. Cent. R.R.—Acquisition & Operation Exemption—In York County, PA*, FD 34501, slip op. at 6 (STB served Feb. 23, 2005) (continued...)

Similarly, BNSF has not identified any information in UP's Notice that is misleading. UP knew that BNSF had requested access to the Mission Rail Park, and it rejected that request as inconsistent with the RASA.¹¹ BNSF had never shared with UP the legal theories it offers in its Petition regarding the potential consequences of UP's notice of exemption—which are, in any event, irrelevant to the use of the notice of exemption process and the validity of UP's Notice.

UP's Notice properly invokes the class exemption for operating an extended railroad line. BNSF's concern that a proper application of the law might affect the arguments it might make in seeking to obtain access to Mission Rail Park under the RASA is no reason to reject UP's Notice.

II. BNSF IS NOT ENTITLED TO A STAY

The Board should immediately vacate its housekeeping stay and allow the exemption to take effect as scheduled. A stay is particularly inappropriate because BNSF has not identified any harm that could not be remedied by revocation of the exemption. As the ICC explained when it adopted the class exemption for the acquisition and operation of railroad lines, the exemption reflects a Congressional policy to allow such transactions to proceed and rely on after-the-fact remedies:

In light of the explicit legislative directive to grant exemptions and then rely on after-the-fact remedies, including revocation, the potential for total or partial reimposition of regulation is always

(revoking exemption because of claims that railroad was improperly using the exemption process to avoid “legitimate processes of state law”); *The Burlington N. & Santa Fe Ry.—Acquisition & Operation Exemption—State of S. Dakota*, FD 34645, slip op. at 2-3 (STB served Jan. 14, 2005) (rejecting notice in part because the issue of railroad's right to the line was “tied up in state court litigation,” and the railroad acknowledged that it could not actually acquire and operate the lines until the litigation was resolved).

¹¹ See BNSF Petition, Ex. B. At about the same time, UP granted BNSF's requests for access to two new shipper facilities—one in Elemendorf and another located along the line leading to Elmendorf over which BNSF obtained trackage rights in the UP/SP merger.

present. Accordingly, we reject protestants' argument that an after-the-fact remedy is not satisfactory.

Class Exemption, 1 I.C.C.2d at 812. BNSF also failed to demonstrate its entitlement to a stay under the Board's traditional stay criteria.

A. BNSF Is Not Likely to Succeed on the Merits

BNSF is not likely to succeed on the merits of its petition to reject UP's Notice. BNSF has not identified any legal infirmities in UP's Notice. UP's Notice is consistent with precedent. BNSF might be able to imagine circumstances in which it might have better arguments that it is entitled to access to Mission Rail Park under the RASA than if the line at issue is subject to the Board's jurisdiction under § 10901, but that does not change the facts or make the proposed transaction controversial or in any way improper.

B. BNSF Will Not Suffer Irreparable Harm in the Absence of a Stay

BNSF will not suffer irreparable harm in the absence of a stay. BNSF's claims of losses are speculative and vague, and they are not supported by any competent evidence in the record. Moreover, BNSF is claiming only financial losses, and it is black-letter law that financial losses do not constitute "irreparable harm."¹² In short, BNSF has utterly failed to demonstrate that it cannot rely on after-the-fact remedies, as the agency intended when it adopted the class exemption.

C. Other Interested Parties Will Be Harmed By A Stay

BNSF incorrectly asserts that UP will not be substantially harmed by a stay. BNSF asserts, without offering any legal analysis, that UP could use the new track "as a spur." BNSF

¹² See, e.g., *Seminole Elec. Coop., Inc. v. CSX Transp. Inc.*, NOR 42110, slip op. at 4 (STB served Dec. 22, 2008) ("A monetary or 'economic loss by itself does not constitute irreparable harm.") (quoting *Consolidated Rail Corp.—Abandonment—Between Corry & Meadville*, AB-167 (Sub-No. 1129) (ICC served Oct. 5, 1995)).

Petition at 9. However, as discussed above, UP would face a real risk that it would be found in violation of § 10901 if it operated over the new line without Board authorization. The Board's test of whether a line is subject to § 10901 is based on the intended use of the track, and UP's intended use of the line is to extend its existing rail line to provide common carrier service to new customers. Moreover, if UP does not operate over the new line, it cannot provide the service that Frac Resources has requested.

D. A Stay Is Not in the Public Interest

The public interest does not warrant a stay. Congress addressed the public interest when it directed the ICC to establish exemptions and rely on after-the-fact remedies. BNSF's concern about access to Mission Rail Park under the RASA does not distinguish this situation from any other situation that could be addressed by after-the-fact relief. The public interest is in UP providing rail service to Frac Resources as soon as possible.

CONCLUSION

The Board should immediately lift its housekeeping stay and allow UP's exemption to take effect as scheduled on November 20. The Board should also deny BNSF's Petition. UP properly invoked the class exemption. If BNSF disagrees, it can seek revocation.

Respectfully submitted,



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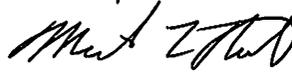
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November 18, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of November, 2013, I caused a copy of the foregoing reply to be served by e-mail or first-class mail, postage prepaid on all parties of record in this proceeding.

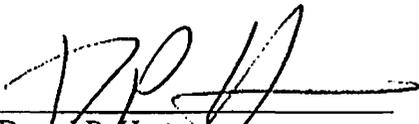


Michael L. Rosenthal

VERIFICATION
OF
DANIEL P. HARTMANN

I, Daniel P. Hartmann, Senior Director Interline Market in Union Pacific Railroad Company's Marketing & Sales department, declare under penalty of perjury that I have read the foregoing reply to BNSF's Petition to Reject Notice of Exemption and Request for Stay of Effective Date of Exemption and that the facts stated therein are true and correct to the best of my knowledge, information, and belief. Further, I certify that I am qualified and authorized to file this Verification.

Executed on November 18, 2013



Daniel P. Hartmann