

STB FINANCE DOCKET NO. 33508¹MISSOURI CENTRAL RAILROAD COMPANY
— ACQUISITION AND OPERATION EXEMPTION —
LINES OF UNION PACIFIC RAILROAD COMPANY

Decided September 9, 1999

This decision denies a petition for reconsideration of a decision served April 30, 1998 (*1998 Decision*), permitting the resumption of certain rail services in the Midwest. This decision also denies a motion seeking to dismiss the proceedings on the theory that the Board should revisit and revoke the authorization for the operations because private contractual issues could preclude the contemplated services from being conducted.

BY THE BOARD:

BACKGROUND

On December 24, 1997, in STB Finance Docket No. 33537, GRC Holdings Corporation (GRCH), a noncarrier, filed a notice of exemption under 49 CFR 1150.31 to acquire from Union Pacific Railroad Company (UP) a 244.5-mile line of railroad between Vigus, MO (milepost 19.0), and Pleasant Hill, MO (milepost 263.5). GRCH, upon acquiring the line, intended immediately to convey to Missouri Central Railroad Company (MCRR) the rail assets necessary to conduct operations over the line. On December 23, 1997, in STB Finance Docket No. 33508, MCRR, also a noncarrier, filed a notice of exemption under section 1150.31 to acquire the rail assets from GRCH and to operate the line, and to acquire directly from UP incidental trackage rights over UP's lines of railroad between Vigus (milepost 19.0) and Rock Island Junction, MO (milepost 10.3), and between Pleasant Hill (milepost 263.5) and Leeds Junction, MO (milepost 288.3), a total distance of 33.5 miles. Notices of the exemptions were served on January 27, 1998, and published at 63 Fed. Reg. 3945 (1998).

¹ This proceeding embraces Finance Docket No. 33537, *GRC Holdings Corporation — Acquisition Exemption — Union Pacific Railroad Company*. These proceedings were consolidated in a decision served April 30, 1998.

As pertinent here, on November 17, 1997, the Cities of Lee's Summit and Raytown, MO (the Cities or petitioners), jointly filed a petition to reject the notice of exemption filed in the MCRR proceeding and to find the exemption void *ab initio*. Between November 17, 1997, and February 11, 1998, approximately 325 individuals residing in or near Lee's Summit, as well as U.S. Congresswoman Karen McCarthy, also filed opposition comments in the MCRR proceeding. The focus of the Cities' and residents' concern is the 24.8-mile "west end" line between Pleasant Hill and Leeds Junction, over which MCRR would operate pursuant to trackage rights granted by UP. The segment passes through Lee's Summit and Raytown.

In their petition to reject, the Cities asserted that, because the subject track had long been inactive and had fallen into substantial disrepair, the line was abandoned by UP and its predecessors in a *de facto* manner, and that MCRR's proposal thus was actually one for construction of a new line of railroad. Petitioners argued further that the acquisition proposal, which along with the trackage rights exemption could adversely affect public safety, the local economy, the environment, and the quality of life in the affected communities, triggered the requirement that the Board undertake an environmental review and that MCRR file an environmental and an historic report, which the railroad did not do.

MCRR replied to the petition for rejection on December 23, 1997. It argued that the Cities erred in claiming that rehabilitation of UP's existing line actually is new construction, and that it did not anticipate crossing any of the thresholds that would trigger environmental review here.

In our *1998 Decision*, we found that the Cities had failed to establish grounds for declaring void or rejecting the notice of exemption. We rejected the Cities' argument that the acquisition proceeding was really a construction application. *1998 Decision*, at 6. We also found no merit in the Cities' argument that the requirements for an environmental review under the National Environmental Policy Act (NEPA) were met because the proposed operations would exceed the thresholds of 49 CFR 1105.7(e)(5)(i)(A).² *1998 Decision*, at 7. We disagreed with the Cities' argument that an increment of one train a day each way five days a week, as projected by MCRR, should be deemed sufficient

² Under that provision of our regulations, which concerns air pollution, an environmental report triggering environmental review is required " * * * [i]f the proposed action will result in * * * [a]n increase in rail traffic of at least 100% (measured in gross ton miles annually) or an increase of at least eight trains a day on any segment of rail line affected by the proposal."

to trigger our environmental reporting and documentation requirements. Instead, we explained (*id.*) that the fact that the 100% standard is paired in the same sentence with an absolute standard of an increase of eight trains a day “suggests that the 100% standard applies to an anticipated increment that greatly exceeds the one train a day each way operation proposed by MCRR.” We concluded that MCRR’s actions were most closely analogous to the situation that arises when a carrier reinstates service on a line where service has been discontinued. In such a case, under 49 CFR 1105.7(e)(5)(i)(C), the environmental requirements are not triggered unless the proposed operations will amount to at least eight trains per day. Thus, reading the regulations as a whole, we rejected the Cities’ argument that the environmental and historic review processes were triggered.

The Cities jointly filed a petition for reconsideration of the *1998 Decision*,³ to which MCRR and GRCH jointly replied. Later, the Cities filed an amendment to their petition, to which MCRR also replied. Several hundred residents of the Lee’s Summit area individually filed letters seeking reconsideration of the Board’s prior action.

In the amendment to their petition, the Cities relied on an information sheet that MCRR allegedly had distributed to the public. According to petitioners, the sheet reveals that, while initially MCRR would be operating only one train a day in each direction, MCRR is projecting five to eight trains per day operating five years following the commencement of operations. The Cities argued that the information sheet shows that the Board erred in assuming that only one train a day each way would operate through Lee’s Summit and Raytown.

MCRR replied to the Cities’ pleading. MCRR explained that the referenced document was distributed to persons attending a public meeting in Lee’s Summit and was intended not to alter its traffic projections but simply to show that, even in a “worst case scenario,” the effect of the proposed operations on the affected communities would be minimal.

By decision issued on November 30, 1998, we directed MCRR to submit a verified statement containing supplemental evidence regarding the number of trains it plans to operate for the reasonably foreseeable future to enable us to render a fully-informed decision on the petition for reconsideration.⁴ We also afforded the Cities the opportunity to reply to the supplemental evidence. MCRR filed the required evidence on December 30, 1998, and the Cities replied

³ The pleading is styled “Petition for Reconsideration and Petition to Reopen and Revoke Exemption of Lee’s Summit, Missouri and Raytown, Missouri.”

⁴ We have followed that approach in other cases where a railroad’s traffic projections are contested.

on January 19, 1999.⁵ Thomas A. Townsend, a resident of Lee's Summit, also filed a reply on that date.

MOTION TO DISMISS

On February 22, 1999, the Cities filed a motion to dismiss the proceedings. The motion is based on an UP news release of February 12, 1999, in which the railroad indicated that the deadline for GRCH's purchase of the 244.5-mile Vigus to Pleasant Hill line had passed and that the line would not be sold to GRCH. The Cities assert that, in the circumstances, there would be no point in the Board's continuing to process the exemptions.

GRCH and MCRR replied to the motion to dismiss on March 15, 1999. They argue that dismissal is inappropriate where, as here, the Cities are assailing effective exemptions and have the burden of showing that revocation is required. GRCH and MCRR point out that the standard under 49 U.S.C. 10502 for revoking an exemption is that we must find that application of a provision of the statute " * * * is necessary to carry out the transportation policy of section 10101," and that the Cities have made no showing even remotely related to that standard. Further, GRCH and MCRR assert that, while they currently are engaged in a contractual dispute with UP, they believe that the railroad remains willing to sell the subject line. They also explain that MCRR continues actively to seek financing for purchase of the line under the new terms UP evidently has set.

The motion to dismiss will be denied. Apart from the fact that the Cities have not even attempted to meet the statutory standard, the fact is that the notices of exemption in these proceedings, which are permissive in nature, were served and published and are effective. Thus, although operations by MCRR over the subject line cannot commence unless and until its right to use the line is established, once an exemption becomes effective, it is up to the parties to decide whether and how to go forward.

Recent press reports indicate that MCRR has filed a lawsuit seeking damages from UP as a result of the carrier's decision not to close the deal earlier this year. In response, an UP spokesman evidently has said that talks with other

⁵ The Cities' reply improperly contains substantial argument and evidence that does not relate to the operations issue that the supplemental evidence was intended to address. We will not strike the extra material, however, as it essentially restates arguments previously made. Accordingly, we will not reject the reply filed February 8, 1999, by MCRR in response to the Cities' reply, even though a reply to a reply is not permitted by our rules. *See*, 49 CFR 1104.13(c).

potential buyers and the State of Missouri are being held in abeyance while UP reviews the lawsuit. However, the fact that the private parties may have a contractual dispute — even one that could have the effect of undermining the transaction — provides no basis for dismissing the already effective exemptions.

THE PETITIONS FOR RECONSIDERATION

The Cities, with the support of many Lee's Summit residents, argue that the Board materially erred in failing to recognize that NEPA requires an environmental analysis of the assertedly major Federal action involved here, regardless of whether MCRR's proposal is categorized as a construction. In this connection, petitioners contend that the Board failed to consider the goals of, and Congressional policies behind, the environmental laws. The Cities further assert that, notwithstanding our finding that the railroad's proposal did not require an environmental report, we should have applied our rule at 49 CFR 1105.6(d), under which we reserve the discretion to require environmental documentation and prepare an environmental assessment when we decide that a particular action has the potential for significant environmental impacts.

Petitioners have made no showing of material error in our prior decision.⁶ Accordingly, the petition for reconsideration will be denied. 49 CFR 1115.3(b)(2).

As we explained in our *1998 Decision*, for purposes of determining whether we conduct an environmental analysis, this case is essentially the same as one in which service is reinstated over a line that was previously abandoned. In such cases, environmental review is not triggered unless the proposed operations will amount to at least eight trains a day. Petitioners have not shown that the interpretation in our prior decision of how our environmental regulations apply to cases such as this one is unreasonable.

The traffic projections in MCRR's verified statement and other supplemental evidence appear reasonable, and they will be accepted.⁷ These traffic projections

⁶ Petitioners do not allege changed circumstances or new evidence.

⁷ As we directed in our decision issued November 30, 1998, MCRR provided a verified statement and other supplemental evidence addressing the number of trains that it proposes to operate through Lee's Summit and Raytown. In that material MCRR explains that, based on local traffic projections for the line, MCRR continues to project operating one train per day each direction, five days per week, through the Lee's Summit/Raytown area beginning in the year 2000 and lasting at least until 2002. Specifically, MCRR states that 13,056 carloads is a reasonably optimistic projection of all the traffic that it might annually garner from shippers, amounting to 50
(continued...)

confirm that MCRR's proposed operations simply do not reach the thresholds at which environmental reporting and documentation are warranted. As MCRR has explained in its verified statements and other supplemental evidence, based on local traffic projections, one train per day each way is a reasonable projection of MCRR's likely traffic on this line.

MCRR acknowledges that it is possible that additional traffic (likely overhead traffic) could develop that would require an additional train in each direction through Lee's Summit and Raytown at some point, but explains that this traffic does not exist now, and that whether or when it actually will come into existence cannot be predicted at this point.⁸ MCRR adds that, even if this additional traffic were to develop, at most it would increase the number of train trips through the area to two each direction each day, five days a week, or a total of 20 train trips per week (just under three trains per day if based on a 7-day week). MCRR has no projection for any greater number of trains to be operated on this line at any time in the foreseeable future.⁹

Thus, it appears that there will likely be no more than one train a day each way on this line for the foreseeable future, in which case there clearly is no basis for environmental reporting and documentation. Although additional traffic (primarily overhead traffic that UP might tender) is possible, whether, when, and

⁷(...continued)

carloads a day, five days a week, over the entire line. Assuming that one-half of the projected carloads were to move over the west end segment near Kansas City — an optimistic assumption given that almost 90% of the local traffic is projected as being generated at or east of a point roughly in the middle of the line — and that there is an almost matching number of empty carload movements, this would comprise merely 1 relatively short (about 24-car) train moving in each direction each weekday.

⁸ MCRR indicates that there presently is no overhead traffic on the line it seeks to operate, and that the contract under which MCRR would acquire the line (through an intermediary transfer involving GRCH) restricts against interchanging with carriers other than UP. However, MCRR acknowledges that it is possible (primarily through growth in overhead traffic that could be tendered by UP) that the number of train movements over the west end segment could increase somewhat. MCRR emphasizes, however, that these higher traffic scenarios are not based on any actual traffic commitments, and that, in the event that MCRR actually were to carry overhead traffic, its operating plan would minimize the number of train movements through Lee's Summit and Raytown by combining local freight and overhead freight into single train movements, rather than running separate local and overhead trains.

⁹ MCRR explains that the railroad's information sheet does not project five to eight trains per day moving on this line within five years, as the Cities claim. Rather, MCRR states that this document contained very broad "off the cuff" calculations and was intended only to show that even in a "worst case scenario" the effect of the proposed operations on the affected communities would be minimal.

how much of this traffic there actually would be is speculative. Moreover, even assuming *arguendo* that all of the possible overhead traffic is obtained, the amount of traffic that likely will move on this line in the foreseeable future (a maximum of two trains per day each way five days a week) falls well short of the level of operations which we have determined has enough potential for environmental impacts to warrant environmental reporting and the preparation of environmental documentation (generally an increase of at least eight trains a day except for nonattainment areas). See, 49 CFR 1105.7(e)(5)(i)(A), (C).

The Cities cite provisions of our regulations that, they assert, do not require an 8-train-a-day threshold, and they argue that this proposal meets one or more of these lower or different thresholds. Their arguments are unavailing. Petitioners suggest that a proposed interchange at Pleasant Hill may qualify as a rail yard, which would trigger the environmental review process under 49 CFR 1105.7(e)(5)(B). But regardless of whether Pleasant Hill is deemed to be a new rail yard, the regulation on which the Cities rely applies only when yard activity increases by at least 100%. As we previously discussed in our *1998 Decision*, it is inappropriate to apply a percentage increase to a base of zero.

The Cities also argue that because St. Louis is a nonattainment area for ozone and lead,¹⁰ the Board's threshold under 49 CFR 1105.7(e)(5)(ii) applies. That section provides that an applicant for an action identified in 49 CFR 1105.6(a) or (b) as normally requiring environmental review should file an environmental report containing information about the potential impacts of the action on air quality if the proposal affects a nonattainment area and would result in an increase of at least three trains a day.

We do not believe section 1105.7(e)(5)(ii) requires environmental reporting under the circumstances presented. MCRR has shown that, based on local traffic projections, no more than one train a day each way five days a week will operate over the line, which is well below the three train per day increase threshold in 49 CFR 1105.7(e)(5)(ii). There is, of course, a possibility that some additional traffic might possibly develop, but there is no basis on which we could find that the three train per day increase threshold in 49 CFR 1105.7(e)(5)(ii) will likely be reached in the reasonably foreseeable future.

¹⁰ We note that, according to the Environmental Protection Agency's listing of nonattainment areas, the lead nonattainment area actually is Herculaneum, MO, in Jefferson County, which is southwest of the City of St. Louis (located in St. Louis County). Additionally, as MCRR points out, the Cities fail to specify any concerns they have about air pollution that would warrant the environmental examination they assert is necessary under 49 CFR 1105.7(e)(5).

We are sensitive to the need to protect nonattainment areas, but we must note that the operations contemplated in these proceedings should have only peripheral impacts on St. Louis. Indeed, the closest portion of the 278 miles of line involved here to that City is the portion between Vigus, MO, at milepost 19, and Rock Island Junction, MO, at milepost 10.3, which is approximately 10 miles west of St. Louis. MCRR plans to acquire from UP only incidental trackage rights over that track. Under 49 CFR 1105.6(c)(4), however, trackage rights requests normally do not require environmental documentation or review regardless of the number of trains that will be operated. Thus, the nearest point to St. Louis where the threshold in 49 CFR 1105.7(e)(5)(ii) could arguably be applicable would be 19 miles west of the City (at Vigus).¹¹

Furthermore, requiring environmental documentation here would be inappropriate because the rail assets MCRR is acquiring and the line over which it is acquiring trackage rights to operate involve lines over which rail service has been provided and which have never been abandoned. The owner of a rail line that has not been authorized to be abandoned may repair, replace, rehabilitate, or rebuild the line without Board authority (and therefore without environmental review by the Board). *See*, discussion in the *1998 Decision* at 6-7.

The Cities also argue that, as the Board does not know whether MCRR will be transporting ozone depleting materials, a review of the information required by section 1105.7(e)(5)(iii) is necessary. But a carrier is not required to present information regarding the transportation of ozone depleting materials unless its proposed operation has reached one of the thresholds at which environmental documentation and review are required. *See, e.g.*, 49 CFR 1105.7(e)(5)(iii); *Implementation of Environmental Laws*, 7 I.C.C.2d 807, 825 (1991). As discussed, no such threshold has been reached here.

It is true that, even where pertinent thresholds are not met, 49 CFR 1105.6(d) permits the Board to depart from the generally applicable provisions of section 1105.6(c)(4), which provides that environmental documentation is not normally required for an acquisition of trackage rights regardless of the number of trains. The Cities argue that potential environmental impacts to both Lee's Summit and Raytown could be significant, and therefore, the Board should conduct an environmental analysis under NEPA. Specifically, the Cities cite the proximity of the rail line to schools and neighborhoods and the potential

¹¹ St. Louis is approximately 250 miles east of the Cities, which are located in the vicinity of Kansas City at the other end of the State.

blockages at at-grade crossings and its effect on response times for police, fire, and emergency medical services.¹²

The Cities have not shown a need to depart from our normal procedure here. As explained above and in our prior decision, it is well settled that repair, replacement, rebuilding or rehabilitation of lines such as this that were never authorized to be abandoned may be done without Board authority or environmental review.¹³ Moreover, this plainly is not a proceeding in which a carrier proposes to construct a new rail line or a connecting track (proposals that requires environmental review), and the Cities' renewed arguments that MCRR's proposal is the equivalent of construction are without merit. Any rail activity will have some impact on the surrounding areas, but there has been no showing that the activity likely to result from the trackage rights operations here would warrant departure from the usual process.¹⁴

As MCRR points out, the cases cited by petitioners do not support their position that, in declining to conduct an environmental or historic review, we have acted in a manner inconsistent with that of our predecessor agency in implementing the same environmental rules. Some of the cited cases involved construction of new track, whereas MCRR's proposal involves repair and rehabilitation of an existing line.¹⁵ In other cases, an environmental report was filed because an applicable threshold was exceeded, or for reasons that are otherwise simply not relevant to the issues before us.

¹² The Cities' suggestion that MCRR use UP's nearby Sedalia Subdivision line instead of the line through Lee's Summit and Raytown is ironic. As MCRR points out, notwithstanding petitioners' professed concern with grade crossing congestion, the alternative route that they advocate is more congested and has more grade crossings than the route through Lee's Summit and Raytown.

¹³ *City of Detroit v. Canadian National Ry. Co., et al.*, 9 I.C.C.2d 1208 (1993), *aff'd sub nom. Detroit/Wayne County Port Authority v. ICC*, 59 F.3d 1314 (D.C. Cir. 1995); *City of Stafford, Texas v. Southern Pac. Transp. Co.*, Finance Docket No. 32395 (ICC served November 8, 1994), *aff'd*, 69 F.3d 535 (5th Cir. 1995).

¹⁴ Petitioners also express concern with the public safety impacts of UP operation, or of MCRR's proposed operation, but those concerns raise matters for consultation with the railroads, the Federal Railroad Administration, the Missouri Division of Railroad Safety, and local safety authorities.

¹⁵ The Cities analogize the situation in this case to *Construction and Operation — Indiana & Ohio Ry. Co.*, 9 I.C.C.2d 783 (1993), but as we have noted, this case does not involve construction of new track. As MCRR points out, the logical extension of the Cities' reasoning would result in the treatment of virtually all requests for trackage rights as proposals for new line construction, because trackage rights are typically obtained to allow a carrier to provide service that reaches a new market or otherwise is "new" to that carrier.

Finally, as MCRR notes, UP itself might operate over the subject line after it has been rehabilitated. But as we pointed out in the *1998 Decision*, because the line over which MCRR is acquiring trackage rights to operate has never been authorized to be abandoned, UP and its predecessors have long had the right to rehabilitate the line through Lee's Summit and Raytown and to recommence operations over it without even notifying the Board, much less seeking our authorization.¹⁶

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The Cities' motion to dismiss is denied.
2. The petition for reconsideration is denied.
3. This decision will be effective October 14, 1999.

By the Board, Chairman Morgan. Vice Chairman Clyburn, and Commissioner Burkes.

¹⁶ Indeed, although they argue that there would be no resumption of operations over the subject line but for the MCRR acquisition, the Cities recognize that UP contemplates operating over the line itself, or there would be no reason for it to retain ownership.