

STB FINANCE DOCKET NO. 33914

TEXAS MEXICAN RAILWAY COMPANY
— PURCHASE EXEMPTION —
UNION PACIFIC RAILROAD COMPANY

Decided December 8, 2000

The Board grants Texas Mexican Railway Company's petition for exemption from the prior approval requirements of 49 U.S.C. 11323-25, to acquire and operate the Rosenberg Line.

BY THE BOARD:

By petition filed on August 11, 2000, and supplemented on October 3, 2000, Texas Mexican Railway Company (Tex Mex or petitioner) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 11323-25, to acquire from Union Pacific Railroad Company (UP) and to operate the Rosenberg Line (the Line). The Line is an 84.5-mile line of railroad between milepost 87.0 near Victoria and milepost 2.5 near Rosenberg, in Jackson, Victoria, Wharton, and Fort Bend Counties, TX. Tex Mex requests that the exemption include its acquisition from UP of approximately 6.3 miles of overhead trackage rights at both ends of the Rosenberg Line, between milepost 0.0 and milepost 2.5 and between milepost 87.0 and milepost 90.8.¹ Additionally, Tex Mex requests permission to move the traffic that will originate or terminate on the Rosenberg Line pursuant to the overhead trackage rights acquired in the 1996 decision that approved the merger of UP and Southern Pacific Transportation Company (SP). See *Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233 (1996) (*UP/SP*), *aff'd sub nom. Western Coal Traffic League v. STB*, 169 F.3d 775 (D.C. Cir. 1999).

Comments in support of the proposed exemption were filed by The Kansas City Southern Railway Company (KCS), UP, Gulf Coast Rural Rail

¹ UP also will grant Tex Mex the use of existing interchange tracks between UP and The Burlington Northern and Santa Fe Railway Company (BNSF) at Rosenberg that permit Tex Mex to interchange only whole, or so-called "solid" trains with BNSF, not trains that require the sorting of cars, classification, and reassembling that require more extensive interchange facilities.

Transportation District (GCRT),² and a number of shippers.³ In the supplement to its petition for exemption, Tex Mex discusses the environmental aspects of the proposed transaction. A supplemental comment was also filed by GCRT. We will grant the petition for exemption subject to employee protective conditions.

BACKGROUND

Tex Mex owns and operates 157 miles of rail line extending from the International Bridge at Laredo, TX (where it connects with its affiliate, Transportation Ferroviaria Mexicana), through Robstown, to Corpus Christi, TX.⁴ Tex Mex also operates over UP lines via trackage rights granted in *UP/SP* from Robstown to Beaumont, TX (where it connects to KCS), via Placedo, Victoria, Flatonia, Rosenberg, and Houston, TX. The trackage rights were granted to ensure that Tex Mex would remain a viable and effective competitor for rail traffic moving between the United States and Mexico.

Tex Mex states that the *UP/SP* trackage rights between Robstown and Rosenberg are circuitous, extending 254 miles to the west and north, and that the last 83.2 miles are over the Glidden Subdivision of UP's heavily used Sunset Route. The Sunset Route is UP's primary route between the West Coast and the Southwest and Southeast via San Antonio, TX, Houston and New Orleans, LA, and is also used by Amtrak. Because the Rosenberg Line is a more direct route between Robstown and Rosenberg, Tex Mex states that it will be able to reduce the one-way and round-trip mileage between Laredo and Houston/Beaumont by 67 and 134 miles, respectively.

Tex Mex and KCS state that the proposed acquisition of the Rosenberg Line is in the interests of all affected shippers. The two railroads assert that, by acquiring the Rosenberg Line, Tex Mex will be able to: (1) restore service to the Line's former shippers; (2) add much-needed rail infrastructure to the Houston/Gulf Coast region; (3) shorten the length of, and add greater capacity to, its route between Laredo and Houston/Beaumont; (4) free up capacity on

² GCRT, a local rail district, was formed to preserve, and return to service, the portion of the Rosenberg Line between Victoria, at milepost 87.0, and Wharton, at milepost 25.86. It petitioned for leave to file comments outside the 20-day time period for filing replies, 49 CFR 1104.13(a). In the interest of a more complete record, GCRT's petition will be granted.

³ Coastal Warehouse, Ltd.; Rice Belt Warehouse, Inc.; Farmers Cooperative of El Campo; and Texana Rice Inc. — all located along the Rosenberg Line.

⁴ Tex Mex, a Class II rail carrier, is a wholly owned subsidiary of Mexrail, Inc. (Mexrail), a Delaware corporation. Transportation Maritima Mexicana, S.A. de C.V., a multimodal transportation company based in Mexico City, Mexico, and Kansas City Southern Industries, Inc., parent of the KCS, respectively, own 51% and 49% of Mexrail's common stock.

UP's Sunset Route; (5) divert operations from 157 miles of UP lines, 83.2 of which are over the heavily used Glidden Subdivision, to a more direct UP route that has seen little service for several years; (6) save substantial trackage rights fees and other, significant distance-related operating costs; (7) become a more efficient and effective competitor for traffic moving under the North American Free Trade Agreement; and (8) inject new and vigorous competition into southern Texas traffic and traffic between the United States and Mexico. Tex Mex states that it began negotiating with UP for the sale of the Rosenberg Line in 1998. An agreement to sell the Line, including the overhead trackage rights at each end and the expanded use of the *UP/SP* trackage rights, was reached on November 16, 1999, and a sale price has been set using a recently concluded arbitration process.

The Rosenberg Line is divided into two segments. The Victoria Segment is 62 miles long, extending from milepost 87.86, near the Victoria rail station, to milepost 25.86, near the Wharton rail station. The Rosenberg Segment is 23.3 miles long extending from milepost 25.86 to milepost 2.5, west of the rail station at McHattie, TX.

A notice of exemption to abandon the 36.8-mile Wharton Branch, which included the Rosenberg Segment and the 13.5-mile Palacios Segment,⁵ was served in 1995 in *Southern Pacific Transportation Company — Abandonment Exemption — In Fort Bend and Wharton Counties TX*, Docket No. AB-12 (Sub-No. 166X) (ICC served Mar 8, 1995, and published at 60 Fed. Reg. 12,784 (1995)). The exemption authority to abandon the Wharton Branch became effective on April 7, 1995, subject to a historic preservation condition and a 90-day salvage condition. On January 20, 1998, UP filed a letter with the Board stating that it had consummated the abandonment of the Palacios Segment. Referring to the Rosenberg Segment, the letter stated that “[t]he remaining portions of trackage authorized for abandonment have not been abandoned by Southern Pacific.”

A notice of exemption to abandon the Victoria Segment was served in 1993 in *Southern Pacific Transportation Company — Abandonment Exemption — In Jackson, Victoria and Wharton Counties TX*, Docket No. AB-12 (Sub-No. 162X) (ICC served Nov. 1, 1993, and published at 58 Fed. Reg. 58,349 (1993)). That exemption became effective on December 1, 1993, subject to a 180-day public use condition, which expired on May 30, 1994. In a decision served on May 12, 1995, our predecessor, the Interstate Commerce Commission (ICC),

⁵ The Palacios Segment originated at Wharton Junction, where it formed a “Y” with the Rosenberg Segment, and terminated to the southeast at New Gulf, TX.

reopened that proceeding at the request of the Texas Parks and Wildlife Department, determined that it retained jurisdiction over the right-of-way, and imposed a trail use condition, which was extended by decisions served on November 17, 1995, and May 29, 1996, and expired on November 30, 1996.

On August 5, 1994, GCRT brought an eminent domain action against SP in the Texas state courts to acquire a 16-mile portion of the Victoria Segment between milepost 25.8 at Wharton and milepost 42 at El Campo, TX. GCRT also sought and was granted a temporary restraining order (TRO) to prevent SP from removing track materials.⁶ SP filed an emergency motion to quash the TRO in the United States District Court. GCRT responded by filing a motion for a temporary injunction to prevent the removal of track material. The court granted the temporary injunction, conditioned on GCRT posting additional bond, and denied SP's motion to quash based on the court's finding that SP had consummated the abandonment of the Victoria Segment.⁷ See *Gulf Coast Rural Rail Transp. Dist. v. Southern Pac. Transp. Co.*, No. H-94-2749 (S.D. Tex. Aug. 31, 1994) (*Gulf Coast*).

GCRT failed to pay the additional bond, the temporary injunction did not go into effect, and GCRT subsequently filed a motion requesting that the court abstain from exercising further jurisdiction over the matter.⁸ The motion was granted, and the matter was remanded to the Texas state courts on July 26, 1995, where it remained inactive.

Tex Mex contends that the Rosenberg Line has not been abandoned. The petitioner asserts that neither SP nor UP ever stated, or indicated to the ICC or the Board, that either had consummated, or intended to consummate, the abandonments; that numerous statements were made to the contrary; and that UP and SP offered to sell the line for continued rail use or rail banking/trail use at all times after the notices of exemption were served and were actively engaged in such negotiations for much of the time. Additionally, Tex Mex states that no

⁶ *Gulf Coast Rural Rail Transp. Dist. v. Southern Pac. Transp. Co.*, No. 32, 241 (23d Jud. Dist. Ct. of Wharton County, Tex.).

⁷ Tex Mex argues that the district court's consummation finding is entitled to little weight because it was made on a highly expedited basis with little development of the facts and the law. Moreover, the finding was contradicted by SP and UP statements and actions, which, Tex Mex asserts, demonstrate that there was no abandonment consummation. Tex Mex contends that SP had no reason to seek reconsideration or appellate review and no opportunity to do so because GCRT failed to file bond or pursue condemnation and the court subsequently declined to exercise further jurisdiction.

⁸ In response to GCRT's motion, SP argued that the condemnation proceeding was preempted under the Interstate Commerce Act. The court rejected this argument, citing *Hayfield Northern R.R. v. Chicago & N.W. Transportation Co.*, 467 U.S. 622 (1984).

part of the right-of-way was transferred, that the integrity of the rail corridor has been maintained, and that the Line's bridges, culverts, ballast, grading, and most of its track and ties remain in place. Tex Mex also observes that rail service has continued over part of the Rosenberg Line, that the Rosenberg Segment remains on UP's System Diagram Map required by 49 CFR 1152.10, and on UP's applicable timetable,⁹ and that the segment continues to be listed in the Official Railroad Station List (ORSL).¹⁰

GCRT also claims that the Rosenberg Line was not abandoned. GCRT contends that the Line's shippers never ceased in their efforts to preserve rail service, and that: (1) it filed the eminent domain action in 1994 only after all negotiations to acquire the Line for continued rail service failed; (2) rail banking/trail use was requested and agreed to in 1995, after the court's consummation finding was issued; (3) rail banking/trail use and negotiations to acquire the Line continued into 1996, when the *UP/SP* merger application was filed; and (4) negotiations in connection with the merger eventually led to UP's agreement to sell the Rosenberg Line to Tex Mex. GCRT denies ever claiming that any portion of the Rosenberg Line was abandoned. To the contrary, it states that its eminent domain action was for continued rail use and, as such, was premised on an intact, and not an abandoned, right-of-way. GCRT states that the court's consummation finding should be given little or no weight. In its supplemental comment, GCRT adds that it moved for a non-suit in the underlying eminent domain action, that its motion was granted, and that the proceeding was dismissed on October 12, 2000.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 11323(a)(2), prior Board approval is required for a rail carrier to acquire the rail operating property of another rail carrier. 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 needed to protect shippers from the abuse of market power.

⁹ Union Pacific Houston Timetable No. 2, effective June 4, 2000, at 46. Previously shown on Union Pacific Houston Timetable No. 1, effective October 25, 1998, at 46, and SP's Southern Region Timetable 1, effective April 14, 1996, at 28.

¹⁰ ORSL 6000-U, effective March 15, 2000, at 793.

An exemption from the prior approval standards is warranted here under the standards of section 10502. Detailed scrutiny under 49 U.S.C. 11323-25 of this privately negotiated transaction encouraged by the Board is not necessary to carry out the rail transportation policy. The proposed transaction will help promote a safe and efficient rail transportation system, foster sound economic conditions, and encourage efficient management by diverting Tex Mex's operations away from a busy, indirect UP route to the unused, more direct Rosenberg Line [49 U.S.C. 10101(3), (5), and (9)]. Reactivating the Rosenberg Line will add to the rail infrastructure of the Houston/Gulf Coast area, boost Tex Mex's efficiency and competitiveness, and add capacity to UP's heavily used Sunset route [49 U.S.C. 10101(4), (5), and (9)]. Reactivation will also help to better meet the needs of the public, particularly the shippers on the Rosenberg Line¹¹ [49 U.S.C. 10101(4)], and will inject new and vigorous competition into the Houston/Gulf Coast and United States-Mexico markets, encouraging more competitive rates and preventing undue concentrations of market power [49 U.S.C. 10101(1), (5), and (12)]. Finally by minimizing the administrative time and expense of considering the proposed transaction in detail, an exemption will expedite regulatory decisions and reduce barriers to entry and exit [49 U.S.C. 10101(2) and (7)].

Regulation of the transaction is also not necessary to protect shippers from an abuse of market power. The transaction will result in a resumption of service for shippers located on the Rosenberg Line and more efficient and competitive services for shippers that currently operate in the Houston/Gulf Coast area and between the United States and Mexico.¹²

The question of whether the abandonment of the Victoria Segment was ever consummated may be relevant to whether the parties may be able to implement the proposed transaction, but that does not prevent us from considering and granting the exemption request.¹³ We are aware that the court in *Gulf Coast* has

¹¹ Tex Mex will provide common carrier service over the Rosenberg Line, and that service may not be discontinued or abandoned without Board authority under 49 U.S.C. 10903 or an exemption under 49 U.S.C. 10502.

¹² Given our market power finding, we need not also determine whether the proposed transaction is limited in scope.

¹³ See, e.g., *Indiana Northeastern Railroad Company — Change in Operators — Branch and St. Joseph Counties Rail Users Association, Inc. in Branch County, Michigan*, STB Finance Docket No. 33760 (STB served Sept. 1, 1999); *Gateway Western Railway Company — Construction Exemption — St. Clair County, IL*, Finance Docket No. 32158, and *Gateway Western Railway Company Petition under 49 U.S.C. 10901(d)*, Finance Docket No. 32157 (Sub-No. 1) (ICC served May 11, 1993); *Rio Grande Industries, Inc., et al. — Purchase and* (continued...)

ruled on the status of the line. However, we note that the court's summary ruling was made on a very limited factual record; that, in its condemnation action, GCRT had not claimed that any portion of the Rosenberg line had been abandoned; and that, at GCRT's request, the condemnation action was dismissed.

Moreover, based on the facts of record in this and other proceedings before the Board, we would also note that, had we considered this matter in the first instance, we would conclude that the abandonment of the Line had not been consummated. UP had already stated on a number of occasions subsequent to the ICC's authorization of abandonment that neither the Rosenberg nor Victoria Segments was abandoned.¹⁴ UP's voluntary filing of a consummation notice, applicable only to the Palacios Segment of the Wharton Branch, strongly supports that contention.¹⁵ Indeed, we later acknowledged in *UP/SP* (Sub- No. 26) Decision No. 10, 3 S.T.B. 1030 (1998), at 1056-1057 and note 47, Tex Mex's desire to acquire the Rosenberg Line from UP and to restore service over it, but found no need to intervene based on UP's willingness to sell the "unused" (*i.e.*, not abandoned) Line to Tex Mex and the progress the parties were making in their private negotiations for the sale. In fact, the Board urged the parties to continue their private negotiations to retain needed rail infrastructure.

As part of the sales agreement, Tex Mex requests permission to expand the use of the trackage rights it acquired in *UP/SP*. It has submitted copies of two draft trackage rights agreements negotiated with UP, which purportedly allow Tex Mex: (1) to use its *UP/SP* trackage rights between Robstown and Beaumont to also move the traffic that will originate or terminate on the Rosenberg Line as a result of the proposed transaction;¹⁶ and (2) to interchange solid trains with BNSF on UP's existing interchange tracks in the southwest quadrant at

¹³(...continued)

Related Trackage Rights — Soo Line Railroad Company Line Between Kansas City, MO and Chicago, IL, Finance Docket No. 31505 (ICC served Apr. 6, 1990).

¹⁴ See, e.g., *UP/SP* (UP/SP-340) (discovery response filed on May 14, 1998), at 7, ("UP states that it has not abandoned the portion of the former SP Wharton Branch between SP milepost 25.8 near Wharton, Texas, and SP milepost 87.8 near Victoria, Texas"); (UP/SP-356) (opposition to conditions applications, filed on Sept. 18, 1998) at 213-14; and (UP/SP-358) (verified statement in opposition to conditions, filed on Sept. 18, 1998) at 9.

¹⁵ A 1-year time limit for exercising abandonment authority and a requirement to file consummation notices with the Board and appropriate state agencies were codified at 49 CFR 1152.29(e)(2) in 1996. See *Aban. and Discon. of R. Lines and Transp. Under 49 U.S.C. 10903*, 1 S.T.B. 894, 904-06 (1996), *aff'd sub nom. National Ass'n of Reversionary Property Owners v. STB*, 158 F.3d 135 (D.C. Cir. 1998).

¹⁶ Under the terms of the draft agreement, the trackage rights may not be used for traffic originating or terminating on lines connecting to, or moving to or from transport facilities on, the Rosenberg Line.

Rosenberg, provided Tex Mex first enters into an interchange agreement with BNSF.¹⁷ Because UP has agreed to the expanded trackage rights and the expansion is in the public interest, Tex Mex's request will be granted.

Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve rail carriers of their statutory obligation under 49 U.S.C. 11326 to protect the interests of their employees. Accordingly, as a condition to granting this exemption, we will impose the conditions for the protection of employees adversely affected by the purchase, as set forth in *New York Dock Ry. — Control — Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979), and the conditions for the protection of employees adversely affected by the trackage rights, as set forth in *Norfolk and Western Ry. Co. — Trackage Rights — BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry. — Lease & Operation*, 354 I.C.C. 732 (1980).

Tex Mex requests expedited consideration to permit it to consummate the purchase and restore service as early as possible. The request is reasonable and in the public interest. Accordingly, the decision will become effective 10 days after December 11, 2000, its service date,

Based on the information before us,¹⁸ this action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. GCRT's petition for leave to file comments outside the 20-day reply period provided in 49 CFR 1104.13(a) is granted.
2. Under 49 U.S.C. 10502, we exempt the above-described transaction from the prior approval requirements of 49 U.S.C. 11323-25, subject to the protective conditions for employees adversely affected by the purchase, as set forth in *New York Dock Ry. — Control — Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979), and the protective conditions for employees adversely affected by the acquisition of trackage rights, as set forth in *Norfolk and Western Ry. Co. —*

¹⁷ Under the terms of the draft agreement, Tex Mex would not be allowed to stop trains on any portion of UP track at Rosenberg to pick up or set out individual carload blocks for interchange with BNSF.

¹⁸ Petitioner states that this transaction is not expected to result in a level of operations that exceeds the thresholds adopted in 49 CFR 1105.7(e)(4) or (5). Moreover, there is no indication that Tex Mex has any plans to dispose of or alter historic properties. Therefore, this transaction is excepted from environmental reporting requirements under 49 CFR 1105.6(c)(2)(i), and an historic report is not required under 49 CFR 1105.8(b)(1) and (3). Further Board approval would be required for Tex Mex to abandon any service.

Trackage Rights — *BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry. — Lease & Operation*, 354 I.C.C. 732 (1980).

3. Tex Mex's request for permission to use the trackage rights granted in *UP/SP* to move traffic originating or terminating on the Rosenberg Line is granted, as provided in the decision.

4. Notice will be published in the *Federal Register* on December 15, 2000.

5. This exemption will be effective on December 21, 2000.

6. Petitions to reopen must be filed by January 2, 2001.

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