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FR-4915-00-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 33611]

Union Pacific Railroad Company--Petition for Declaratory Order--Former Missouri-Kansas-Texas Railroad Line Between Jude and Ogden Junction, TX

AGENCY: Surface Transportation Board.

ACTION: Institution of declaratory order proceeding; request for comments.

SUMMARY: The Surface Transportation Board (Board) is instituting a declaratory order proceeding and requesting comments on the petition of the Union Pacific Railroad Company (UP), for an order declaring that the Board lacks authority under 49 U.S.C. 10901 over UP's decision to rehabilitate and reactivate 16.7 miles of line passing through New Braunfels, TX.

DATES: Any interested person may file with the Board written comments concerning UP's petition by June 22, 1998. UP may reply by June 30, 1998.

ADDRESSES: Send an original plus 10 copies of all pleadings, referring to STB Finance Docket No. 33611, to: Surface Transportation Board, Office of the Secretary, Case Control Unit, Attn: STB Finance Docket No. 33611, 1925 K Street, N.W., Washington, DC 20423-0001. In addition, pleadings must certify that a copy has been served on UP's representatives: J. Michael Hemmer and Pamela L. Miles, Covington & Burling, 1201 Pennsylvania Avenue, N.W., P.O. Box 7566, Washington, DC 20044-7566.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 565-1600.

[TDD for the hearing impaired: (202) 565-1695.]

SUPPLEMENTAL INFORMATION: By petition filed on May 26, 1998, UP requests the Board to issue an order under 49 CFR 1117.1 declaring that its rehabilitation of the segment of the former Missouri-Kansas-Texas Railroad (MKT) line that runs parallel to UP's mainline in the New Braunfels, TX area does not need to be reviewed by the Board under 49 U.S.C. 10901.¹ According to UP, the City Council of New Braunfels adopted in May a resolution requesting UP to permanently cease rehabilitating the line.

UP states that it has encountered significant congestion on its Austin Subdivision north of San Antonio. UP maintains that, because of inadequate rail capacity on this route, it has been unable to haul all of the aggregates needed by the Texas construction industry. To remedy the capacity problem, UP has begun rehabilitating the former MKT line between UP milepost 219.5 at Jude, TX (about 10 miles south of San Marcos), and UP milepost 236.2 at Ogden Junction, TX, a distance of about 16.7 miles.² UP claims that this rehabilitation project will eliminate the only single-track section on the 56 miles between San Marcos and San Antonio.

¹ Under 49 U.S.C. 10901(a), a carrier may “(1) construct an extension to any of its railroad lines; (2) construct an additional railroad line; [or] (3) provide transportation over, or by means of, an extended or additional railroad line; . . . only if the Board issues a certificate authorizing such activity.”

² According to UP, the line rehabilitation will “accommodate the current volume of traffic in this area, meet the unmet needs of local shippers, and handle expected growth of Laredo gateway traffic.”

UP notes that, in the UP-MKT merger (Union Pacific Corp. Et Al.- Cont. - MO-KS-TX Co. Et Al., 4 I.C.C.2d 409 (1988)), the Interstate Commerce Commission (ICC) granted abandonment authority for the line.³ UP states that, while service has been discontinued on the line, the track was not removed and, except for a few locations, the line is intact.⁴ Parts of the track continue to be used.⁵

UP argues that 49 U.S.C. 10901 does not give the Board authority over all rail track projects. It notes that 49 U.S.C. 10906 excludes spur tracks from Board construction jurisdiction. While the line at issue is not a spur, UP contends that some track projects fall between section 10906 exclusions and section 10901 jurisdiction, because they are neither “an extension” of a rail line nor “an extension of a railroad line.” Specifically, UP argues that section 10901 does not apply to this situation because it is a “mere addition of a second track to an existing line or railroad, [and it does] not alter the competitive situation by injecting a carrier into a new service area.”

UP cites Missouri Pacific R.R.--Construction and Operation Exemption--Avondale, LA, STB Finance Docket No. 33123, (STB served July 11, 1997) at 2 for the proposition that “[a]n extension or addition to a rail line occurs when a construction project enables a

³ Although no citation is given, it appears that in the merger the line was authorized for abandonment in Missouri-Kansas-Texas Railroad Company-Abandonment Exemption-In Comal County, TX, Docket No. AB-102 (Sub-No. 18X).

⁴ UP states that, although the lines are not located within the same right-of-way, in some places they are only 100 feet apart. Based on the map provided by UP, it also appears that in one place the lines are more than 1.5 miles apart.

⁵ UP states that a shipper in New Braunfels is being served over about one-half mile of the former MKT line. UP also uses another 4000 feet of track to serve a lumber shipper. Prior to the rehabilitation, additional segments of the line were evidently used for storage.

carrier to penetrate or invade a new market.” UP claims that it is not creating a new rail line, but simply reinstating service on a previously operated line. Moreover, it argues that it is not penetrating new territory, because UP is the only railroad serving customers in the area.⁶

UP also contends that its rehabilitation is not a line addition or extension, because it is simply developing a second main line or “double tracking” to increase the capacity of the existing mainline. According to UP, the ICC found that it did not have jurisdiction over double track construction. City of Detroit v. Canadian National Ry., 9 I.C.C.2d 1208 (1993), aff’d sub nom. Detroit/Wayne County Authority v. ICC, 59 F.3d 1314 (D.C. Cir. 1995) and City of Stafford, Texas v. Southern Pacific Transportation Co., Finance Docket No. 32395 (ICC served Nov. 8, 1994) aff’d sub nom. City of Stafford v. ICC, 59 F. 3d 535 (5th Cir. 1995).

By this notice, the Board is requesting comments on UP’s petition.

⁶ UP claims that this case differs from Dakota Rail, Inc.--Petition for Exemption from 49 U.S.C. 10901, 10903 & 11301, Finance Docket No. 30721 (ICC served Apr. 10, 1986) (Dakota). There the ICC indicated that the carrier would need to seek authority to resume service over a line it had abandoned. UP argues that the discussion in Dakota was simply dicta. Moreover, the line abandoned there was the only one in that geographic area, and if service were resumed, the carrier would arguably be entering new territory. Here, UP submits, UP maintained service in the area even after the abandonment through the use of its parallel track.

STB Finance Docket No. 33611

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Decided: June 1, 1998.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams

Secretary