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SERVICE DATE – JUNE 19, 2013

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 33 (Sub-No. 277X)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT EXEMPTION—
IN LAFOURCHE PARISH, LA.

Docket No. FD 35601¹

BNSF RAILWAY COMPANY—TRACKAGE RIGHTS EXEMPTION—
UNION PACIFIC RAILROAD COMPANY

Digest:² Union Pacific Railroad Company is permitted to stop providing rail service over a 12.5-mile portion of a rail line it owns in Lafourche Parish, La., known as the Lockport Branch. BNSF Railway Company is permitted to operate over a 14.1-mile portion of the Lockport Branch.

Decided: June 17, 2013

In these proceedings, Union Pacific Railroad Company (UP) and BNSF Railway Company (BNSF) both seek authorizations from the Board regarding a line of railroad known as the Lockport Branch, in Lafourche Parish, La. (the Lockport Branch or the Line). UP seeks to discontinue³ service over a portion of the Line, while BNSF requests authorization for trackage rights over a portion of the Line. The Board is allowing both the discontinuance and trackage rights exemptions to take effect on the service date of this decision.

BACKGROUND

In Docket No. AB 33 (Sub-No. 277X), UP filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon a portion of the Line, between

¹ These proceedings are not consolidated. A single decision is being issued for administrative convenience.

² 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. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

³ UP originally filed a notice of exemption to abandon a portion of the Lockport Branch, but later filed a motion to modify its notice of exemption to permit UP only to discontinue service over the same segment.

milepost 1.7 near Raceland and milepost 14.2 near Jay, a distance of 12.5 miles. Notice of the exemption was served and published in the Federal Register on November 14, 2011 (76 Fed. Reg. 70,534).⁴

On December 6, 2011, BNSF submitted a letter asserting that it has authority sanctioned by the Board to serve customers on the portion of the Line that UP sought to abandon. BNSF argued that UP should not be permitted to consummate the abandonment until BNSF voluntarily discontinues its authority to serve customers on the Line. UP contested BNSF's claim.⁵

By decision served on January 30, 2012, the Board postponed the effective date of UP's abandonment exemption until further order of the Board, directed the parties to file a copy of any documentary evidence referred to or relied upon in their submissions to date, and allowed the parties to file additional evidence and argument. BNSF and UP filed additional evidence and argument, together with copies of referenced documents, on February 9, 2012.

Shortly thereafter, on February 21, 2012, BNSF filed, in Docket No. FD 35601, a verified notice of exemption under 49 C.F.R. § 1180.2(d)(7) for trackage rights over 14.1 miles of the Lockport Branch between milepost 0.1 at Raceland Junction and milepost 14.2 near Jay. Notice of the exemption was served and published in the Federal Register on March 8, 2012 (77 Fed. Reg. 14,058). BNSF submitted a copy of the trackage rights agreement (First Supplemental Agreement) with its verified notice of exemption.⁶

On March 15, 2012, UP filed a petition to reject BNSF's verified notice of exemption. BNSF filed a reply in opposition to UP's petition on March 19, 2012. By decision served on March 21, 2012, the Board postponed the effective date of BNSF's trackage rights exemption until further order of the Board.

⁴ The notice also embraced Docket No. AB 318 (Sub-No. 7X), Louisiana & Delta Railroad, Inc.—Discontinuance of Service Exemption—in Lafourche Parish, La. (LDRR Discontinuance), in which Louisiana & Delta Railroad, Inc. (LDRR) sought an exemption to discontinue service over the same portion of the Line. That discontinuance exemption became effective on December 14, 2011, and on December 28, 2011, LDRR filed a notice of consummation effective December 31, 2011.

⁵ See UP letters submitted December 23, 2011, and January 18, 2012. On January 6, 2012, BNSF submitted a letter replying to UP.

⁶ BNSF explains that this agreement, dated August 1, 2000, is a supplement to the Trackage Rights Agreement dated September 10, 1998, between UP and BNSF, which was authorized by the Board in Burlington Northern & Santa Fe Railway Co.—Trackage Rights Exemption—Union Pacific Railroad Co., FD 33663 (STB served Oct. 19, 1998).

On June 12, 2012, UP and BNSF jointly filed a motion to hold both proceedings in abeyance, pending settlement negotiations, which the Board granted by decision served on June 15, 2012.

On September 20, 2012, UP filed a motion to modify its notice of exemption to permit only UP's discontinuance of service over the same portion of the Line it had previously sought to abandon. UP states that this modification would also allow the Board to lift the housekeeping stay in Docket No. FD 35601, so that BNSF's trackage rights exemption could become effective. However, UP asks the Board to indicate that allowing BNSF's trackage rights exemption to take effect would not constitute a determination regarding BNSF's contractual right to operate over the Line. On September 24, 2012, Valentine LLC (Valentine)⁷ and Bollinger Shipyard, Inc. (Bollinger) submitted a letter stating that they do not oppose UP's motion to modify its notice of exemption.⁸ On February 27, 2013, Valentine and Bollinger submitted a letter seeking to withdraw their September 24 letter and stating that they now oppose UP's discontinuance of service, because "several shippers expressed to the Board a desire to locate rail shipping facilities along the Lockport Branch."⁹ On April 5, 2013, the Lafourche Parish Government (the Parish), a political subdivision of the State of Louisiana, submitted a letter requesting a decision on UP's discontinuance request and asserting that allowing UP to discontinue service over a portion of the Line may hold back economic development in the region.

BNSF submitted a reply to UP's motion on October 9, 2012, requesting that the Board lift the housekeeping stay in Docket No. FD 35601 and confirm BNSF's contractual right to directly serve customers on the Line. On October 17, 2012, UP submitted a reply asking the Board to refrain from interpreting the terms of the relevant contractual agreements between UP and BNSF. UP further stated that, "if the Board grants UP's motion and confirms that publication of BNSF's notice of exemption does not in and of itself allow BNSF to operate over the Line, UP would not object if the Board also confirms that BNSF has rights to serve present and future shippers on the Line 'pursuant to the terms and conditions of the governing

⁷ On November 23, 2011, Valentine filed a formal expression of intent to file an offer of financial assistance (OFA) to purchase the Line. See 49 U.S.C. § 10904; 49 C.F.R. § 1152.27(c)(2). By letter submitted on December 29, 2011, however, Valentine notified the Board that it does not intend to file an OFA and asked the Board either to reject UP's abandonment exemption or limit the exemption to discontinuance of service.

⁸ On January 29, 2013, Valentine (now referring to itself as Valentine Chemicals LLC) submitted a letter asserting that there is a realistic potential for substantial rail traffic over the Lockport Branch if the tracks are rehabilitated. UP submitted a letter in reply on February 12, 2013.

⁹ See discussion of letters from Rail Solutions LLC and LogiBio LLC, infra.

agreements.” UP stated in addition that the parties’ September 1, 2000 Joint Operating Agreement requires the parties to invoke arbitration in the first instance.¹⁰

DISCUSSION AND CONCLUSIONS

UP’s request to modify its notice of exemption is reasonable and will be granted.¹¹ The Board has previously granted similar requests to narrow an exemption from abandonment to discontinuance.¹² In this case, UP has met the requirements for the class exemption under 49 C.F.R. § 1152.50 regarding discontinuance of service over lines that have been out of service for at least two years.¹³ The record does not reflect any shipper requesting transportation service from UP over the Line.¹⁴ The Board notes that Rail Solutions LLC (Rail Solutions) stated that it

¹⁰ See UP October 17 Reply 5-6.

¹¹ On November 18, 2011, the Board’s Office of Environmental Analysis (OEA) served an environmental assessment (EA) in Docket No. AB 33 (Sub-No. 277X). In the EA, OEA concluded that it saw no environmental or historic preservation issues and did not recommend that any environmental conditions be imposed. No comments to the EA were received. Therefore, a Finding of No Significant Impact under 49 C.F.R. § 1105.10(g) will be made pursuant to 49 C.F.R. § 1011.7(a)(2)(ix).

On November 28, 2011, the Parish filed a request for the issuance of a notice of interim trail use (NITU) under the National Trails System Act, 16 U.S.C. § 1247(d), and 49 C.F.R. § 1152.29, and for a public use condition under 49 U.S.C. § 10905. However, by letter filed on January 31, 2012, and amended on February 21, 2012, the Parish asks to withdraw its request for a NITU and a public use condition. The Parish’s request to withdraw the request for a NITU and a public use condition is reasonable and will be granted.

¹² See, e.g., Union Pac. R.R.—Aban. Exemption—in Yuma & Maricopa Cntys., Ariz., AB 33 (Sub-No. 178X), slip op. at 1 n.1 (STB served Dec. 23, 2002).

¹³ UP certifies that there has been no local or overhead freight service on the portion of the Line between mileposts 1.7 and 14.2 for at least two years, stating that the last local service over this portion of the Line was in December 2008. UP Verified Notice of Exemption 2. UP adds that there was no overhead traffic on the Line because it is not a “through line.” Id. UP further certifies that no formal complaint by a user of rail service on the same portion of the Line, or a state or local government entity acting on behalf of such user, regarding cessation of service over this segment either is pending with the Board or any U.S. District Court, or has been decided in favor of the complainant within the two year period. Id.

¹⁴ Valentine, Bollinger, and the Parish oppose discontinuance, but these parties do not indicate that they are shippers requesting service over the Line, and instead they refer either to the possibility of a potential shipper locating a facility along the Line (apparently referring to Rail Solutions LLC), or to economic development in general.

has been working with BNSF to locate one of its facilities adjacent to the Lockport Branch.¹⁵ However, the possibility that Rail Solutions may locate a facility on the Line and request service from BNSF at some point in the future is too speculative a basis on which to deny UP discontinuance authorization.¹⁶

Following discontinuance, the Line will remain part of the national transportation system and subject to the Board's jurisdiction;¹⁷ therefore, UP can choose to resume service without obtaining new authorization from the Board.¹⁸ Thus, narrowing UP's exemption will also remedy a concern raised by BNSF and Valentine, who objected to consummation of UP's proposed abandonment because it would prevent resumption of service.¹⁹

BNSF, however, objects to UP's request that the Board refrain from interpreting BNSF's contractual right to access customer facilities on the Line. Instead, BNSF asks the Board to confirm BNSF's contractual right to directly serve customers on the Line. BNSF argues that the Board has already recognized the scope of BNSF's contractual right to access customer facilities on the Line, citing the Board's decision in Burlington Northern & Santa Fe Railway Co. & Union Pacific Railroad Co.—Acquisition Exemption—Lines Between Dawes, Tex., & Avondale, La., FD 33630 (STB served Sept. 29, 1998) (50/50 Line Decision). In the 50/50 Line

¹⁵ See Rail Solutions letter submitted Oct. 10, 2012. On January 7, 2013, LogiBio, LLC (LogiBio) submitted a letter asking the Board to approve BNSF's authority to serve future industries on the Lockport Branch. Although this letter does not indicate LogiBio's relationship to Rail Solutions, it appears that Rail Solutions may have been renamed as LogiBio Louisiana. See Minutes of Greater Baton Rouge Port Comm'n, Oct. 27, 2011, at 2, available at <http://www.portgbr.com/media/user/meetings/CommMtgMinutes%2010-27-11.pdf>.

¹⁶ See, e.g., Union Pac. R.R.—Discontinuance—in Utah Cnty., Utah, AB 33 (Sub-No. 209), slip op. at 3 (STB served Jan. 2, 2008); CSX Transp., Inc.—Aban.—Between Bloomingdale & Montezuma, in Parke Cnty., Ind., AB 55 (Sub-No. 486) et al., slip op. at 9-10 (STB served Sept. 13, 2002), aff'd in pertinent part sub nom., Montezuma Grain Co. v. STB, 339 F.3d 535, 541 (7th Cir. 2003); CSX Transp., Inc. v. STB, 96 F.3d 1528, 1531-32 (D.C. Cir. 1996).

¹⁷ See, e.g., Mfrs. Ry.—Discontinuance Exemption—in St. Louis Cnty., Mo., AB 1075X, slip op. at 2 (STB served Feb. 6, 2013).

¹⁸ Id.

¹⁹ According to BNSF, converting UP's proposed abandonment to a discontinuance of service will prevent any interested party from making an offer of financial assistance to acquire the Line. BNSF October 9 Reply 7. But the OFA process is unavailable at this stage of the proceeding in any event because only Valentine timely filed a notice of intent to file an OFA, and it subsequently notified the Board that it would not file an OFA.

Decision, the Board approved BNSF's and UP's exchange of 50 percent ownership interests in each other's portions of the rail line between Dawes, Tex., and Avondale, La. (50/50 Line), which Southern Pacific Transportation Company (SP) had owned prior to SP's merger with UP. See id. As background to the exchange of 50 percent ownership interests, the 50/50 Line Decision noted that a February 12, 1998 term sheet agreement between BNSF and UP (Term Sheet) had provided BNSF with "access to all present and future shipper facilities on the [50/50 Line] and on former SP branches or spurs that connect to the [50/50 Line], as well as on new branches and spurs added to the [50/50 Line]." 50/50 Line Decision, slip op. at 2. However, the 50/50 Line Decision did not provide any interpretation of those access rights, as BNSF now requests, and it obviously did not interpret the First Supplemental Agreement, which was not executed until nearly two years later.

Nor did the 50/50 Line Decision authorize trackage rights over the Line (or any other former SP branch or spur connecting to the 50/50 Line). In a verified statement attached to the petition in Docket No. FD 33630, a BNSF witness stated that the access provision of the Term Sheet provided BNSF with multiple options by which it could elect to access industries or facilities on the branches or spurs in question. See FD 33630 Pet., Ex. B, V.S. of Peter J. Rickershauser 5-6. However, some of these methods of access, such as haulage, do not require Board authorization.²⁰ Others, such as direct access using trackage rights, would require Board authorization when and if BNSF elected to use those methods of access, as in the First Supplemental Agreement that BNSF and UP entered into subsequently.²¹ Thus, while we agree that the 50/50 Line Decision recognized the principle that BNSF has access rights, which include the Lockport Branch at issue here, we do not agree that it "recognized the scope of the trackage rights at issue." BNSF October 9 Reply 5 (emphasis added). No agreement providing trackage rights over the Line (or any other former SP branch or spur connecting to the 50/50 Line) was before the Board in that proceeding; as previously noted, the parties did not enter into the First Supplemental Agreement, which addresses such trackage rights, until nearly two years after the 50/50 Line Decision.

BNSF also argues that its contractual right is "related to conditions imposed by the Board" in connection with the UP/SP merger and that refusing to enforce this right would undermine the Board's regulatory processes. BNSF October 9 Reply 5, 7-8. The Board takes

²⁰ See, e.g., Union Pac. R.R.—Aban. Exemption—in Riverside & San Bernardino Cnty., Cal., AB 33 (Sub-No. 296X), slip op. at 2 & n.1 (STB served May 3, 2011).

²¹ The 50/50 Line Decision recognizes that the Term Sheet created UP trackage rights over BNSF's line between Beaumont and Navasota, Tex., for which the parties sought an exemption in Docket No. FD 33584. 50/50 Line Decision at 2 n.4. If the Term Sheet had also provided for BNSF trackage rights over the Lockport Branch, the parties would have needed to seek an exemption for those trackage rights, as they did for the trackage rights between Beaumont and Navasota.

seriously the conditions it has imposed on mergers, and if a merger condition is violated, the Board will take appropriate action.²² Here, however, BNSF does not indicate the specific condition that allegedly would be violated, or how such a violation would allegedly take place. See BNSF October 9 Reply 7-8 (referring generally to UP/SP merger conditions and citing, without elaboration, a decision addressing the “new facilities” and transload condition²³). Thus, we cannot find, based on BNSF’s argument, that interpreting the parties’ agreement is necessary to enforce a UP/SP merger condition.

Finally, BNSF argues that allowing UP to raise uncertainty regarding BNSF’s right to directly serve the Lockport Branch may impact the plans of Rail Solutions to locate a facility adjacent to the Line.²⁴ That argument, however, ignores the fact that the authorization granted through an exemption is permissive: it gives the parties permission to proceed with a transaction or activity, using whatever underlying contractual rights they may have, but it is not dispositive as to whether or not a party actually has a specific contractual right.²⁵ Although BNSF makes a plausible argument that the First Supplemental Agreement provides it with the trackage rights it claims, we will leave this interpretation to an arbitrator in the first instance, consistent with the parties’ agreement. See Sept. 10, 1998 Trackage Rights Agreement, Ex. 2 to BNSF Verified Notice of Exemption, FD 33663 (Sept. 29, 1998), General Conditions § 6 (providing for arbitration of controversies arising under the September 10, 1998 agreement later modified by the First Supplemental Agreement). Because this situation involves a shipper that may want to receive service and a railroad that wants to provide service, we are hopeful that any contractual dispute can be resolved quickly in the appropriate forum.

²² See Union Pac. Corp.—Control & Merger—S. Pac. Corp., 5 S.T.B. 1173, 1178 (2001) (“[N]otwithstanding the conclusion of the formal oversight process, we remain available—into the indefinite future—to consider and promptly resolve any disputes of general applicability relating to BNSF’s access to shippers under the BNSF Agreement, or other issues relating to the parties’ compliance with the conditions we imposed on the UP/SP merger, subject to any applicable requirement to arbitrate.”).

²³ Union Pac. Corp.—Control & Merger—S. Pac. Corp., 2 S.T.B. 697 (1997).

²⁴ BNSF October 9 Reply 4-5, 7; see also Rail Solutions letter submitted Oct. 10, 2012 (requesting that the Board “clearly and unequivocally approve BNSF’s trackage rights exemption on the Lockport Branch”).

²⁵ See, e.g., Saratoga & N. Creek Ry.—Operation Exemption—Tawahus Line, FD 35631, slip op. at 4 (STB served Oct. 11, 2012); BNSF Ry.—Discontinuance of Trackage Rights Exemption—in Peoria & Tazewell Cntys., Ill., AB 6 (Sub-No. 470X) et al., slip op. at 11-12 (STB served Apr. 26, 2011); Sioux Valley Reg’l R.R. Auth.—Trackage Rights Exemption—Lines of South Dakota, FD 34646, slip op. at 4 (STB served Jan. 19, 2005); Buckingham Branch R.R.—Lease—CSX Transp., Inc., FD 34495, slip op. at 11 (STB served Nov. 5, 2004).

Although BNSF states that the First Supplemental Agreement covers all former SP branches connecting to 50/50 Line—of which the Lockport Branch is one—BNSF seeks authorization in Docket No. FD 35601 for trackage rights only over a portion of the Lockport Branch between milepost 0.1 and milepost 14.2.²⁶ Accordingly, our decision today authorizes trackage rights only over this portion of the Line and not the other former SP branches connecting to the 50/50 Line.

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

It is ordered:

1. In Docket No. AB 33 (Sub-No. 277X):

- a. The housekeeping stay entered on January 30, 2012, is lifted.
- b. UP's motion to modify its notice of exemption is granted, and UP may discontinue service over, but not abandon, the portion of the Lockport Branch between milepost 1.7 near Raceland, La., and milepost 14.2 near Jay, La., subject to the employee protective conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979).
- c. Discontinuance of service over the involved rail line will have no significant effect on the quality of the human environment and conservation of energy resources or on historic resources.
- d. The Parish's request to withdraw its request for the issuance of a NITU and for the imposition of a public use condition is granted.

2. In Docket No. FD 35601:

- a. The housekeeping stay entered on March 21, 2012, is lifted.
- b. BNSF's notice of exemption is effective on the service date of this decision.
- c. UP's petition to reject BNSF's notice of exemption is denied.

²⁶ See BNSF Verified Notice of Exemption, FD 35601, at 5.

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

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.