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SERVICE DATE – LATE RELEASE JULY 23, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 33 (Sub-No. 303X)

UNION PACIFIC RAILROAD COMPANY—
ABANDONMENT OF FREIGHT EASEMENT—
IN ALAMEDA AND SANTA CLARA COUNTIES, CAL.

Docket No. AB 980 (Sub-No. 1X)

SANTA CLARA VALLEY TRANSPORTATION AUTHORITY—
ABANDONMENT OF COMMON CARRIER SERVICE—
IN ALAMEDA AND SANTA CLARA COUNTIES, CAL.

Digest:¹ Union Pacific Railroad Company is permitted to end its responsibility to provide freight rail service over its freight easement, and Santa Clara Valley Transportation Authority is permitted to end its common carrier obligation to provide freight rail service, over an 8.95-mile line in Alameda and Santa Clara Counties, Cal. The tracks will be rebuilt and incorporated into the Bay Area Rapid Transit System.

Decided: July 23, 2012

By a joint petition filed on April 4, 2012, as clarified on April 20, 2012, Union Pacific Railroad Company (UP) and Santa Clara Valley Transportation Authority (SCVTA) (collectively, Petitioners) seek exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10903 for UP to abandon its common carrier obligation pursuant to a freight easement and for SCVTA to abandon its common carrier obligation over an 8.95-mile portion of the San Jose Industrial Lead between milepost 7.35 and milepost 16.3 in Alameda and Santa Clara Counties, Cal. (the Line). Petitioners also seek exemption from 49 U.S.C. § 10904 (offer of financial assistance (OFA) procedures) and 49 U.S.C. § 10905 (public use provisions). Notice of the exemptions was served and published in the Federal Register on April 24, 2012 (77 Fed. Reg. 24,561).

For the reasons discussed below, we will grant the exemption from 49 U.S.C. § 10903, thereby authorizing UP to abandon its freight easement and SCVTA to abandon its common

¹ 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).

carrier obligation, subject to environmental and standard employee protective conditions. Petitioners' request for exemption from the OFA process will also be granted, and their request for exemption from the public use provisions of 49 U.S.C. § 10905 will be denied as moot.

BACKGROUND

SCVTA purchased the Line from UP in December of 2002, at which time UP retained a freight easement over the Line.² Petitioners state that the Line, which is surrounded by existing streets, highways, mass transportation services, utilities and recreational public parks, is no longer needed to provide freight rail service to shippers. According to Petitioners, the only two shippers that were using the Line—Clean Harbors San Jose LLC (Clean Harbors) and Frank-Lin Distillers Products Ltd. (Distillers)—have relocated their operations pursuant to agreements with SCVTA and will continue to receive rail service from UP at their new locations off the Line. Petitioners add that the City of San Jose will continue to receive rail service from UP on lines adjacent to or in the vicinity of the Line; that all overhead traffic through San Jose moves over an adjacent UP line; and that the area serviced by the Line is shifting to non-rail-oriented industries and, as a consequence, no new shippers are expected to locate on the Line. SCVTA intends to retain and rebuild the Line for future inclusion into the Bay Area Rapid Transit System (BART).

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10903, a rail line may not be abandoned without prior approval from the Board. Under 49 U.S.C. § 10502, however, the Board must exempt a transaction or service from regulation when it finds 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 necessary to protect shippers from the abuse of market power.

Detailed scrutiny of the proposed abandonment of UP's freight easement and SCVTA's common carrier obligation under 49 U.S.C. § 10903 is not necessary in this case to carry out the rail transportation policy. The Line is not needed for continued freight rail service and will be rebuilt for future inclusion into BART. By minimizing the administrative expense of the application process, an exemption will expedite regulatory action and reduce regulatory barriers to exit, in accordance with 49 U.S.C. §§ 10101(2) and (7). An exemption will also foster sound economic conditions and encourage efficient management by permitting the rationalization of an unnecessary rail line, consistent with 49 U.S.C. §§ 10101(5) and (9). Other aspects of the rail transportation policy will not be adversely affected by the use of the exemption process.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power because there are no longer any active shippers on the Line. The City of San

² See Santa Clara Valley Transp. Auth.—Acquis. Exemption—Union Pac. R.R., FD 34292 (STB served Dec. 26, 2002, and Apr. 30, 2003).

Jose will continue to receive rail service from UP, and local and overhead traffic is moved over adjacent or nearby UP lines.³ Additionally, no party has filed in opposition to the proposed abandonment of the Line. Nevertheless, to ensure that Clean Harbors and Distillers are informed of our action, we will require UP and SCVTA to serve a copy of this decision on them so that they will receive it within five days of the service date of this decision and to certify contemporaneously to the Board that they have done so.

Exemption from 49 U.S.C. § 10904. Under 49 U.S.C. § 10904, a financially responsible person may offer to purchase, or subsidize continued rail operations over, a rail line sought to be abandoned. The Board has granted exemptions from the OFA provisions of 49 U.S.C. § 10904 when the record shows that the right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service. See, e.g., Norfolk S. Ry.—Aban. Exemption—in Norfolk & Va. Beach, Va., AB 290 (Sub-No. 293X) (STB served Nov. 6, 2007). In support of their request, Petitioners assert that an exemption is needed so the tracks can be rebuilt for future inclusion into BART. No party has filed in opposition to the Petitioners' request for exemption from §10904.

Petitioners have justified an exemption from the OFA process. They have demonstrated that the Line is needed for a valid public purpose—inclusion in BART. Likewise, there is no overriding public need for continued rail service. As noted above, the Line's only two shippers have relocated and are receiving UP rail service at their new locations and the City of San Jose will continue to receive rail service from UP. With regard to future rail service needs, the development in the area of San Jose served by the Line is shifting away from rail-oriented industries, decreasing the likelihood that rail-oriented shippers would locate on the Line. Accordingly, we find that a valid public purpose is present, and there is no overriding public need for continued freight rail service.

We conclude that applying the OFA provisions in this situation is not necessary to carry out the rail transportation policy. Allowing the abandonment exemption to become effective expeditiously, without first being subject to these provisions, will minimize the need for Federal regulatory control over the rail transportation system, expedite the regulatory action, and reduce regulatory barriers to exit, consistent with 49 U.S.C. §§ 10101(2) and (7). Other aspects of the rail transportation industry will not be adversely affected. As discussed above, regulation is not necessary to protect shippers from an abuse of market power because there are no shippers on the Line. Thus, the record here establishes that the proposed exemption from 49 U.S.C. § 10904 meets the criteria of 49 U.S.C. § 10502.

Exemption from 49 U.S.C. § 10905. Petitioners also seek exemption from the public use provisions of 49 U.S.C. § 10905. Because requests for a public use condition were due by

³ Because we find that regulation of the proposed abandonment of the Line is not necessary to protect shippers from the abuse of market power, we need not determine whether the proposed abandonment is limited in scope.

May 14, 2012, and none were received, Petitioners' request for exemption from § 10905 will be denied as moot.

Employee Protection. Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, the Board will impose 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).

Environmental Review. Petitioners have submitted a combined environmental and historic report and have notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed abandonments. See 49 C.F.R. § 1105.11. The Board's Office of Environmental Analysis (OEA) has examined the environmental and historic report, investigated the record, and analyzed the probable effects of the proposed action on the quality of the human environment.

OEA served an Environmental Assessment (EA) in this proceeding on June 1, 2012, recommending that two conditions be imposed on any decision granting abandonment authority. OEA notes that, according to Petitioners, there are two bridges located on the Line that are at least 50 years old. The first bridge, located at milepost 15.19, was constructed in 1958 and would be replaced by BART as part of the proposed transit project. The second bridge, located at milepost 16.1, was constructed in 1957 as a 200-foot long girder structure crossing Highway 101 and is not designated for use in the BART project. OEA therefore recommends a condition requiring Petitioners to retain their interest in and take no steps to alter the historic integrity of these two bridges, as well as all other historic properties, including sites, buildings, structures, and objects within the project right-of-way that are eligible for listing or listed in the National Register of Historic Places, until the Section 106 process of the National Historic Preservation Act, 16 U.S.C. § 470f, has been completed. Under this condition, Petitioners shall report back to OEA regarding any consultations with the California State Parks, Office of Historic Preservation (SHPO) and the public. Further, Petitioners may not file their consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties) until the Section 106 process has been completed and this condition has been removed.

OEA also states that the U.S. Department of Commerce, National Geodetic Survey (NGS) has notified it that there are approximately 22 geodetic station markers located in the area of the proposed abandonment. OEA therefore recommends that Petitioners be required to consult with NGS at least 90 days before beginning any salvage activities that would disturb or destroy any geodetic station markers.

Pursuant to 36 C.F.R. § 800.2, OEA conducted a search of the Native American Consultation Database (Database)⁴ to identify any Federally recognized tribes that may have

⁴ <http://home.nps.gov/nacd/>

ancestral connections to the project area. According to the EA, the Database indicated that there are no Federally recognized tribes that may have knowledge regarding properties of traditional religious and cultural significance within the right-of-way of the proposed abandonment.

Comments to the EA were due by July 2, 2012. No comments to the EA were received. Accordingly, we will impose the conditions recommended by OEA in the EA. Based on OEA's recommendation, we conclude that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Under 49 U.S.C. § 10502, we exempt from the prior approval requirements of 49 U.S.C. § 10903 the abandonment by UP of its freight easement and by SCVTA of its common carrier obligation over the Line, 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), and subject to the conditions that UP and SCVTA shall: (1) (a) retain their interest in and take no steps to alter the historic integrity of all historic properties, including sites, buildings, structures, and objects within the project right-of-way that are eligible for listing or listed in the National Register of Historic Places, until the Section 106 process of the National Historic Preservation Act, 16 U.S.C. § 470f, has been completed, (b) report back to OEA regarding any consultations with the SHPO and the public, and (c) not file their consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties) until the Section 106 process has been completed and the Board has removed this condition; and (2) consult with NGS at least 90 days before beginning any salvage activities that would disturb or destroy any geodetic station markers.

2. Petitioners' request for exemption from the provisions of 49 U.S.C. § 10904 is granted.

3. Petitioners' request for exemption from the provisions of 49 U.S.C. § 10905 is denied as moot.

4. Petitioners are directed to serve a copy of this decision on Clean Harbors and Distillers so that it is received within five days of the service date of this decision and certify contemporaneously to the Board that they have done so.

5. The exemptions will be effective on August 22, 2012. Petitions to stay must be filed by August 7, 2012, and petitions to reopen must be filed by August 17, 2012.

6. Pursuant to the provisions of 49 C.F.R. § 1152.29(e)(2), Petitioners shall each file a notice of consummation with the Board to signify that they have exercised the authority granted and fully abandoned the Line. If consummation has not been effected by Petitioners' filing of a notice of consummation by July 23, 2013, and there are no legal or regulatory barriers to

consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the one-year period, the notice of consummation must be filed no later than 60 days after the satisfaction, expiration, or removal of the legal or regulatory barrier.

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