

**APPENDIX C
DECISIONS AND RELATED CORRESPONDENCE**

Appendix C contains the following documents:

- The Surface Transportation Board's August 2002 Decision
- The letter from SEA (Victoria Rutson) to GBCPA (James Blackburn, Jr.) dated October 30, 2002
- The Surface Transportation Board's December 2002 Decision
- The letter from the Surface Transportation Board (Secretary Vernon Williams) to GBCPA (James Blackburn, Jr.) dated February 11, 2003

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SERVICE DATE - AUGUST 28, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34079

SAN JACINTO RAIL LIMITED CONSTRUCTION EXEMPTION AND
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
OPERATION EXEMPTION—BUILD-OUT TO THE BAYPORT LOOP NEAR
HOUSTON, HARRIS COUNTY, TX

Decided: August 19, 2002

By petition filed on August 30, 2001, San Jacinto Rail Limited (San Jacinto) and The Burlington Northern and Santa Fe Railway Company (BNSF) (collectively, petitioners) seek an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901 for the construction by San Jacinto and the operation by BNSF of a 12.8-mile line of railroad serving the Bayport Industrial District (Bayport Loop) in southeast Houston, Harris County, TX, near Galveston Bay. The line would connect the Bayport Loop with the former Galveston, Henderson and Houston Railroad (GH&H) line now owned by Union Pacific Railroad Company (UP) near the southeast corner of Ellington Field. Petitioners request that, consistent with our usual practice in rail construction cases, we conditionally grant the exemption, subject to our completion of the ongoing environmental review and the issuance of a further decision addressing the environmental issues and establishing an effective date for the exemption, if warranted, subject to any necessary conditions.¹

¹ In October 2001, the Board's Section of Environmental Analysis (SEA) issued a notice of intent to prepare a full Environmental Impact Statement (EIS) in this case. A draft scope of study was issued for public review and comment in November 2001. Following scoping meetings held in January 2002, a Final Scope of Study for the EIS was issued in July 2002. A Draft Environmental Impact Statement (Draft EIS) now is being prepared. After it is issued for public review and comment (for a minimum of 45 days), SEA will issue a Final Environmental Impact Statement addressing the public's comments. We will then consider the potential environmental impacts associated with the proposal and make our final determination as to whether the exemption will become effective, and whether construction can begin.

On August 30, 2001, the Bayport Producers petitioned the Board for leave to intervene in the proceeding.² On October 9, 2001, UP filed comments, to which petitioners replied on October 29, 2001. By decision served November 28, 2001, the Board instituted a proceeding under 49 U.S.C. 10502(b) to consider the petition and responsive pleadings. On April 18, 2002, the United Transportation Union (UTU) filed comments opposing construction of the proposed line, and on June 13, 2002, petitioners filed a reply.³

As discussed below, we tentatively conclude, subject to completion of the ongoing environmental review, that the proposed exemption meets the statutory standards of 49 U.S.C. 10502. Following our practice in rail construction cases, this is a preliminary decision addressing transportation-related issues. We will not make a final determination, the exemption will not be effective, and construction cannot begin, until after we have considered the potential environmental impacts associated with this proposal. We will make the exemption authority effective at that time, if appropriate, subject to any necessary mitigation conditions.

BACKGROUND

San Jacinto, a Delaware limited partnership, is comprised of one general partner, Bay Rail, LLC, a subsidiary of BNSF, and several limited partners, i.e., BNSF, Basell Impact Holding

² The Bayport Producers consist of producers/shippers ATOFINA Petrochemicals, Inc. (ATOFINA), Basell USA Inc., Equistar Chemicals, LP, and Lyondell Chemical Company. All of these companies previously filed statements in support of the petition, which were attached thereto. The intervention request is reasonable and will be granted.

³ Statements in opposition to the proposal were filed by The Galveston Bay Conservation and Preservation Association (Galveston Bay) and the Greater East End Coalition For Community Concerns. These groups generally raise concerns related to the environment, traffic, and safety—concerns that will be fully addressed in the ongoing environmental review process in this proceeding. These groups also raise infrastructure concerns which will be resolved in our response to UP's arguments.

A letter in support of the proposal was filed by John O'Leary of ATOFINA Chemicals, Inc., a sister corporation of ATOFINA that is building a new facility adjacent to ATOFINA in the Bayport Loop. This letter stresses the importance of competitive rail service to its business in the Bayport Loop as well as to the chemical industry in general.

In addition, letters in support of the proposal were filed by the American Chemistry Council, David Boswell of Velsicol Chemical Corporation, and Mary E. Nave of Old World Industries, Inc. These letters stress the importance of competitive rail service to shippers in the chemical industry.

Company, Bay Junction, Inc., Equistar Bayport, LLC, and Lyondell Bayport, LLC.⁴ The Bayport Loop contains the chemicals and plastics production facilities of many petrochemical companies that rely heavily on rail transportation to obtain raw materials, move their products to market, and store cargo to reduce the need for silos. These producers state that they require efficient and reliable rail service at competitive rates. According to petitioners, UP, the only rail carrier now serving the Bayport Loop producers, has not always been able to meet their transportation needs.

Petitioners plan to construct and operate the proposed line to provide additional rail service to this area. San Jacinto plans to acquire all necessary land for the line and to either construct the line or have it constructed on its behalf.⁵ BNSF (or its designated operator), pursuant to a contract with San Jacinto, intends to operate the line as a common carrier. BNSF would initially provide service to the four core producers, but it plans to offer service to all shippers located in the Bayport Loop and adjoining areas upon request.⁶

BNSF intends to reach the proposed line from the storage yard of CMC Railroad, Inc. in Dayton, TX, approximately 30 miles northeast of Houston. From the Dayton yard, BNSF would operate trains in a southwesterly direction via a combination of trackage rights over UP lines and over a joint BNSF/UP track segment to Tower 85. At Tower 85, BNSF trains would turn south onto UP's GH&H line to the proposed build-out. BNSF states that it intends to seek authority to operate over UP's GH&H line pursuant to trackage rights stemming from a condition, imposed on UP when the Board approved its merger with Southern Pacific Transportation Company (SP), giving BNSF a right to travel over the UP line to reach a build-in/build-out point.⁷

⁴ With the exception of BNSF, the limited partners are wholly owned subsidiaries of the four members of the Bayport Producers.

⁵ According to petitioners, no residences or recreational lands will be necessary for construction, and the line will be located next to existing track, utilities, and pipelines where possible.

⁶ According to petitioners, BNSF anticipates running one 36-to-66-car train each way per day on the line, for a total of 13,000 to 23,000 loaded rail cars per year. Petitioners state that this volume of traffic could be accommodated on the GH&H line. Most cargo on the line would consist of non-hazardous plastic pellets moved in covered hopper cars. The remainder would be chemicals moved in tank cars, of which 1,500 to 7,000 cars per year would contain hazardous materials or other miscellaneous commodities. The majority of the cars involved would be private cars owned or leased by the producers.

⁷ This route is a change from the route described in BNSF's original petition and was brought
(continued...)

The proposed line would extend from the GH&H at the Graham Siding, near the Ellington Field, a commercial airport. It would be about 12.8 miles long, initially running about 6 miles through mostly undeveloped, industrially or municipally owned properties before entering the Bayport Loop. Inside the Bayport Loop, the line would proceed for another 7 miles, crossing the lines of UP, Bayport Rail Terminal, Inc. (BRT), and several public and private access roads.⁸ The line would terminate near the ATOFINA facilities, just east of Highway 146.

Each of the Bayport Producers has submitted a statement in support of the proposal explaining the importance of the new line to their business' success. In addition, BNSF states that the new line would increase the availability of efficient, reliable, and competitive rail service to area shippers, increase rail capacity and infrastructure in the Houston area, increase shippers' access to BNSF's single-line service, provide an alternate route during service disruptions,⁹ extend BNSF's access to petrochemical and plastics facilities on the Gulf Coast, and replace the pre-existing competition between UP and SP.

⁷(...continued)

to the Board's attention in a letter dated August 6, 2002, addressed to our SEA. In its original petition, BNSF proposed to reach the GH&H by running its trains through the New South Yard south of Houston and over the Glidden Subdivision, which connects to the GH&H at Tower 30. In response to community concerns about potential congestion impacts near New South Yard, BNSF proposes this alternative to avoid New South Yard altogether. BNSF states that this change does not affect the proposed route location for the new line construction.

⁸ No carrier may refuse permission for a constructing carrier to cross its property, so long as the construction and operation of the crossing do not unduly interfere with the operation of the crossed line and the crossing carrier compensates the owner of the crossed line. 49 U.S.C. 10901(d)(1). Any carrier engaged in a crossing dispute may request that we set the terms for crossing when the carriers are unable to agree. 49 U.S.C. 10901(d)(2).

Petitioners indicate that they have secured permission from BRT to cross its track and that they intend to promptly engage in talks with UP. Should the latter be unsuccessful, petitioners state that they will seek authority to cross UP's track pursuant to section 10901(d). UP, in its comments, pledges to cooperate with BNSF in reaching a crossing agreement. UP Comments, p. 17.

⁹ Petitioners claim that, in 1997 and 1998, shippers experienced a disruption of UP's rail service as UP's merger with SP was being implemented, resulting in significant delays, substantial economic damage, and customer dissatisfaction.

DISCUSSION AND CONCLUSIONS

Transportation Aspects of the Petition. Generally, the construction and operation of common carrier railroad lines requires prior Board approval under 49 U.S.C. 10901. However, under 49 U.S.C. 10502, 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 necessary to protect shippers from the abuse of market power.

UTU opposes the petition. It argues that BNSF's delay in declaring who would operate the line creates the possibility that BNSF would hire a non-union carrier using underpaid and inexperienced workers. UTU maintains that this possibility conflicts with the rail transportation policy (RTP), which "encourages fair wages and safe and suitable working conditions in the rail industry." 49 U.S.C. 10101(11). Furthermore, according to UTU, BNSF should be obligated to operate the line itself under the terms of the UP/SP merger agreement and should not be able to designate another operator in its stead.

We find UTU's concerns to be premature. Any operator that BNSF might designate to perform service in the future would have to file with the Board for authority to operate. That proceeding would provide UTU with ample opportunity to raise its objections.¹⁰

In its comments, UP states that it does not oppose petitioners' plans here and does not intend to attempt to delay the proposed line. However, it expresses concerns about losing traffic to the proposed new BNSF alternative and criticizes the proposed build-out on grounds that BNSF's Houston facilities are allegedly inadequate to handle its existing traffic. UP states that, by rerouting rail traffic to and from the Bayport Loop, and by attracting other shippers to the Bayport area, the build-out would add rail traffic to facilities that already need expansion, and that this increased pressure on the infrastructure would increase delays and the risk of service failures.¹¹

¹⁰ UTU also argues that, because this transaction is really part of the UP/SP merger subject to the provisions of the predecessor to section 11323, the labor conditions set forth in New York Dock Ry.-Control-Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), should apply here. We disagree. The instant petition is an independent, properly filed request for an exemption from the provisions of section 10901 for which, by statute, no labor protection may be imposed.

¹¹ UP also expresses concern for the safety of railroad yard employees and motorists, and a fear of automobile and railcar congestion at locations along the proposed route where rail traffic would increase. Similarly, Galveston Bay has asked us to find that the RTP does not permit the proposed
(continued...)

We find no support on the record for UP's fears. All traffic in the area currently moves over UP. Should BNSF not make sufficient infrastructure improvements to enable it to offer shippers a superior service, traffic would stay on UP.

UP's argument that the proposed construction would lure into Bayport new industry that would overwhelm the rail network is not persuasive. That argument assumes that firms in the petrochemical industry would make irrational investments of millions of dollars simply because BNSF plans to build this line. But any industrialist contemplating building a facility in this area would carefully study the entire transportation system before undertaking such a major investment. UP's claim that this line constitutes a lure for the unwary ignores the reality of how this sort of investment decision is made.

The proposal fulfills a condition imposed on the UP/SP merger to preserve pre-merger competition between UP and SP. As such, the effect of the proposed build-out on UP's traffic is simply a consequence of BNSF's proper exercise of its trackage rights acquired under the UP/SP merger agreement. In short, BNSF's new line would result in an additional service option for Bayport Loop shippers and require BNSF and UP to compete for their traffic. These goals are fully consistent with the public interest and the RTP.¹²

Based on the information provided, we conclude that detailed scrutiny of the proposed construction and operation under 49 U.S.C. 10901 is not necessary to carry out the RTP. The requested exemption would promote the RTP by providing an alternative rail service option to shippers in the Bayport Loop and by increasing competition [49 U.S.C. 10101(1) and (4)]. Exempting the proposed construction and operation would reduce the need for Federal regulatory control over the rail transportation system [49 U.S.C. 10101(2)], ensure the development of a sound transportation system with effective competition among carriers [49 U.S.C. 10101(4)], foster sound economic conditions [49 U.S.C. 10101(5)], and reduce regulatory barriers to entry [49 U.S.C. 10101(7)]. Unless we determine otherwise following the environmental analysis, other aspects of the RTP would not be adversely affected.

¹¹(...continued)

construction, citing concerns that Galveston Bay has raised in the ongoing environmental review process. These concerns, however, will be addressed in the EIS and in our final decision, where we will consider the environmental issues following completion of the environmental review process.

¹² Under 49 U.S.C. 10901(c), we must authorize a rail line construction project "unless the Board finds that such activities are inconsistent with the public convenience and necessity." This permissive licensing policy establishes a clear presumption in favor of rail construction proposals and conforms to the broader congressional policies to promote "effective competition among rail carriers" and to "reduce regulatory barriers to entry into . . . the industry." 49 U.S.C. 10101(4), (7).

Regulation of the proposed construction and operation is not necessary to protect shippers from an abuse of market power. Rather, the proposed transaction would dilute any existing market power in the Bayport Loop area by providing another transportation option. Thus, the proposal would enable shippers to realize the benefits of increased competition, and at the same time, it would fulfill a condition imposed on the UP/SP merger to preserve pre-merger competition between UP and SP. In light of our finding that regulation is not necessary to protect shippers from an abuse of market power, we need not determine whether the transaction is limited in scope.

Completion of the Construction Proceeding. As noted above, petitioners have requested that we pursue our usual approach of issuing a preliminary decision addressing the transportation aspects of the proposed construction prior to completion of our environmental review, which we are doing here. But we cannot, of course, authorize the construction until we have completed our environmental review.¹³ Therefore, this exemption will not be effective, and no construction can begin, until our environmental review process is concluded.

Following the conclusion of the environmental review process,¹⁴ we will issue a further decision assessing the potential environmental impacts of the proposal and making the exemption effective at that time, if appropriate, subject to mitigation conditions, if necessary. See Missouri Mining, Inc. v. ICC, 33 F.3d 980 (8th Cir. 1994). This decision does not in any way prejudge our ultimate decision, and it will not diminish our capacity to address environmental issues in reaching a final decision. Illinois Commerce Com'n v. ICC, 848 F.2d 1146, 1259 (D.C. Cir. 1988), cert. denied, 488 U.S. 1004 (1989). Construction may not begin until our final decision in this proceeding has been issued and has become effective.

As conditioned, this action will not significantly affect either the quality of the human environment or the conservation of energy resources.

¹³ Our November 28, 2001 decision instituting this proceeding contemplated that the proceeding would be completed by August 28, 2002. However, it will take considerably longer to complete a full examination of the potentially significant environmental issues that have surfaced, warranting preparation of a full EIS, rather than a more limited Environmental Assessment.

¹⁴ As previously indicated, a number of organizations and individuals have raised safety and environmental concerns about this proposal. Those concerns will be fully considered and addressed in the environmental review of this proceeding.

It is ordered:

1. The Bayport Producers' request to intervene in this proceeding is granted.
2. Under 49 U.S.C. 10502, we conditionally exempt San Jacinto's construction and BNSF's operation of the above-described line from the prior approval requirements of 49 U.S.C. 10901, subject to our further consideration of the anticipated environmental impacts of the proposal.
3. On completion of the environmental review, we will issue a further decision addressing those matters and establishing an effective date for the exemption, if appropriate, subject to any necessary conditions, thereby allowing construction to begin at that time.
4. Notice will be published in the Federal Register on August 28, 2002.
5. Petitions to reopen must be filed by September 17, 2002.
6. This decision is effective 30 days from the date of service.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams
Secretary

John Ford - Alan
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SURFACE TRANSPORTATION BOARD

Washington, DC 20423

Office of Economics, Environmental Analysis, and Administration

October 30, 2002

Mr. James B. Blackburn, Jr.
Blackburn Carter
2900 Wesleyan, Suite 400
Houston, Texas 77027

Re: STB Finance Docket No. 34079 – San Jacinto Rail Limited –
Construction Exemption – And the Burlington Northern and Santa Fe
Railway Company – Operation Exemption – Build-Out to the Bayport
Loop Near Houston, Harris County, Texas; Response to Request to Extend
Scoping and Produce Documents

Dear Mr. Blackburn:

I am writing to respond to two issues¹ that you have raised on behalf of the Galveston Bay Conservation and Preservation Association (GBCPA) in two motions you recently filed before the Surface Transportation Board – your “Motions to Sanction, Reopen, and Related Requests for Relief” (Motion 1) dated August 31, 2002, and filed on September 17, 2002, and “Motion to compel the production of applicant-provided Evidence and requested relief” (Motion 2), dated October 15, 2002, and filed on October 11, 2002.

First, you allege that San Jacinto Rail Limited (SJR) and The Burlington Northern Santa Fe Railway Company (BNSF) (collectively, petitioners) improperly submitted a letter to the Board’s Section of Environmental Analysis (SEA), and that such a submission warrants reopening the environmental scoping process that SEA conducted in accordance with the National Environmental Policy Act (NEPA). Second, you allege that GBCPA submitted a letter addressed to me dated August 26, 2002, requesting the same material that had been supplied to SEA by petitioners, and that SEA should be required to provide that material to GBCPA. For the reasons I discuss in detail below, it would be inappropriate for me to grant the relief you seek.

Background

By petition filed on August 30, 2001, petitioners sought an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901 for the construction by SJR and the operation by BNSF of a 12.8-mile line of railroad serving the Bayport Industrial District (Bayport Loop) in southeast Houston, Harris County, Texas, near Galveston Bay. The line would connect the Bayport Loop with the former Galveston, Henderson and Houston Railroad line now

¹The Surface Transportation Board will rule on the balance of your motions at the appropriate time.

owned by the Union Pacific Railroad Company (UP) near the southeast corner of Ellington Field, a municipal airport located in southeast Houston.

On August 28, 2002, the Board issued a preliminary decision addressing the transportation aspects of the proposed construction, tentatively approving the proposed construction subject to completion of the environmental review. Following the conclusion of the environmental review process, the Board will issue a further decision assessing the potential environmental impacts of the proposal and making the exemption effective at that time, if appropriate, subject to mitigation conditions, if necessary.

In its August 28, 2002 decision, the Board preliminarily found that the new line, if built, would produce transportation benefits by giving the petitioners an opportunity to compete with UP in the Bayport Loop.² The Board explained, however, that it would not make a final determination until it had the opportunity to conduct the extensive environmental review required by NEPA, and fully assess the potential environmental effects of the construction and the cost of any environmental mitigation that might be imposed.

The Board's Environmental Review Process in this Proceeding

Because the construction and operation of this project has the potential to result in significant environmental impacts, SEA determined that the preparation of a full Environmental Impact Statement (EIS)³ here is appropriate. On October 1, 2001, SEA published a notice of intent to prepare an EIS in this case in the *Federal Register*. The Board served all parties of record with the notice of intent.

Pursuant to the regulations of the President's Council on Environmental Quality (CEQ), SEA then began "scoping," which CEQ defines as "an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action." 40 CFR 1501.7. See also 49 CFR 1105.10(a)(2). On November 26, 2001, SEA published in the *Federal Register* and made available to the public the Notice of Availability of Draft Scope of Study for the EIS, Notice of Scoping Meetings, and Request for Comments. Thereafter, SEA held four public scoping meetings in the Houston area on January 14 and 15, 2002. The scoping comment period originally concluded February 1, 2002, but in response to

²The Board's practice of conducting a preliminary review of the transportation aspects of rail construction proposals in advance of the environmental issues has been judicially approved. See Missouri Mining, Inc. v. ICC, 33 F.3d 980 (8th Cir. 1994).

³Under the regulations of the President's Council on Environmental Quality (CEQ) implementing NEPA, as well as the Board's environmental rules, actions that would significantly affect the environment generally require a full EIS. See 40 CFR 1508.11; 49 CFR 1105.4(f). The Board's rules further provide for an EIS normally to be prepared for rail construction proposals for which Board approval is required. 49 CFR 1105.6(a).

requests, SEA extended the scoping period an additional 30 days, to March 14, 2002. During the scoping comment period, the U.S. Coast Guard, the Federal Aviation Administration, and the National Aeronautics and Space Administration requested cooperating agency status in the preparation of the EIS. After review and consideration of all comments received, SEA issued the Final Scope of the EIS on July 19, 2002. The Final Scope reflected changes to the Draft Scope made as a result of the comments and summarized the principal environmental concerns raised by the comments.

SEA, working with the cooperating agencies, is now preparing a Draft EIS for the proposal. In accordance with NEPA, CEQ's implementing regulations, and the Board's environmental rules, SEA is conducting an independent environmental analysis. In addition, SEA is independently assessing and verifying information supplied by petitioners.⁴ The information requested by SEA and provided by petitioners includes preliminary engineering data, operational information, and environmental data collected by the petitioners prior to filing and after filing, such as wetlands information for wetlands permits and for bridge construction permits.

SEA will issue the Draft EIS for a minimum period of 45 days for public review and comment. After the close of the public comment period, SEA will then prepare a Final EIS reflecting the agencies' further analysis and the comments on the Draft EIS. Following issuance of the Final EIS, the Board then will take the entire environmental record into account before issuing its final decision in this case.

Discussion

Petitioners' August 6th Letter Does Not Warrant Further Extending Scoping

Petitioners' August 6, 2002 letter to SEA details a modification to petitioners' proposal that would route Bayport train traffic along the GH&H and East Belt to Dayton Yard, instead of into and out of New South Yard. The modification would slightly shift proposed operations over existing UP lines, but would not change the route of the proposed new construction. The modification would be contingent upon BNSF's acquisition of trackage rights on the segment of the GH&H between Tower 30 and Tower 85, in addition to the acquisition of trackage rights on the GH&H between the proposed new rail line and Tower 30 described in petitioners' initial proposal.

The CEQ regulations at 40 CFR 1501.7(c) state that an agency shall revise its scoping determinations "if substantial changes are made later in the proposed action, or if significant new circumstances or information arise which bear on the proposal or its impacts." When petitioners submitted the August 6, 2002 letter, SEA saw no reason to reopen the scoping process. The

⁴The CEQ regulations specifically provide that agencies may request information from an applicant "for possible use by the agency in preparing an [EIS]." 40 CFR 1506.5(a).

proposed change in the route described in the letter does not represent a substantial change in the proposed action or significant new circumstances or information related to the proposal or its impacts. Rather, the modification alters the route over existing rail lines that BNSF trains would take after leaving the newly constructed line, should the Board authorize the proposed rail line construction. The routing change does not affect any proposed new rail line construction. And of note, the same environmental analysis that would have been conducted in the Draft EIS for BNSF's originally planned operations over existing rail lines will be addressed for BNSF's modified route.

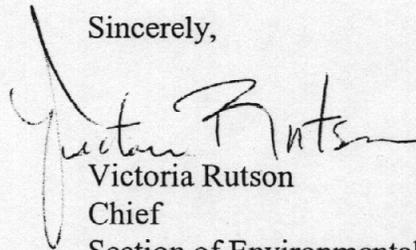
Additionally, extending scoping is unnecessary because GBCPA – and all other interested parties – will have the opportunity to comment on the petitioners' modification. The new information on the change to the proposed routing over existing rail lines will be fully examined and analyzed in the Draft EIS, then made available for public review and comment.

The Materials Sought Are Already Publicly Available and Will Be Included as an Addendum to the Draft EIS

SEA has not received the August 26, 2002 letter from GBCPA referenced in Motion 2. The only letter of that date from GBCPA received at the Board is a letter to Secretary Vernon Williams, requesting a copy of the service list for the proceeding. However, in response to GBCPA's request in Motion 2, SEA does not need to provide GBCPA with the materials submitted by petitioners. The information will be included as an addendum to the Draft EIS, so GBCPA (together with all interested parties) will have adequate opportunity to review and comment on the information after the issuance of the Draft EIS. Moreover, the information sought by GBCPA is in the public docket for this proceeding, and therefore, is publicly available in the Board's reading room, in either paper copy or on microfiche.

Thank you for your interest in this proceeding. If you have any questions, please feel free to contact me or Ms. Dana White of my staff at (202) 565-1552.

Sincerely,



Victoria Rutson
Chief
Section of Environmental Analysis

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34079

SAN JACINTO RAIL LIMITED CONSTRUCTION EXEMPTION AND
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
OPERATION EXEMPTION—BUILD-OUT TO THE BAYPORT LOOP NEAR
HOUSTON, HARRIS COUNTY, TX

Decided: December 2, 2002

By petition filed on August 30, 2001, San Jacinto Rail Limited (San Jacinto) and The Burlington Northern and Santa Fe Railway Company (BNSF) (collectively, petitioners) seek an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901 for the construction by San Jacinto and the operation by BNSF of a 12.8-mile line of railroad serving the Bayport Industrial District (Bayport Loop) in southeast Houston, Harris County, TX, near Galveston Bay. The line would connect the Bayport Loop with the former Galveston, Henderson and Houston Railroad (GH&H) line now owned by Union Pacific Railroad Company (UP) near the southeast corner of Ellington Field.¹

On August 28, 2002, pursuant to petitioners' request, we served a decision (August decision) in which we tentatively concluded, subject to completion of the ongoing environmental review,² that the

¹ On August 30, 2001, the Bayport Producers, consisting of producers/shippers ATOFINA Petrochemicals, Inc., Basell USA Inc., Equistar Chemicals, LP, and Lyondell Chemical Company, petitioned the Board for leave to intervene in the proceeding. That request has been granted in a prior decision in this matter. On October 9, 2001, UP filed comments, to which petitioners replied on October 29, 2001. By decision served November 28, 2001, the Board instituted a proceeding under 49 U.S.C. 10502(b) to consider the petition and responsive pleadings. On April 18, 2002, the United Transportation Union (UTU) filed comments opposing construction of the proposed line and, on June 13, 2002, petitioners filed a reply.

² In October 2001, the Board's Section of Environmental Analysis (SEA) issued a notice of intent to prepare a full Environmental Impact Statement (EIS) in this case. A draft scope of study was issued for public review and comment in November 2001. Following scoping meetings held in January 2002, a Final Scope of Study for the EIS was issued in July 2002. A Draft Environmental Impact Statement (Draft EIS) will be issued shortly. After it is issued for public review and comment (for a

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proposed exemption meets the statutory standards of 49 U.S.C. 10502. This was a preliminary decision addressing transportation-related issues. In that decision, we stated that we would not make a final determination as to whether to grant the exemption, thereby allowing the line to be built, until after we consider the potential environmental impacts of the proposal.

Also in the August decision, we noted that petitioners had sent a letter to SEA on August 6, 2002, proposing a change in the routing by which BNSF would move over the GH&H and other existing lines. Specifically, in lieu of routing Bayport traffic into and out of New South Yard south of Houston and over the Glidden subdivision, petitioners proposed routing that traffic to Dayton Yard along the GH&H and the East Belt, a UP-owned rail line, the applicable portion of which runs north and south through both residential and industrial parts of eastern Houston.³ Petitioners asserted that the change pertained only to a shift in proposed operations within the East End area of Houston and did not affect the proposed new line itself.

On September 17, 2002, in response to this letter, the Galveston Bay Conservation and Preservation Association (Galveston Bay)⁴ filed various motions and related requests for relief. On October 8, 2002, petitioners filed a reply. On October 11, 2002, Galveston Bay filed a motion to compel to obtain certain environmental materials supplied to Board staff by petitioners in this case. For the reasons discussed below, we will deny Galveston Bay's motions.

POSITIONS OF THE PARTIES

In its September pleading, Galveston Bay argues that the letter from petitioners to SEA functioned as a revision to the original petition. It further argues that this revision is improperly included in the record because it was not filed with the Board's Secretary or served on the parties, thereby denying the public notice and an opportunity to comment. Galveston Bay also contends that the

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minimum of 45 days), SEA will issue a Final Environmental Impact Statement addressing the public's comments. We will then consider the potential environmental impacts associated with the proposal and make our final determination as to whether the new line may be built.

³ BNSF's operation over this route would be subject to its acquisition of any necessary trackage rights or trackage rights modifications.

⁴ On January 11, 2002, Galveston Bay filed a statement opposing the proposed construction. The statement generally raised concerns relating to the environment, traffic, and safety—concerns that will be fully addressed in the ongoing environmental review process in this proceeding. It also raised infrastructure arguments that were resolved in the August decision.

communication of the letter to the Board is an improper ex parte communication between petitioners and Board staff. Galveston Bay asks us to strike petitioners' letter from the record and to impose sanctions on petitioners and certain Board employees for ex parte communications and on petitioners for failure to serve other parties. Galveston Bay also asks us to reopen the environmental scoping process to allow for public comment on the proposed change.

In its October pleading, Galveston Bay argues that, under the regulations of the Council on Environmental Quality (CEQ) at 40 CFR 1506.6(f), it is entitled to review and comment on materials supplied by petitioners in the environmental review process, some of which were submitted before and after the official comment period on the draft scope. Galveston Bay asks that we immediately place all such evidence, data, and correspondence in the record and provide Galveston Bay with an inventory of all such information along with an estimate of the costs of reproducing the material.

In response, petitioners argue that the letter describing the change did not revise the original petition, but merely proposed a voluntary mitigation measure addressing potential congestion impacts near New South Yard. They also argue that the letter did not constitute an ex parte communication because it related to the environmental review, not the transportation merits of the exemption proceeding. In addition, they assert that, because the letter is an environmental comment, it need not have been filed with the Board or served on other parties. Therefore, petitioners claim, there is no basis for disregarding the letter or imposing sanctions. Petitioners add that Galveston Bay also provides no basis on which to reopen the scoping process because the proposed change in the routing is not a substantial change or a significant new circumstance,⁵ and, in any event, Galveston Bay will have an opportunity to comment on the change when the Draft EIS is issued.

DISCUSSION AND CONCLUSIONS

Our review of the record leads us to conclude that neither petitioners nor any Board employees have engaged in any inappropriate communications or other misconduct with regard to petitioners' letter. Under the National Environmental Policy Act, the environmental review process is necessarily informal and all-inclusive and depends on cooperative consultations with the applicant as well as other agencies and other interested parties with expertise, so that all possible environmental information, issues, and points of view will come before the agency. See *City of Auburn v. United States*, 154 F.3d 1025, 1033 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999) (opportunity for public participation

⁵ Under CEQ regulations at 40 CFR 1501.7(c), an agency shall revise its scoping determinations "if substantial changes are made later in the proposed action, or if significant new circumstances or information arise which bear on the proposal or its impacts."

provides necessary checks and balances).⁶ The letter itself is not an ex parte communication because it does not relate to the merits of the proposed construction but is environmental correspondence that merely proposes, in response to community concerns about potential congestion impacts near New South Yard, an alternate routing by which BNSF trains would move over the GH&H and other existing lines. This type of voluntary mitigation measure is not only contemplated but encouraged by our environmental procedures. In addition, because the communication was part of the environmental review process, petitioners' letter was properly sent directly to SEA rather than to the Board's Secretary. SEA acted properly in accepting the letter, placing it in the public files in the Board's public reading room,⁷ and in bringing it to our attention so that it could be mentioned in the August decision. Finally, because the letter is environmental correspondence, petitioners were not required to serve it on other parties. See 49 CFR 1105.10(e). Consequently, there was no improper communication here or notice deficiency.

We also find no basis to reopen the exemption proceeding. The letter does not seek to revise the construction proposal itself. Nor do the contents of the letter have any bearing whatsoever on the transportation-related issues already addressed in this proceeding. The letter concerns environmental matters, and that phase of the case has not yet been completed. Galveston Bay and other interested parties will have an opportunity to comment on the routing change after issuance of the Draft EIS. As SEA explained in an October 30, 2002 letter to Galveston Bay's attorney, the CEQ environmental regulations at 40 CFR 1501.7(c) do not require that we reopen the environmental scoping process for a change of this nature.⁸ Accordingly, we will not do so.

Finally, the environmental materials supplied to Board staff by petitioners are already in the public docket for this proceeding and, therefore, are publicly available in the Board's reading room,

⁶ Indeed, the CEQ regulations implementing NEPA specifically anticipate the continuing involvement and participation of the applicant throughout the process, so long as the agency independently evaluates the information submitted and is responsible for its accuracy. See, e.g., 40 CFR 1506.5(a)-(c). Our environmental rules also provide that the railroad may "participate in the preparation of environmental documents." 49 CFR 1105.4(j).

⁷ Thus, the letter was made available to all interested parties, and it became part of the administrative record in this case.

⁸ The change in routing does not affect the proposed rail construction itself and, therefore, does not represent a substantial change in the proposed action. Nor is this routing modification a significant enough new circumstance or piece of information to warrant revisiting the scope of the environmental review at this point. Finally, reopening the scoping process is unnecessary here because the proposed routing change will be included in the Draft EIS, which will be available for public review and comment.

either in paper copy or on microfiche. Moreover, all of this correspondence will be included as an addendum to the Draft EIS, so Galveston Bay and all other interested parties will have adequate opportunity to review and comment on the information after the Draft EIS is issued.

For these reasons, Galveston Bay's various motions are groundless and will be denied.

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

It is ordered:

1. Galveston Bay's motion to strike is denied.
2. Galveston Bay's motion to impose sanctions is denied.
3. Galveston Bay's motion to reopen the exemption proceeding is denied.
4. Galveston Bay's motion to reopen the environmental scoping process is denied.
5. Galveston Bay's motion to compel is denied.
6. This decision is effective on the date of service.

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

Vernon A. Williams
Secretary



SURFACE TRANSPORTATION BOARD
1925 K STREET, N.W.
WASHINGTON, D.C. 20423-0001

February 11, 2003

James B. Blackburn, Jr.
Blackburn Carter
2900 Wesleyan, Suite 400
Houston, TX 77027

Re: STB Finance Docket No. 34079, San Jacinto Rail Limited
Construction Exemption and The Burlington Northern and
Santa Fe Railway Company Operation Exemption—Build-
Out to the Bayport Loop Near Houston, Harris County, TX

Dear Mr. Blackburn:

This is in response to your January 21, 2003 request on behalf of the Galveston Bay Conservation and Preservation Association for production of documents and records by the Board pursuant to 49 CFR 1114.30. Under the Board's discovery rules at 49 CFR Part 1114, discovery may be obtained only from a "party" to a proceeding. Because the Board is not a party to a proceeding before it, discovery may not be sought or obtained from the agency. Accordingly, your request will not be entertained.

The correct procedure for seeking information from a Federal agency such as the Board is to file a Freedom of Information Act request pursuant to 5 U.S.C. 552. The request also must comply with the Board's regulations at 49 CFR 1101.1 *et seq.* The request must be as specific and clear as possible. The request set out in your "request for production of documents and records" is extremely general. If you have any questions about this process you may contact the Board's FOIA officer, John M. Atkisson, at the agency's address.

Also, material that is already in the docket is available to the public and is therefore excluded from FOIA. To the extent that your client's public safety concerns touch on the environmental issues in this case, your client may find helpful the environmental materials supplied to the Board's Section of Environmental Analysis by the petitioner railroads. As the Board stated in its recent decision served in this proceeding on December 3, 2002, these materials are already in the public docket in this proceeding.

If I may be of further assistance, please contact me.

Sincerely,


Vernon A. Williams
Secretary

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