

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33123

MISSOURI PACIFIC RAILROAD COMPANY AND SOUTHERN PACIFIC
TRANSPORTATION COMPANY--CONSTRUCTION AND OPERATION
EXEMPTION--AVONDALE, LA

MOTION TO DISMISS

Decided: July 1, 1997

On October 2, 1996, Missouri Pacific Railroad Company and Southern Pacific Transportation Company (respectively MP and SP or applicants collectively) filed a notice of exemption under 49 CFR 1150.36 to construct connecting tracks between their adjacent rail lines at three locations at or near Avondale, LA.¹ The exemption notice was served and published in the *Federal Register* on October 22, 1996 (61 FR 54847). Pursuant to 49 CFR 1150.36(c)(7), the exemption became effective 70 days after publication--in this case, on December 31, 1996.²

MP and SP simultaneously with their notice of exemption filed a motion to dismiss their notice of exemption. Applicants maintain that their proposed construction and operation projects do not require approval or exemption because the activities do not fall within the Board's jurisdiction. The United Transportation Union (UTU) opposes applicants' motion and seeks the imposition of labor protective conditions on the projects. For the reasons discussed below, applicants' motion will be granted and the exemption will be vacated.

BACKGROUND

According to MP and SP, their proposed construction of connecting tracks is intended to facilitate transactions already approved or exempted in *Union Pacific Corp., et al.--Control and Merger--Southern Pacific Rail Corp., et al.*, STB Finance Docket No. 32760, slip op. (STB served Aug. 12, 1996) (*UP/SP Control*). In *UP/SP Control*, the Board authorized the common control and merger of, among other entities, MP and SP. The three construction projects involved here were described in detail in environmental documents prepared by the applicants in *UP/SP Control*.³

In the environmental report in STB Finance Docket No. 32760, applicants described the connecting track projects as Avondale 1, 2 and 3, and indicated that the projects are required to facilitate consolidated UP/SP operations and Burlington Northern Santa Fe Railway Company (BNSF) operations as approved or exempted in the Board's August 12 decision. Specifically, the projects involve the construction of crossover tracks between parallel MP and SP lines (Alexandria Subdivision) near MP mileposts 9.97, 12.25, and 14.5. Avondale 3 includes the construction of connecting track to give BN access to MP's Westwego intermodal facility pursuant to the BNSF settlement agreement described in *UP/SP Control, supra*, at 226.

UTU argues that the railroads' motion should be denied on the grounds that two of the crossovers (i.e., Avondale 1 and 2) are extensions of applicants' main lines and are therefore rail lines subject to the Board's jurisdiction. UTU also contends that, because the projects are

¹ Applicants filed their notice under the Surface Transportation Board's (Board) class exemption for the construction and operation of connecting railroad tracks, recently adopted in *Class Exem. for the Construction of Connecting Track*, 1 S.T.B. 75 (1996) (*Connecting Track Exemption*).

² Applicants indicated that they intended to begin construction on December 31, 1996.

³ See STB Finance Docket No. 32760, *Environmental Report (Exhibit 4)--Construction*, UP/SP-27, Vol. 6, Part 5, pp. 369, 376, 378-85.

transactions within the scope of *UP/SP Control*, the labor protective conditions in *New York Dock*⁴ should be imposed.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10901(a), a person may “construct an extension to any of its railroad lines * * * [or] construct an additional railroad line * * * only if the Board issues a certificate authorizing such activity * * * .” An extension or addition to a rail line occurs when a construction project enables a carrier to penetrate or invade a new market. *Texas & Pac. Ry. v. Gulf. Etc. Ry.*, 270 U.S. 266 (1926); *Nicholson v. Missouri Pacific Railroad Company*, 366 I.C.C. 69, 72 (1982), *aff’d sub nom. Nicholson v. ICC*, 711 F.2d 364 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1056 (1984); *Chicago Great W. Ry. v. Illinois Central R.R.*, 275 F. Supp. 909 (N.D. Iowa 1967).

Not all railroad construction activities require the Board’s approval. Pursuant to 49 U.S.C. 10906, the Board does not have authority “over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks” (the so-called spur track exception). Authority to construct a rail line is not required if the line is to be operated only incidentally to existing line-haul transportation. *Nicholson*, 711 F.2d at 369-70. In addition, improvements to an existing line not involving an extension of the carrier’s lines or the construction of an additional line do not fall within the scope of section 10901. *City of Detroit v. Canadian National Ry.*, 9 I.C.C.2d 1208, 1218-19 (1993), *aff’d sub nom. Detroit/Wayne County Authority v. ICC*, 59 F.3d 1314 (D.C. Cir. 1995) (*City of Detroit*).⁵

We will grant applicants’ motion to dismiss. Applicants maintain that the Avondale projects were previously considered in STB Finance Docket No. 32760 and that, because the projects standing alone will not open up new markets or territory, they are neither extensions of their rail lines nor the construction of additional lines. It is apparent that applicants’ position is not based on the spur track exception and that UTU errs in contending that the dismissal request is based on the spur exception in section 10906. UTU reply at 3. Rather, the situation here is analogous to *City of Stafford, TX v. Southern Pacific Transportation Company*, Finance Docket No. 32395 (ICC served Nov. 8, 1994) (*City of Stafford*), *aff’d sub nom. City of Stafford v. ICC*, 69 F.3d 535 (5th Cir., 1995).

In *City of Stafford*, SP proposed to construct 12.9 miles of double or parallel trackage near Stafford, TX. Although the double-tracking was intended to improve SP’s operating efficiency and capacity, the parallel line would be constructed within the existing right-of-way and no new territory or shippers would be served by the line. The municipality of Stafford complained, as UTU argues here, that SP’s construction required prior regulatory approval. However, the Interstate Commerce Commission (ICC), the Board’s predecessor agency, found that, because no new territory or new shippers would be served, the construction was not an extension to a rail line or an additional rail line within the meaning of section 10901. The ICC therefore granted SP’s motion to dismiss the municipality’s complaint.

Here, applicants’ track construction at Avondale is similar to, although significantly less extensive than, the construction project involved in *City of Stafford*. The proposed connecting tracks are nothing more than short crossovers between adjacent MP and SP tracks. No shippers will be served from the tracks and the crossovers will be constructed entirely on existing railroad rights-of-way. Because the three Avondale projects do not permit the carrier undertaking the construction

⁴ *New York Dock Railway--Control--Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979).

⁵ In *Connecting Track Exemption*, *supra*, 1 S.T.B. at 80, we said that “rail construction projects involving connecting track would require our approval under 49 U.S.C. 10901.” We did not mean to overrule 75 years of precedent with that statement. There will continue to be some construction track projects, like this one, that are simply not subject to our jurisdiction. Our class exemption was merely intended to expedite approval of those construction track projects that are within our jurisdiction.

to invade new territory, review of the transactions under section 10901--or an exemption from that provision--is not warranted. Moreover, Congress did not intend that our jurisdiction would be triggered any time there is an increase in efficiency or an improvement in a carrier's competitive position. *City of Detroit, supra*.⁶

UTU contends that the proposed crossovers are part of *UP/SP Control* and therefore the protective conditions in *New York Dock* should be imposed. Applicants' proposed crossovers at Avondale apparently are intended to integrate the applicants' systems. Thus, it appears that any employees affected by changes in operations following construction will be covered by employee conditions imposed upon our approval of the merger and trackage rights to the extent that they are affected by changes in operations resulting from implementing the merger or trackage rights authority.⁷

Because our jurisdiction is not involved here, no environmental analysis is required.

It is ordered:

1. The motion to dismiss is granted. Because we lack jurisdiction over applicants' proposed crossover construction at Avondale, LA, the notice of exemption in this proceeding is vacated.
2. This proceeding is dismissed.
3. This decision is effective 30 days from the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

⁶ See also *Brotherhood of Locomotive Engineers v. Union Pacific Railroad Company and Iowa Interstate Railroad*, Finance Docket No. 32394 (ICC served Nov. 6, 1995), *aff'd*, *Brotherhood of Locomotive Engineers v. United States*, 101 F.3d 718 (D.C. Cir. 1996), where rail labor filed a complaint alleging that the carriers' disputed switching operation required regulatory approval because it was over main line tracks and enabled one of the carriers to invade new territory. In denying rail labor's complaint, the ICC found that, even though the switching agreement permitted more efficient and competitive service, it did not open access to new shippers or more territory and therefore did not require prior approval.

⁷ Even if we had found that the Avondale projects were subject to section 10901, Congress, in enacting the ICC Termination Act of 1995, Pub. L. No. 104-88, eliminated any discretion the agency previously had to impose labor protection on section 10901 transactions. See *Class Exemp. for Acq. or Oper.--Under 49 U.S.C. 10902*, 1 S.T.B. 95, 101 n.10.