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SERVICE DATE – JANUARY 26, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35846

METROPOLITAN TRANSIT AUTHORITY OF HARRIS COUNTY, TEX.—ACQUISITION EXEMPTION—UNION PACIFIC RAILROAD COMPANY (RIGHT TO RESTORE RAIL SERVICE OVER RAILBANKED RIGHT-OF-WAY IN HARRIS, FORT BEND, AUSTIN, WHARTON, AND COLORADO COUNTIES, TEX.)

Docket No. FD 35847

FORT BEND COUNTY TOLL ROAD AUTHORITY—ACQUISITION EXEMPTION—METROPOLITAN TRANSIT AUTHORITY OF HARRIS COUNTY, TEX. (RIGHT TO RESTORE RAIL SERVICE OVER A RAILBANKED RIGHT-OF-WAY IN HARRIS, FORT BEND, AUSTIN, WHARTON, AND COLORADO COUNTIES, TEX.)

Docket No. AB 33 (Sub-No. 156)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT—IN HARRIS, FORT BEND, AUSTIN, WHARTON, AND COLORADO COUNTIES, TEX.

Docket No. AB 33 (Sub-No. 253X)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT EXEMPTION—IN COLORADO AND WHARTON COUNTIES, TEX.

Decided: January 26, 2015

In a series of transactions dating back to 2000,¹ approximately 58 miles of rail line near Houston, Tex., known as the Westpark Line, were authorized to be abandoned by Union Pacific Railroad (UP) and rail banked pursuant to the National Trails System Act, 16 U.S.C. § 1247(d) (Trails Act). By notice of exemption that became effective on August 28, 2014, the owner of the real property and improvements underlying the rail line, the Metropolitan Transit Authority of Harris County, Tex. (METRO), acquired from UP the right to restore rail service over the

¹ See Union Pac. R.R.—Aban.—In Harris, Fort Bend, Austin, Wharton, and Colo. Cntys., Tex., AB 33 (Sub-No. 156) (STB served Nov. 8, 2000, and Dec. 1, 2006); Union Pac. R.R.—Aban. Exemption—In Colo. and Wharton Cntys., Tex., AB 33 (Sub-No. 253X) (STB served Feb. 15, 2008, and Mar. 24, 2008).

Westpark Line. Metro. Transit Auth. of Harris Cnty., Tex.—Acquis. Exemption—Union Pac. R.R., FD 35846 (STB served Aug. 14, 2014).

In Docket No. FD 35847, the Fort Bend County Toll Road Authority (FBCTRA) seeks to acquire from METRO the right to reactivate rail service over a 41.2-mile portion of the Westpark Line. FBCTRA stated that its notice of exemption was contingent upon METRO's notice first becoming effective. Although METRO's authority became effective on August 28, 2014, FBCTRA's notice of exemption seeking acquisition authority was held in abeyance, by a decision served on August 27, 2014, in order to address issues concerning rail banking, as discussed below.

In addition, on July 29, 2014, FBCTRA and METRO filed a related joint petition to vacate and reissue the notice of interim trail use (NITU) and certificate of interim trail use (CITU) permitting rail banking/interim trail use in Docket Nos. AB 33 (Sub-No. 253X) and AB 33 (Sub-No. 156), respectively. In the joint petition, the parties stated that FBCTRA's immediate development plans include the expansion of the Westpark Tollway for a 13-mile stretch beginning at milepost 20, approximately 2,020 feet east of the Harris-Fort Bend County border. Within this 13-mile stretch, the parties state that FBCTRA intends to preserve 26 feet of the original 100-foot wide subject right-of-way for trail use and possible future restoration of rail service. In a decision served on September 19, 2014, METRO and FBCTRA were directed to submit, by October 21, 2014, a detailed discussion as to why the remaining 26-foot-wide right-of-way would be adequate to accommodate potential future rail service. On October 20, 2014, the Board granted METRO's and FBCTRA's request to extend the deadline to February 18, 2015.

On November 10, 2014, METRO and FBCTRA filed a "clarification" in the exemption and abandonment dockets (November 10 Filing). The parties state that FBCTRA would take the property and right-of-way with no greater rights than METRO currently holds. Specifically, FBCTRA would take the property and right-of-way subject to all conditions and exceptions set forth in the recorded land documents covering the property and right-of-way. The parties further state that the following conditions set forth in the Vesting Deeds between METRO and Southern Pacific Transportation Company and the Interim Trail Use/Rail Banking Agreements and Assignments and Deeds Without Warranty between METRO and UP apply:

The Property conveyed herein is expressly restricted so that, and by Grantee's acceptance of delivery of this Deed Grantee expressly covenant that, neither Grantee nor any other person or entity other than Grantor, its licensees and successors, shall have the right to use any part of the Railroad Easement or any other part of the Property for purposes of providing, or the right to hold itself out as providing, freight rail operations or other railroad service provided by common carrier railroads.

November 10 Filing 6-7.

5. Conditions and Exceptions.

....

d. Union Pacific reserves and retains unto itself, its successor and assigns, the following interests reserved in the Vesting Deed: ... the right to enforce the restrictive covenant set forth in the Vesting Deeds prohibiting the use of the Railroad Easement for freight service except with the prior written consent of Union Pacific.

November 10 Filing 7.

The conditions set forth above suggest that METRO does not, in fact, hold the right to reactivate rail service as stated in the notices of exemption and the joint petition filed on July 29, 2014. The conditions further suggest that the transaction between METRO and UP might not be consistent with the requirement that all interim trail use is subject to potential reactivation of the right-of-way for rail service, as the restrictive covenant in the Vesting Deed apparently “prohibits use of the Subject ROW for freight rail service except with prior written consent of UP.”² METRO and FBCTRA cite Board precedent finding that the right to reactivate a rail-banked line is not an exclusive right and that, under the Trails Act, not only the abandoning railroad but any other approved rail service provider may reassert control over the right-of-way to restore service in the future.³ However, the Board’s concerns about the November 10 Filing do not involve the exclusivity of the right to reactivate. Rather, the filing has raised questions about the nature of the rights actually held by METRO and whether UP’s apparent right to veto reactivation is consistent with the Trails Act.

Accordingly, in addition to the information requested in the Board’s September 19 decision, METRO and FBCTRA are directed to submit, by February 18, 2015, a more detailed explanation as to what reactivation rights METRO holds in light of UP’s retained rights. The parties and UP may also submit comments on UP’s apparent retained right to veto reactivation.

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

It is ordered:

1. METRO and FBCTRA are directed to file, either jointly or separately, by February 18, 2015, a more detailed explanation as to what reactivation rights METRO holds in light of

² November 10 Filing 7.

³ King Cnty., Wash.—Acquis. Exemption—BNSF Ry., FD 35148 (STB served Sept. 18, 2009).

UP's retained rights. The parties and UP may also submit comments on UP's apparent retained right to veto reactivation.

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

By the Board, Rachel D. Campbell, Director, Office of Proceedings.