

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-980X

SANTA CLARA VALLEY TRANSPORTATION AUTHORITY–ABANDONMENT
EXEMPTION–IN SANTA CLARA AND ALAMEDA COUNTIES, CA

Decided: December 16, 2005

By petition filed on August 29, 2005, Santa Clara Valley Transportation Authority (SCVTA) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon its residual common carrier obligation over a 1.19-mile line of railroad, extending from milepost 16.30 to milepost 17.49 in San Jose, Santa Clara County, CA (Industrial line), and a 2.77-mile line of railroad, extending from milepost 2.61 near Paseo Padre Drive to milepost 5.38 near Grimmer Boulevard in and near Fremont, Alameda County, CA (Milpitas line). Notice of the filing was served and published in the Federal Register on September 16, 2005 (70 FR 54803-04). The petition for exemption will be granted, subject to environmental, historic preservation, and standard employee protective conditions.

BACKGROUND

The Industrial line is located within central San Jose, and is surrounded by streets, highways, mass transportation services, utilities, and public parks. The Milpitas line passes through the densely populated San Francisco Bay area. Both lines were constructed in 1921 by the Western Pacific Railroad, a predecessor of Union Pacific Railroad Company (UP). In 2002, SCVTA filed a notice of exemption to acquire a UP line which encompasses the two lines at issue here.¹ As part of that transaction, UP retained an exclusive permanent easement for purposes of providing freight service. See Santa Clara Valley Transportation Authority–Acquisition Exemption–Union Pacific Railroad Company, STB Finance Docket No. 34292 (STB served Dec. 26, 2002).

UP has since discontinued service and abandoned its freight easements over these lines pursuant to the following exemptions: (1) over the Industrial line, in Union Pacific Railroad Company–Abandonment Exemption–in Santa Clara County, CA, STB Docket No. AB-33 (Sub-No. 221X) (STB served Nov. 26, 2004); and (2) over the Milpitas Line, in Union Pacific

¹ SCVTA filed a motion to dismiss and vacate the notice of exemption on December 31, 2002, arguing that it acquired only the physical assets of the line, and not UP's common carrier obligation. SCVTA subsequently filed a notice of withdrawal of its motion to dismiss and vacate on April 22, 2003.

Railroad Company—Abandonment Exemption—in Alameda County, CA, STB Docket No. AB-33 (Sub-No. 211X) (STB served Nov. 12, 2003).

According to SCVTA, the only customer on the Industrial line is Smurfit Stone Recycling Corporation (Smurfit), a shipper of scrap or waste paper. Smurfit shipped 138 cars over the line in 2002, 123 cars in 2003, and 26 cars in the first quarter of 2004. SCVTA states that Smurfit would continue to receive rail service by UP over a spur connecting Smurfit's facility to a nearby UP line. SCVTA also states that no traffic has moved over the Milpitas line for at least 5 years and that any traffic in the future could move over an adjacent parallel UP line. In addition, SCVTA contends that there is no likelihood of new rail business on either line. SCVTA plans to make portions of these lines available to Bay Area Rapid Transit (BART) for the operation of a light rail system.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without our prior approval. Under 49 U.S.C. 10502, however, 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.

Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will also foster sound economic conditions and encourage efficient management by allowing SCVTA to avoid the cost of owning and maintaining lines that are not being used or will not be used [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be adversely affected.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. No traffic has moved over the Milpitas line for at least 5 years, and it appears that Smurfit, the only shipper on the Industrial line, will continue to receive rail service to its facility via an adjacent UP line. Nevertheless, to ensure that Smurfit is informed of our action, we will require SCVTA to serve a copy of this decision on Smurfit within 5 days of the service date and certify to us that it has done so. Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

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, we will impose the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

SCVTA has submitted environmental and historic reports with its petition and has notified the appropriate Federal, state and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed abandonment. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment. SEA served an environmental assessment (EA) on October 28, 2005, and requested comments by November 28, 2005.

In the EA, SEA states that the National Geodetic Survey (NGS) has identified one geodetic station marker along the Industrial line, and 19 geodetic station markers along the Milpitas line that may be affected by the proposed abandonment. Therefore, SEA recommends that SCVTA provide NGS with 90 days' notice prior to beginning salvage activities to plan for the possible relocation of the station markers by NGS.

SEA also states in the EA that the California Public Utilities Commission (CPUC) has expressed concern about unused rail and ties that could create traffic and pedestrian safety hazards, and has requested that the Board condition any abandonment authority on the removal of all rail and ties within 2 years of granting the abandonment exemption.² SCVTA has indicated, however, that portions of the rail lines to be abandoned would continue to be used for BART light rail purposes. Therefore, no salvage activities are contemplated. Nevertheless, in order to address CPUC's concerns, SEA recommends that SCVTA be required to consult with CPUC regarding possible safety hazards prior to consummation of the abandonment, and that SCVTA report the results of this consultation to SEA in writing.

SEA further states in the EA that the California Office of Historic Preservation (SHPO) has not completed its review of the proposed abandonment. Specifically, the SHPO has requested that SEA submit additional information to the SHPO explaining the relationship between SCVTA's current abandonment proceeding and UP's prior abandonment proceedings. Therefore, pending completion of consultation with the SHPO, SEA recommends that SCVTA retain its interest in and take no steps to alter the historic integrity of all sites and structures on the rights-of-way that are 50 years old or older until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f.

No comments on the EA were filed by the due date. Therefore, the conditions recommended by SEA in the EA will be imposed. The proposed abandonment, as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

² CPUC also states that it believes that local agencies should not be left financially accountable for removal or maintenance of the crossings, and that funding must be given to cleaning up the abandoned railroad right-of-way and crossings.

SEA has indicated in its EA that the rights-of-way may be appropriate for other public uses under 49 U.S.C. 10905. Public use requests were due no later than 20 days after publication of the notice of the petition in the Federal Register, or by October 6, 2005. No one has sought a public use condition, and none will be imposed.

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 SCVTA of the above-described lines, subject to the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), and subject to the conditions that SCVTA: (1) notify NGS 90 days prior to beginning salvage activities to plan for the possible relocation of the station markers by NGS; (2) prior to consummation of the abandonment, consult with CPUC regarding CPUC's concerns that abandoned track could cause safety hazards on roadways, and report the results of those consultations in writing to SEA; and (3) retain its interest in and take no steps to alter the historic integrity of all sites and structures on the rights-of-way that are 50 years old or older until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f.

2. SCVTA is directed to serve a copy of this decision on Smurfit within 5 days after the service date of this decision and to certify to the Board that it has done so.

3. An offer of financial assistance (OFA) under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by SCVTA and the Board by December 27, 2005, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by the \$1,200 filing fee. See 49 CFR 1002.2(f)(25).

4. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **“Office of Proceedings, AB-OFA.”**

5. Provided no OFA has been received, this exemption will be effective January 15, 2006. Petitions to stay must be filed by January 3, 2006, and petitions to reopen must be filed by January 10, 2006.

6. Pursuant to the provisions of 49 CFR 1152.29(e)(2), SCVTA shall file notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by SCVTA's filing of a notice of consummation by December 16, 2006, 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 1-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary