

SERVICE DATE – DECEMBER 24, 2013

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35776

UNION PACIFIC RAILROAD COMPANY—OPERATION EXEMPTION—IN BEXAR AND  
WILSON COUNTIES, TEX.

Digest:<sup>1</sup> Union Pacific Railroad Company (UP) seeks authority through a notice of exemption to operate rail service over a line in Bexar and Wilson Counties, Tex. In this decision, the Board is allowing rail service to begin so that UP may serve a shipper on the line that has traffic en route to its facility. The Board, however, will investigate the circumstances surrounding the construction of the line at issue. The Board also denies the request of BNSF Railway Company (BNSF) to reject UP's notice of exemption and denies as moot BNSF's request to postpone the effective date of the exemption. The Board clarifies that the effectiveness of the notice will not affect any rights BNSF may have to provide competitive service to shippers on the line.

Decided: December 24, 2013

By petition filed on November 13, 2013, BNSF Railway Company (BNSF) requests that the Board reject the notice of exemption filed by Union Pacific Railroad Company (UP) to operate as a rail common carrier over a line in Bexar and Wilson Counties, Tex. (the Line), because the transaction presents controversial issues related to BNSF's right to provide competitive service on the line. BNSF also requests that the Board stay the effective date of the exemption, if necessary, to afford sufficient time for the Board to act on its petition to reject. For the reasons discussed below, the petition to reject will be denied, the request for stay will be denied as moot, and the exemption will take effect on the service date of this decision so that rail service to Frac Resources LP (Frac Resources), a shipper on the Line that has approximately 200 rail cars in transit to its facility, may commence. However, as discussed below, the Board also will investigate the circumstances leading up to UP's request for operating authority in light of assertions made in this proceeding.

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<sup>1</sup> 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).

## BACKGROUND

On October 21, 2013, UP filed a verified notice of exemption under 49 C.F.R. § 1150.31 to operate as a rail common carrier over approximately 7,391 feet of track between milepost 16.1 and milepost 17.5 in Bexar and Wilson Counties, Tex. According to UP, on October 17, 2013, it purchased the Line from Frac Resources, which had constructed the Line on a UP-owned right-of-way to facilitate rail service to its facility. Notice of the exemption was served and published in the Federal Register on November 6, 2013 (78 Fed. Reg. 66,802). The exemption was scheduled to become effective on November 20, 2013.

On November 13, 2013, BNSF filed a petition to reject the notice of exemption and further requested that the Board stay the effectiveness of the exemption, if needed, to afford the Board sufficient time to act on BNSF's petition to reject. BNSF argues that the streamlined exemption procedures under § 1150.31 are not appropriate for the proposed transaction because it presents non-routine and potentially controversial issues relating to BNSF's right to provide competitive service to shippers on the Line pursuant to conditions imposed in the UP-Southern Pacific Rail Corporation (SP) merger proceeding<sup>2</sup> and the terms of the Restated and Amended Settlement Agreement (RASA) entered into by BNSF and UP, which the Board approved in the context of its review of the merger transaction. Specifically, BNSF asserts that it has the right to serve any new shipper facility located at "2-to-1" points identified in the RASA, which includes shipper facilities located along or adjacent to a spur or industrial track that connects to a 2-to-1 point.<sup>3</sup> BNSF states that the Line connects with the southern boundary of the 2-to-1 point at Elmendorf, Tex. (the Elmendorf switch district), and that therefore BNSF is entitled to access any new shipper facility located along the Line. BNSF is concerned that, upon converting the Line to a common carrier line through this exemption proceeding, UP could argue that BNSF may not access shippers on the Line because the shippers would no longer connect to the Elmendorf switch district by spur or industrial track but rather by a newly authorized UP rail line. However, BNSF states that, if UP affirms that it will not use its exemption as a basis for denying BNSF's access to shippers on the Line, BNSF would consider withdrawing its objections to the notice.

By decision served on November 15, 2013, the Board issued a housekeeping stay postponing the effective date of the exemption until further order of the Board to allow time for parties to reply to BNSF's petition and for the Board to fully consider the arguments presented. UP filed a reply on November 18, 2013.

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<sup>2</sup> See Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., 1 S.T.B. 233, 419-420 (1996).

<sup>3</sup> The Board's jurisdiction extends to spur or industrial track that links shipper facilities to railroad main lines, see 49 U.S.C. § 10501(b)(2), even though the Board's licensing authority is not needed for a rail carrier to construct, acquire, operate, or abandon such track, see 49 U.S.C. § 10906.

On December 11, 2013, Frac Resources and Mission Rail Industrial Park LLC (collectively, FRAC) filed a reply. FRAC states that, after it approached UP in 2012 for the purpose of obtaining rail service, UP and FRAC entered into an Industry Track Agreement that required FRAC to construct the Line on a right-of-way owned by UP. FRAC states that after the Line was constructed, UP purchased the track over which UP would provide rail service to Frac Resources and Mission Rail Park (a new industrial rail facility). FRAC states that, in entering into the agreement, it anticipated that other railroads (specifically BNSF) would be able to serve Mission Rail Park. FRAC requests that the Board allow the exemption to become effective so that service to Frac Resources and Mission Rail Park may begin. FRAC states that any further delay in providing service would have severe adverse consequences for both Frac Resources and Mission Rail Park, given that approximately 200 rail cars are en route and are badly needed by Frac Resources to service its customers.

### DISCUSSION AND CONCLUSIONS

*Issues surrounding the Line's construction.* UP and FRAC have submitted separate descriptions of the circumstances leading to UP's request for operating authority. The facts asserted by UP and FRAC raise questions as to whether Board authority to construct the Line under § 10901 was required and whether the transaction between UP and Frac Resources was structured purposefully to avoid seeking such authority. In prior cases, we have held that the informal, streamlined class exemption process is unsuited for cases in which the record reveals that a more searching review of the proposed transaction would be appropriate.<sup>4</sup> Nevertheless, as noted, the record before us here indicates that further delay may result in significant harm to Frac Resources, given that there are 200 cars in transit to Frac Resources. Therefore, under these unique circumstances, and notwithstanding our concerns, we will allow the exemption to take effect so that UP may provide needed rail service to Frac Resources and Mission Rail Park.

We will, however, keep this docket open to investigate the circumstances under which the Line was built so that we can determine whether remedial action is appropriate. As an initial step in our further consideration of this matter, UP will be directed to file with the Board, by January 6, 2014, a copy of the executed Industry Track Agreement between UP and Frac Resources (under seal and accompanied by a motion for protective order if necessary). The parties are on notice that they should maintain any documents related to the construction of the Line and rail service to Frac Resources.

*BNSF Petition to Reject.* BNSF challenges UP's use of the class exemption procedure here because this case allegedly presents controversial issues related to BNSF's asserted right to provide competitive service to new shippers on the Line. BNSF also claims that the notice is misleading because it fails to mention that the scope of BNSF's rights under the RASA is disputed.

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<sup>4</sup> See, e.g., Burlington N. & Santa Fe Ry.—Acquis. & Operation Exemption—South Dakota, FD 34645 (STB served Jan. 14, 2005).

UP's right to seek authority to operate over the Line as a common carrier is separate and distinct from BNSF's asserted right to access shippers on the Line under the terms of the RASA. Allowing the exemption to go into effect, thus permitting UP common carrier service to begin, does not preclude BNSF from seeking, through either arbitration or a new, separate Board proceeding, a determination that it *also* is entitled to access the Line.<sup>5</sup> In any such proceeding, whether before an arbitrator or the Board, our decision here shall not be construed as permitting UP to defeat any rights that BNSF may have had to serve shippers on the Line had the exemption not become effective.

For these reasons, BNSF's petition to reject the notice is denied. Because BNSF's argument in support of its stay request is based on its petition to reject, we will deny as moot BNSF's request for a stay.

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

It is ordered:

1. The housekeeping stay entered on November 15, 2013, is lifted.
2. BNSF's petition to reject the notice of exemption is denied.
3. BNSF's request to stay the effective date of the exemption is denied as moot.
4. UP shall file with the Board a copy of the executed Industry Track Agreement between UP and Frac Resources by January 6, 2014.
5. This decision is effective on its date of service.

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

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<sup>5</sup> This case thus differs from the recent dispute between these same parties in Union Pacific Railroad—Abandonment Exemption—in LaFourche Parish, La., AB 33 (Sub-No. 277X) et al. (STB served June 19, 2013), in which the authority UP initially sought (to abandon the subject line) would have precluded the trackage rights authority BNSF sought over the same line.