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SERVICE DATE - DECEMBER 5, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34252

UNION PACIFIC RAILROAD COMPANY —  
OPERATION EXEMPTION — IN YOLO COUNTY, CA

Decided: December 4, 2002

By notice filed on October 21, 2002, Union Pacific Railroad Company (UP) seeks to invoke the class exemption from the regulatory requirements of 49 U.S.C. 10901, contained in 49 CFR 1150 Subpart D, for the announced purpose of changing the legal status of its operations over approximately 6.3 miles of track (some of which is owned by the Sacramento-Yolo Port District (Port) and some by UP)<sup>1</sup> in Yolo County, CA, from excepted<sup>2</sup> operations to operations subject to our licensing authority. The notice was scheduled to become effective on November 11, 2002. On October 28, 2002, Yolo Shortline Railroad Company (Yolo) filed a petition to reject UP's notice of exemption or, alternatively, to stay the exemption's effectiveness. UP filed a reply on November 1, 2002.<sup>3</sup> For the reasons discussed below, we will reject the notice.

BACKGROUND

UP states that it and its predecessors have performed excepted industrial track operations over the Port trackage since the early 1950s and over the UP trackage since 1966. In October 2001, however, Yolo entered into an agreement with the Port under which the Port granted Yolo exclusive

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<sup>1</sup> The Port owns 2.92 route miles of the track (herein, Port trackage) and UP owns 3.38 route miles (herein, UP trackage).

<sup>2</sup> Although UP uses the term "exempt," the proper term for operations that come under 49 U.S.C. 10906 is "excepted."

<sup>3</sup> On November 1, 2002, The Burlington Northern and Santa Fe Railway Company (BNSF) filed a comment requesting that the Board not reach any decisions in this or related proceedings adversely impacting "BNSF's customer or facility access in the Sacramento area or BNSF's ability to provide efficient and reliable competitive service as envisioned by the Board when it approved the UP/SP merger," but offered no further explanation.

occupancy and operating rights on portions of the Port's trackage.<sup>4</sup> Accordingly, in November 2001, Yolo invoked a class exemption from 49 U.S.C. 10902 (a companion rail licensing provision to 49 U.S.C. 10901) contained in 49 CFR 1150.41 to lease and operate certain Port trackage, including the track involved here,<sup>5</sup> and on November 16, 2001, Yolo sent a letter to UP giving notice of termination of the February 12, 1951 agreement between the Port and Southern Pacific Railroad Company (SP), that gave SP (and now SP's successor, UP) the right to serve industries from the Port trackage.<sup>6</sup> The 1951 agreement required a 1-year notice of termination. The 1-year period expired on November 16, 2002. UP has filed its notice of exemption in an attempt to avoid being forced to discontinue its operations over the Port trackage.

By decision served on November 8, 2002, the Board's Chairman stayed the effectiveness of UP's notice seeking to invoke the section 10901 class exemption pending consideration of the arguments made in Yolo's petition and UP's reply.

#### POSITIONS OF THE PARTIES

In its notice of exemption, UP states that it is "currently operating over the subject trackage as [excepted] industrial trackage" and that "[n]o changes in [its] operations are anticipated." Rather, UP concedes that the purpose of its filing is to change the legal status of its operations on this track to regulated common carrier service in order to prevent Yolo from unilaterally terminating any of UP's existing service.

In its petition, Yolo contends that UP's filing of this notice, in light of the fact that it plans no changes in its operations, amounts to an abuse of the Board's regulatory procedures simply to try to avoid termination of a contract pursuant to its terms.

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<sup>4</sup> Pursuant to the October 10, 2001 agreement, the Port also assigned to Yolo all of its rights (including the right to terminate) and obligations under certain agreements, including agreements dated February 12, 1951, and September 1, 1966.

<sup>5</sup> See Yolo Shortline Railroad Company — Lease and Operation Exemption — Port of Sacramento, STB Finance Docket No. 34114 (STB served Nov. 20, 2001). On October 21, 2002, UP filed a petition to revoke Yolo's exemption, to which Yolo filed a reply on November 6, 2002, which UP addressed in a letter filed on November 8, 2002. That revocation request will be dealt with in a subsequent decision in that docket.

<sup>6</sup> A second agreement, dated September 1, 1966, between the Port, Sacramento Northern Railway Company, and SP, gives UP the right to use Port trackage as a bridge to reach UP trackage serving the West Sacramento Port Center. That agreement is not the subject of a termination notice.

In response, UP argues that its operations on the line should be found to fall under section 10901 because they involve transportation over, or by means of, an extended or additional rail line. UP adds that its service over the Port trackage has expanded over the years such that, now, it could be considered to come under our licensing authority. UP claims that the track has many indicia of a common carrier rail line. Moreover, UP states that it will be holding itself out to perform common carrier service for all shippers on the line. Finally, UP points to prior decisions of the Board and its predecessor, the Interstate Commerce Commission (Commission), in which UP claims that notices of exemption were used to convert excepted track operations to fully regulated common carrier service, citing Arkansas Central Railway Co., Inc. — Operation Exemption — Line of Herzog Stone Products, Inc., Finance Docket No. 31405 (ICC served May 31, 1989) (Arkansas Central); Yolo Shortline Railroad Company — Acquisition and Operation Exemption — County of Sacramento, CA, STB Finance Docket No. 34018 (STB served Mar. 27, 2001) (Yolo Shortline); and Texas Central Business Lines Corporation — Operation Exemption — MidTexas International Center, STB Finance Docket No. 33997 (STB served Sept. 20, 2002) (Texas Central).

#### DISCUSSION AND CONCLUSIONS

In cases governed by 49 U.S.C. 10906 (formerly 49 U.S.C. 10907 (1995)), we do not have authority under sections 10901 through 10905 and 10907 over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching or side tracks. Whether a track segment is excepted from our licensing authority by section 10906 or, alternatively, fully subject to the rail licensing provisions of the statute<sup>7</sup> is determined by examining the intended use of the track.<sup>8</sup> A line is subject to our regulation under section 10901 if the effect of the trackage is to extend the line of a carrier into new territory,<sup>9</sup> if it is used for continuous transportation service by through trains between

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<sup>7</sup> Under 49 U.S.C. 10901, a person may (1) construct an extension to any of its railroad lines; (2) construct an additional railroad line; (3) provide transportation over, or by means of, an extended or additional railroad line; or (4) in the case of a person other than a rail carrier, acquire a railroad line or acquire or operate an extended or additional railroad line, only if the Board issues a certificate authorizing such activity.

<sup>8</sup> When more than one carrier uses a particular piece of trackage, it is possible that the track's status will be different for each user, based on each carrier's use and operations over the track. See Brotherhood of Locomotive Engineers v. United States, 101 F.3d 718, 727 (D.C. Cir. 1996) (discussion of the use test and the "dual-use" situation).

<sup>9</sup> Texas & Pac. Ry. v. Gulf, Colo. & S.F. Ry., 270 U.S. 266, 278 (1926).

different points,<sup>10</sup> or if the trackage constitutes the entirety of a carrier's line.<sup>11</sup> Conversely, if the line is used for loading, unloading, storage, switching, or other purposes incidental to transportation service, it is excepted trackage under section 10906.<sup>12</sup>

In this case, UP acknowledges in its notice that the trackage has historically been treated as excepted industrial track over which UP has performed, and continues to perform, switching service that is ancillary to its already authorized common carrier line-haul service on other tracks in the vicinity. UP's mere assertion, in its reply, that we should find that the track is now subject to our licensing authority does not meet its burden of demonstrating how its use of the Port trackage has changed so that it now falls within section 10901. On the contrary, UP made clear in its notice that there has been no significant change in the operations it conducts on this trackage. UP has been performing as a contract operator over the track owned by the Port, doing work the Port could have done itself or hired another operator to perform. The contract terms allow either party to terminate by giving notice as specified in the contract.<sup>13</sup> Thus, notwithstanding certain "indicia" that UP briefly mentioned in its reply (existence of a station designation, weight of rail, etc.), UP has not shown that this trackage is not properly categorized as section 10906 excepted track for purposes of UP's use of the track.

The cases that UP relies upon are distinguishable from the situation here. In Arkansas Central, the Commission allowed a new railroad to obtain a license to operate over a 1.3-mile track that had been an industrial spur in the past because the railroad demonstrated that its use of the track would be substantially different — it would no longer be used for storage but would instead be used for the through movement of trains. See Arkansas Central at 2. Here, in contrast, UP acknowledges that no significant operational changes are anticipated. In Yolo Shortline, the track had previously been used only for service within a military base. Yolo's notice stated that the site was being redeveloped after the military base was closed, and that Yolo would come in and offer service over the involved tracks to all tenants that locate in the new industrial park — again, a significant change in use. Finally, in Texas Central, although the railroad claimed that it did not need our authorization to acquire track because its operations would constitute "switching," we found the track to be subject to our licensing authority because, unlike UP's situation here, the track constituted the new carrier's entire line of railroad, enabling it to serve shippers in territory it had not previously served. See Texas Central at 2. Thus,

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<sup>10</sup> Nicholson v. ICC, 711 F.2d 364, 367 (D.C. Cir. 1983) (Nicholson).

<sup>11</sup> United Transp. Union v. STB, 183 F.3d 606, 613 (7th Cir. 1999).

<sup>12</sup> Nicholson, at 367-68.

<sup>13</sup> Indeed, under the treatment accorded this track for the past 50 years, UP could have terminated its operations over this track without even notifying us.

none of these cases support UP's contention that the nature of its operations on the Port trackage require our approval under section 10901.<sup>14</sup>

UP seeks to avoid being ejected from the line. But because its operations continue to involve only services that are excepted under section 10906, UP may not use Board procedures to frustrate the terms of a private contract. And although UP expresses concern that service to shippers could suffer if UP's right to operate over the affected Port trackage is terminated, Yolo stands ready to continue to provide service over the affected trackage.

UP argues that we should assert authority to license its operations over this track because we exercised licensing authority in November 2001 when we authorized Yolo to operate over Port trackage, some of which may overlap with this trackage, in STB Finance Docket No. 34114. UP argues that our action in that case had the effect of converting this previously excepted industrial trackage into trackage subject to our licensing authority, as it asserts that Yolo's operations do not materially differ from UP's current operations. Whether Yolo's notice of exemption in STB Finance Docket No. 34114 was proper depends upon Yolo's own use of that track, and will be examined in that case, when we consider the petition to revoke Yolo's notice that UP filed in that case on October 21, 2002.

For the reasons discussed, we find that Yolo's petition to reject UP's notice should be granted and the notice rejected.<sup>15</sup>

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

It is ordered:

1. Yolo's petition to reject the notice of exemption is granted, and UP's notice is rejected.
2. Yolo's petition to stay the effectiveness of the exemption pending consideration of its petition is denied as moot.

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<sup>14</sup> Because we find that UP has failed to show that its activities on the line fit within section 10901 rather than 10906, we must also conclude that its activities cannot qualify for the class exemption from section 10901 in 49 CFR 1150 Subpart D.

<sup>15</sup> The fact that we are finding UP to be providing switching services over excepted track here, and rejecting its notice on that basis, does not mean that we have no jurisdiction over UP's operations. See 49 U.S.C. 10501(b)(2).

3. This decision is effective on the date of service.

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

Vernon A. Williams  
Secretary