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SERVICE DATE - APRIL 30, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33508¹

MISSOURI CENTRAL RAILROAD COMPANY
--ACQUISITION AND OPERATION EXEMPTION--
LINES OF UNION PACIFIC RAILROAD COMPANY

STB Finance Docket No. 33537

GRC HOLDINGS CORPORATION--ACQUISITION EXEMPTION--
UNION PACIFIC RAILROAD COMPANY

Decided: April 28, 1998

On December 24, 1997, in STB Finance Docket No. 33357, GRC Holdings Corporation (GRCH), a noncarrier, filed a notice of exemption under 49 CFR 1150.31 to acquire from Union Pacific Railroad Company (UP) a 244.5-mile line of railroad between Vigus, MO (milepost 19.0) and Pleasant Hill, MO (milepost 263.5). GRCH stated that, upon acquiring the line, it intended immediately to convey to Missouri Central Railroad Company (MCRR) the rail assets necessary to conduct operations over the line.² On December 23, 1997, in STB Finance Docket No. 33508, MCRR, also a noncarrier, filed a notice of exemption under section 1150.31 to acquire the rail assets from GRCH and to operate the line, and to acquire directly from UP incidental trackage rights over UP's lines of railroad between Vigus (milepost 19.0) and Rock Island Junction, MO (milepost 10.3), and between Pleasant Hill (milepost 263.5) and Leeds Junction, MO (milepost 288.3), a total distance of 33.5 miles. Notices of the exemptions were served and published on January 27, 1998 (both at 63 FR 3945). The earliest possible date for consummation of the transactions was March 17, 1998.

On November 17, 1997, the Cities of Lee's Summit and Raytown, MO (the Cities or petitioners), jointly filed a petition to reject the notice of exemption filed in the MCRR proceeding and to find the exemption void ab initio. Between November 17, 1997, and February 11, 1998, approximately 325 individuals residing in or near Lee's Summit filed opposition comments in the

¹ These proceedings are consolidated in this decision.

² GRCH is owned by individuals who also own stock in General Railway Corporation, which owns 100 percent of the stock of MCRR. There is no direct corporate affiliation between GRCH and MCRR.

MCRR proceeding.³ Also on November 17, U.S. Congresswoman Karen McCarthy submitted comments on behalf of her constituents in the Lee's Summit--Raytown area. Between December 16, 1997, and January 12, 1998, supporting comments were filed in the MCRR proceeding by the City of Versailles, MO, a resident of Versailles, UMB Bank of Kansas City, MO, and a resident of Kansas City. On December 1, 1997, United Transportation Union (UTU) filed a letter seeking imposition of labor protective conditions in the MCRR proceeding. On December 23, 1997, MCRR replied to the petition for rejection.

PRELIMINARY MATTER

The petition to reject, as well as the many commenting letters, have been filed in the MCRR acquisition proceeding. Clearly though, the petitioners' and commenters' arguments also relate to the GRCH acquisition proceeding, as the transaction covered therein forms the cornerstone of MCRR's proposed operation. Accordingly, we will consolidate the two proceedings and treat the petition to reject and the comments as affecting both proceedings.

BACKGROUND

The 278-mile Rock Island Junction to Leeds Junction line comprising the proposed acquisition and two grants of trackage rights is a former property of the Chicago, Rock Island and Pacific Railroad Co. (the Rock Island). UP owns the line as successor-in-interest to The St. Louis Southwestern Railway Company (SSW), which acquired the line from the bankrupt Rock Island in 1979.⁴

The focus of the Cities' concern is the 24.8-mile "west end," between Pleasant Hill and Leeds Junction, over which MCRR would operate pursuant to trackage rights granted by UP. The segment passes through Lee's Summit and Raytown.

POSITIONS OF THE PARTIES

The Cities request that we find the exemption in the MCRR acquisition proceeding void ab initio, asserting that the related notice contains false and misleading information.⁵ The Cities contend that there is in fact no existing line of railroad that UP can sell or over which it can grant trackage rights because the line was abandoned by UP and its predecessors in a de facto manner. At

³ Approximately 315 of the comments are letters from residents of Lee's Summit. The remainder are from residents of other cities, including Raytown, Kansas City, Blue Springs, and Pleasant Hill, MO.

⁴ SSW was at the time a subsidiary of Southern Pacific Transportation Company (SP).

⁵ The Board's regulations at 49 CFR 1150.32(c) state that: "If the notice contains false or misleading information, the exemption is void ab initio."

most, petitioners assert, UP has a right-of-way upon which MCRR proposes to construct a new line of railroad. Petitioners contend that MCRR's notice, by misleadingly omitting material facts and inaccurately describing others, appears to seek to avoid complying with environmental reporting requirements relevant to a proposal to construct a new rail line. Petitioners contend that the notice must be rejected, and that MCRR must instead file an application for construction authority subject to the public convenience and necessity standard in 49 U.S.C. 10901 or seek an exemption from construction authority under 49 U.S.C. 10502.

Petitioners find a falsehood in MCRR's statement that GRCH will convey all assets necessary for MCRR to conduct railroad operations over the subject line.⁶ Petitioners assert that the property lacks the "assets," such as rail, ties, switches, bridges, and crossings, necessary to commence rail service. The Cities claim that MCRR's statements in its pleadings that it will "rehabilitate" the line between mileposts 263.5 and 288.3 are misleading in that they understate the work necessary to make the trackage rights operational.

The Cities assert that virtually all of the subject track has been inactive since 1979. They claim that much of the rail, ties, and ballast have been removed or are in substantial disrepair, that crossings have been torn up or paved over, and that bridges have been removed. In Lee's Summit, petitioners assert, there are no tracks, ties, or ballast for approximately 3 miles. The petitioners claim that approximately 7 miles of line are in such disrepair that removal of material and the construction of a new line would be necessary.

Petitioners argue, further, that the proposal triggers the requirement that the agency undertake an environmental review and that the railroad file an environmental and an historical report, and that MCRR's notice omits reference to underlying facts that make those requirements applicable. Petitioners contend that MCRR's proposed operation would result in a 100% increase in rail traffic and, thus, would exceed the threshold for cases in which an environmental assessment (EA) typically must be prepared. Further, petitioners claim that the required construction activity independently triggers the environmental documentation requirements.

The Cities also contend that MCRR should have filed an historic report as required by the Board's regulations at 49 CFR 1105.8. Petitioners note that, in a proceeding instituted pursuant to an attempt to abandon the line,⁷ an EA prepared by the Board concluded that the entire corridor containing the line is eligible for inclusion in the National Register of Historic Places. In petitioners'

⁶ While such a statement appears in the notice published in the GRCH acquisition proceeding, but not in the MCRR acquisition proceeding, such a statement was made in the pleadings filed in both proceedings.

⁷ The St. Louis Southwestern Railway Company--Abandonment Exemption--In Gasconade, Maries, Osage, Miller, Cole, Morgan, Benton, Pettis, Henry, Johnson, Cass, and Jackson Counties, MO, ICC Docket No. AB-39 (Sub-No. 18X) (SSW--Abandonment Exemption).

view, even if the requirement to file an historic report is determined not to be applicable here, MCRR's failure to state that it proposed construction activity in a corridor that is historic is false and misleading.

The Cities state that their residents strongly oppose MCRR's proposals to rehabilitate and operate the line. Petitioners indicate that the population of Lee's Summit increased from approximately 28,900 in 1980 to approximately 63,200 in 1997, and that the right-of-way runs adjacent to significant residential development. Petitioners assert that reactivation of rail service would directly impact 14 neighborhoods. They aver also that reactivation would include reestablishing six at-grade crossings in Lee's Summit, and that two elementary schools and a junior high school would be extremely close to an at-grade crossing. Petitioners complain that the at-grade crossings would be blocked as trains pass, and that response times for police, fire, and emergency medical services would be seriously affected. The Cities believe that this adverse impact is unnecessary because UP owns and operates a parallel line that MCRR could use instead of the west end.

The commenters who oppose the proposed operation state that they are concerned with the reinstatement of rail service over the west end, particularly operations through Lee's Summit and Raytown. These commenters say they are concerned that reactivating this segment might have an adverse impact on public safety, the local economy, the environment, and the overall quality of life in their communities. The commenters reiterate points made by the Cities in this regard and, in addition, emphasize the danger posed by trains carrying hazardous materials and those operating through at-grade crossings. These commenters would have the Board place stringent conditions on any exemption for the acquisition of trackage rights over the west end. These conditions would include the requirement that MCRR remove all at-grade crossings or install fencing and extensive crossing signals at them, shift the railbed away from residential areas, and install sound barriers. Commenters also would have the Board impose limits on the number of trains permitted, the types of materials MCRR could transport, and the speed at which its trains could operate.

MCRR replies that the Cities' petition errs in claiming that rehabilitation of UP's existing line actually is construction of a new line and that, because the line must be rehabilitated, GRCH cannot convey the assets necessary for operation of the line. MCRR replies, also, that petitioners have taken statements out of context or have claimed that statements not made or not required to be made are nevertheless false or misleading.

MCRR notes that the Rock Island Junction to Leeds Junction line was never authorized to be abandoned and has never been abandoned. The railroad states that the line is in remarkably good condition despite the deferral of maintenance for many years.⁸ While MCRR states that short

⁸ The railroad presents an extensive discussion of the condition of the line, specifically including the portions shown in the photographs submitted by the Cities, to support MCRR's statement that
(continued...)

segments of track have been stolen or vandalized, and that portions of the rail line have been paved over,⁹ the railroad asserts that the bridges along the line are in good shape. MCRR notes that three bridges need to be rebuilt. The railroad says that two bridges were removed in 1996 and 1997 by Missouri authorities for highway projects, but that the State recognizes its responsibility to restore them. One bridge is located in Raytown and requires rebuilding because the City removed a portion of an embankment and right-of-way without the permission of UP or its predecessors.

MCRR states that rehabilitation will require only about one-tenth of the work and expense that construction of a new line would involve. In any event, the railroad says, as a legal matter, the proposed rehabilitation is not construction. MCRR notes that UP could undertake the work MCRR proposes -- the improvement of an existing, non-abandoned rail line -- without seeking Board permission or even notifying the Board. MCRR states that, as the purchaser from UP and as the operator of the trackage rights over the track that UP will continue to own, MCRR may also improve the line. MCRR adds that its proposal to restore the line will preserve what petitioners claim is an historic asset.

MCRR says that it does not anticipate crossing any of the thresholds that would trigger environmental review here. MCRR also contends that the Cities' assertions regarding potential impact on public safety are exaggerations. The railroad indicates that petitioners are misinformed about the extent to which crossings would be blocked. MCRR adds that it plans to operate only one scheduled train each way, per day, 5 days a week, over the west end. MCRR states that it is willing to work with responsible local officials to resolve any public safety problems that might arise. Finally, regarding the Cities' contention that MCRR could operate over UP's nearby parallel route, MCRR states that it has discussed the alternative route with UP and has been told that the route is too congested to allow additional traffic.

The supporting commenters assert that the proposed operation would economically benefit Missouri and area cities and counties by reducing costs for businesses, creating new businesses and jobs along the line, and promoting tourism. These commenters maintain that the potential for adverse impacts on the environment has been misstated by the opponents. The supporting commenters suggest that the proposed operation will relieve stress on roadways and on UP's existing lines and will result in less air pollution.

⁸(...continued)
the right-of-way is essentially intact.

⁹ The railroad claims, however, that this paving has been done without permission.

DISCUSSION AND CONCLUSIONS

The Cities have failed to establish grounds for rejecting the notice of exemption. The Cities have not demonstrated that the notice contains false and misleading information. The fact that the line may need repairs does not render the statement that GRCH is conveying all assets necessary to commence rail operations a falsehood. GRCH is merely stating that it is transferring the rail properties acquired from UP to MCRR, as opposed to some of the nonrail properties, which GRCH is retaining for itself. The Cities have not even alleged, much less shown, that GRCH has withheld from the properties acquired from UP anything that MCRR would need in order to provide service.

The Cities have used the rejection criteria simply as a means of making their argument that this acquisition proceeding is really a construction application and should be treated as such. This argument suffers from a couple of fatal weaknesses. The first, of course, is that this case simply involves GRCH invoking a class exemption to acquire a rail line from the UP, and MCRR then invoking the same exemption to acquire the line from GRCH and also to acquire incidental trackage rights from UP. The Cities have not shown that the acquisitions do not meet the standards for the class exemption or that either GRCH or MCRR has violated our rules in invoking the exemption.

The second flaw in the Cities' argument is their claim that MCRR requires construction authority to lay track, build bridges, and undertake similar projects on this property. The lines MCRR is acquiring and those over which it is acquiring trackage rights to operate are lines over which rail service has been provided and which have never been authorized to be abandoned; see the "Verified Statement on Behalf of Union Pacific Railroad Company," attached as Appendix B to the Verified Statement of MCRR's Witness Larkin. The owner of a rail line that has not been authorized to be abandoned may repair, replace, rehabilitate or rebuild the line without Board authority. City of Detroit v. Canadian National Ry. Co., et al., 9 I.C.C. 2d 1208 (1993) (City of Detroit), aff'd sub nom. Detroit/Wayne County Port Authority v. ICC, 59 F.3d 1314 (D.C. Cir. 1995); City of Stafford, Texas v. Southern Pac. Transp. Co., Finance Docket No. 32395 (ICC served Nov. 8, 1994), aff'd, 69 F.3d 535 (5th Cir. 1995).

The term "construction" within the meaning of section 10901 of the ICC Termination Act (and, previously, within the meaning of section 10901 of the Interstate Commerce Act) refers to the extension of a rail line into territory that the constructing carrier presently lacks authority to serve. City of Detroit, 9 I.C.C.2d at 1214-1217; City of Stafford. By acquiring the line from UP, GRCH and, subsequently, MCRR, have acquired the authority to provide service over the line. Thus, MCRR does not need construction authority from the Board to build or rebuild rail facilities to recommence service on the line. Moreover, the west end, the chief concern of the petition, remains the property of the UP. MCRR has merely acquired the right--the nonexclusive right--to operate over the property. Thus, while UP has delegated the job of rehabilitating that property, UP, as owner, remains the party primarily responsible for any improvements on the west end. UP does not of course require authority to make improvements on its lines.

The Cities argue that the line was de facto abandoned from long disuse. But the Cities offer no statutory or precedential support for this proposition. Nor can they, because it is well established that a rail line is not abandoned until this agency authorizes abandonment under 49 U.S.C. 10903 or the exemption provisions at 49 U.S.C. 10502. The Phillips Company--Petition for Declaratory Order, Finance Docket No. 32518 (ICC served Apr. 18, 1995), reopening denied, Feb. 14, 1997.

The Cities argue that the requirement for an environmental review under the National Environmental Policy Act (NEPA) are met because the operations proposed by MCRR will exceed the threshold of subsection 1105.7(e)(5)(i)(A) of the regulations. That provision, which concerns air quality, provides that an Environmental Report is required “. . . [i]f the proposed action will result in . . . [a]n increase in rail traffic of at least 100 percent (measured in gross ton miles annually) or an increase of at least eight trains a day on any segment of rail line affected by the proposal.” Because no operations are currently being conducted, the Cities argue that MCRR’s proposal to operate one train a day each way, five days a week, represents an increase over present levels exceeding 100%.

When a line currently carries no traffic, any resumption of service, no matter how small, represents an increase mathematically of infinite magnitude. But, the Cities have cited no instance, nor are we aware of any, where an increment of one train a day each way as proposed by MCRR has been deemed to suffice to trigger our environmental reporting and documentation requirements. The fact that the 100% standard is paired in the same sentence with an absolute standard of an increase of eight trains a day suggests that the 100% standard applies to an anticipated increment that greatly exceeds the one train a day each way operations proposed by MCRR. Moreover, MCRR’s actions are most closely analogous to the situation that arises when a carrier reinstates service on a line where service has been discontinued. In such a case, under 49 CFR 1105.7(e)(5)(i)(C), the environmental requirements are not triggered unless the proposed operations will amount to at least eight trains per day. Reading the regulations as a whole, we cannot accept the Cities’ interpretation of the environmental report and documentation requirements.

Our use of thresholds is meant to help us answer the question we ask in every action we undertake: does our action create a potential for significant environmental impact? See 49 CFR 1105.6(d). To provide that answer, we have to look at the state of things before we act and compare them to any new opportunities created by our action. A key issue is, what is the relevance of MCRR’s acquisition to the resumption of operations on the line?

This case presents a set of facts from which two conflicting inferences can be drawn. The long hiatus in service--more than 18 years--suggests that the resumption of service, absent the acquisition by MCRR, is unlikely. If SSW, or its affiliate SP, or later UP, had wanted to operate the line, why didn’t they commence service sometime during the past 18 years?

The preservation of the right of way, albeit in a state of disrepair, however, suggests an intent to resume rail operations at some point. The track alone represented an enormous opportunity cost for SSW and SP, and then UP, a cost the owning railroad incurred every year for 18 years. If the

owners didn't intend to resume service, why didn't they abandon the line, scrap the track, and sell the real estate?

As noted previously, the line was bought by SP's subsidiary, SSW, from the bankrupt Rock Island in 1979. The SP/SSW did not operate over the line at least in part because it received trackage rights over the parallel UP line between St. Louis and Kansas City as a condition of the approval by the Interstate Commerce Commission (ICC) of the merger between the UP and the Missouri Pacific Railroad Company in 1982. The SP/SSW embargoed the poorly maintained line after acquiring it, but did not seek authority from the ICC during the 1980s either to discontinue service or to abandon the line.

SP/SSW's embargo became a source of controversy in 1994 when a group of local shippers and other interested people calling themselves the Save The Rock Island Committee (STRICT) demanded a restoration of service over the line. Save The Rock Island Committee Inc. v. The St. Louis Southwestern Railway Company, Docket No. 41195. The SP, through its subsidiary SSW, had proposed to abandon most of the line by invoking the class exemption (for abandonment of lines that had been out of service 2 years or more) several months prior to the time that STRICT filed its complaint in January 1994. In SSW--Abandonment Exemption (ICC served Apr. 1, 1994), the ICC rejected the notice of exemption because the evidence showed some movement of local traffic over a part of the line at issue during the 2-year period prior to SSW's filing of the notice invoking the exemption.¹⁰

An aspect of the proposed abandonment relevant to the likelihood that service would be restored on the west end is the fact that the UP invoked the "offer of financial assistance" provisions of the Interstate Commerce Act that require a railroad that has received permission to abandon a line to sell the line to a "financially responsible offeror" at a price set by the ICC failing agreement by the parties. On January 6, 1994, UP offered to buy the west end, the segment between Leeds Junction and Pleasant Hill, for slightly more than \$2 million.

Because abandonment was never authorized, the offer of financial assistance provisions were never triggered. Subsequently, UP acquired SP and SSW, including, of course, the line at issue here. See Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Railroad Company, STB Finance Docket No. 32760 (STB served Aug. 12, 1996) (UP/SP Merger). UP's acquisition of control of SP was the subject of a thorough environmental assessment conducted as part of the Board's proceedings. Because the acquisition of

¹⁰ The ICC instead decided to treat the filing as a petition for exemption to permit the proposed abandonment. No action has been taken on the petition, which has been held in abeyance. In January 1997, SSW withdrew the west end segment between Leeds Junction and Pleasant Hill from the pending abandonment request.

the line at issue here did not trigger our thresholds, the impact of its acquisition was not made the subject of a separate discussion.

In its pleadings in UP/SP Merger discussing the line, UP expressed doubt that the entire line would ever be returned to service, though UP noted that it had engaged in discussions with “parties interested in purchasing the former Rock Island line for rail service.” However, the UP specifically stated that “UP/SP would railbank the west end, which is out of service, as a potential second mainline for UP’s busy track between Kansas City and Pleasant Hill, Missouri, although there is very aggressive local opposition to any return of rail service.” Applicant’s Rebuttal Volume 1-Narrative, pp. 298-300 (emphasis added).

The transaction now before us confirms UP’s interest in the west end. The UP is retaining the west end and is granting MCRR nonexclusive trackage rights restricted against providing local service.

UP’s interest in acquiring and retaining the west end and that railroad’s view of the line as an alternative mainline between Kansas City and Pleasant Hill indicates that UP planned and still plans to resume operations there. The right-of-way, while needing repair, remains largely intact. Under these circumstances, we cannot say that this acquisition of an unabandoned rail line should be viewed differently from the way we view the acquisition of other lines that have not been abandoned. In those cases, we do not require the filing of an environmental report and we do not prepare an environmental assessment unless the acquiring entity proposes to conduct operations that would exceed thresholds the proposed MCRR operations would not reach here. See 49 CFR 1105.6(b)(4) and (c)(2) and (3). Therefore, we will not impose such a requirement or undertake such an analysis in this case.

Neither is an historic review required by our rules. As to the western and eastern segments, the subject transaction is a trackage rights transaction that will not alter the level of maintenance of the railroad property in such a way as to affect any historic properties. See 49 CFR 1105.8(b)(3). As to the segment MCRR is acquiring from GRCH, that transaction is a sale for the purpose of continued rail operations where further approval is required for abandonment, and there are no plans to dispose of or alter properties 50 years old or older. See 49 CFR 1105.8(b)(1). When it adopted the governing regulations, our predecessor agency noted that transactions of the type involved here rarely affect historic properties and, as such, excepted such proposals from historic report requirements. Implementation of Environmental Laws, 7 I.C.C.2d 807, 828 (1991).

Accordingly, we deny the petition to reject.

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

STB Finance Docket No. 33508, et al.

It is ordered:

1. The proceedings in STB Finance Dockets No. 33508 and 33537 are consolidated.
2. The petition to reject is denied.
3. This decision is effective 30 days from its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary