

29543
EB

SERVICE DATE - LATE RELEASE DECEMBER 21, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33461

SOUTHERN PACIFIC TRANSPORTATION COMPANY—TRACKAGE RIGHTS
EXEMPTION—THE HOUSTON BELT & TERMINAL RAILWAY COMPANY

STB Finance Docket No. 33462

UNION PACIFIC RAILROAD COMPANY—TRACKAGE RIGHTS
EXEMPTION—THE HOUSTON BELT & TERMINAL RAILWAY COMPANY

STB Finance Docket No. 33463

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY—TRACKAGE
RIGHTS EXEMPTION—THE HOUSTON BELT & TERMINAL RAILWAY COMPANY

STB Finance Docket No. 33507

THE TEXAS MEXICAN RAILWAY COMPANY AND KANSAS CITY
SOUTHERN RAILWAY COMPANY

v.

THE HOUSTON BELT & TERMINAL RAILWAY COMPANY, THE BURLINGTON
NORTHERN AND SANTA FE RAILWAY COMPANY, UNION PACIFIC
RAILROAD COMPANY, AND SOUTHERN PACIFIC TRANSPORTATION COMPANY

Decided: December 18, 1998

Following the merger of the Union Pacific Railroad Company (UP) and the Southern Pacific Transportation Company (SP),¹ the Texas Mexican Railway Company and Kansas City Southern Railway Company (Tex Mex/KCS) on October 31, 1997, filed a petition for an emergency cease and desist order and complaint in STB Finance Docket No. 33507 alleging that UP, SP

¹ Union Pacific Corp.—Control and Merger—Southern Pacific Rail Corp., Finance Docket No. 32760, (STB served Aug. 12, 1996) (Decision No. 44) [officially Union Pacific/Southern Pacific Merger, 1 STB 233 (1996), because the pagination is incomplete, we are citing to the slip opinion].

(collectively, UPSP), and The Burlington Northern and Santa Fe Railway Company (BNSF), using the trackage rights notices of exemption issued in STB Finance Docket Nos. 33461, 33462, and 33463, are unlawfully leasing and/or acquiring joint use of the properties of their subsidiary, The Houston Belt & Terminal Railway Company (HBT), in violation of the prior approval requirements of 49 U.S.C. 11323(a)(2) and (6).² Additionally, Tex Mex/KCS alleged that HBT is unlawfully abandoning and/or discontinuing service in violation of the prior approval requirements of 49 U.S.C. 10903(a)(1)(B). Pending an investigation, Tex Mex/KCS requested that we suspend the UPSP/BNSF plan that they claim will improperly divide HBT's assets, assume HBT's operations, and dissolve HBT as a carrier.³

On February 3, 1998, Tex Mex/KCS filed an amendment to its complaint in which it further alleged that UP and SP, or, in the alternative, that UPSP, jointly with BNSF, are exercising unlawful control over HBT in violation of the prior approval requirements of 49 U.S.C. 11323(a)(3) and (b)(3).⁴ With respect to the three trackage rights notices of exemption, Tex Mex/KCS simultaneously filed a petition for consolidation, to declare the exemptions void ab initio, and to revoke the exemptions (February 3 petition).⁵ On February 23, 1998, UPSP and BNSF filed replies embracing both the amended complaint and the February 3 petition.⁶ On March 16, 1998, Tex Mex/KCS filed a reply to UPSP's February 23 reply, and UPSP responded on March 23, 1998, with

² The notices of exemption were filed under 49 CFR 1180.2(d)(7) on September 9, 1997, and were served, and published at 62 FR 50049, on September 24, 1997.

³ UPSP and BNSF filed replies and consummated the trackage rights transactions on October 31, 1997.

⁴ UP and SP completed their merger on February 1, 1998; for purposes of this decision, we will refer to the merged carrier as UPSP.

⁵ Also on February 3, 1998, Tex Mex/KCS served interrogatories and document production requests on UPSP, BNSF, and HBT, and each filed objections on or about February 18, 1998. On February 27, 1998, Tex Mex/KCS filed a motion to compel discovery, a proposed discovery schedule, and a request that an Administrative Law Judge (ALJ) be assigned to resolve disputes and/or issues of interpretation. UPSP, BNSF, and HBT filed a joint reply on March 6, 1998. The motion to compel will be denied, as discussed in n.39, infra.

⁶ The consolidation of STB Finance Docket Nos. 33461- 63 is unopposed. Because these proceedings form integral parts of a single, coordinated action and present identical issues of law, consolidation will be granted. The complaint in STB Finance Docket No. 33507 is factually and legally related but is not consolidated; a single decision is being issued for administrative convenience.

a comment.⁷ Finally, on May 18, 1998, Tex Mex/KCS submitted a copy of a letter Port Terminal Railroad Association (PTRA) sent notifying all tenants in the Union Station building, where HBT is the lessee and PTRA is a subtenant, “that on or about June 30, 1998, the [HBT] will cease operations and have no presence in the building.”

We find that Tex Mex/KCS have failed to establish that the three trackage rights notices of exemption violated the provisions of 49 CFR 1180.2(d)(7) or that the use of the class exemption was otherwise improper or unlawful under 49 U.S.C. 11323(a)(2), (3), (6), or (b)(3). Additionally, we find that Tex Mex/KCS has failed to establish that the challenged transactions resulted in an unlawful abandonment or discontinuance in violation of 49 U.S.C. 10903(a)(1)(B) and has otherwise failed to present adequate reason for revoking the trackage rights exemptions under the rail transportation policy (RTP), 49 U.S.C. 10101, and the statutory revocation standards, 49 U.S.C. 10502(d).⁸

BACKGROUND

HBT, a terminal railroad serving the heart of the Houston terminal area, was incorporated on August 31, 1905. Subsequently, as part of the joint control that was approved in Houston Belt & Term. Ry. Co. Control, 275 I.C.C. 289 (1950) (Houston), HBT’s stock was divided among its five owning carriers, subject to the so-called “1948 HB&T Operating Agreement” (1948 Agreement).⁹ The 1948 Agreement was the culmination of a series of interrelated transactions that included

⁷ Tex Mex/KCS insist that UPSP’s February 23 reply to its February 3 petition actually constitutes a motion to dismiss because it seeks affirmative relief on a legal theory (that the track at issue is exempt switching track under 49 U.S.C. 10906) different from, and inconsistent with, the exemptions granted in STB Finance Docket Nos. 33461-63. As a consequence, they claim that a reply may be filed without violating the sanction in 49 CFR 1104.13(c). Tex Mex/KCS also argue that discovery should proceed to test the new legal theory.

In response, UPSP claims that Tex Mex/KCS’s March 16 reply lacks merit and ignores the other, independent grounds for relief that were set forth in its February 23 reply. Further, UPSP observes that Tex Mex/KCS’s discovery requests do not concern the character or use of HBT’s track (the new legal theory allegedly introduced in the February 23 reply), and, in any event, that discovery would not be relevant because the use of the track is undisputed. In the interest of a complete record, Tex Mex/KCS’s March 16 reply and UPSP’s March 23 comment will be accepted.

⁸ Contrary to UP’s belated assertions, this is not excepted track as contemplated in 49 U.S.C. 10906. The track lies in the heart of the Houston terminal area; it has been, and continues to be, used not just for switching, but for through movements by UP and other rail carriers. However, even if we had determined otherwise, the ultimate outcome for Tex Mex/KCS would not have changed in view of our other findings.

⁹ A full copy of the 1948 Agreement was submitted by Tex Mex/KCS in their February 3 petition, Exhibit A.

leases, constructions, operating agreements, and stock issuances; its general object and purpose was “to provide for the enlargement of the facilities of the [HBT] and . . . to unify the Houston terminal facilities and operations of the parties hereto.” Tex Mex/KCS February 3 petition, Exhibit A, Recital 13. HBT was to own and/or operate openly and impartially a number of lines and terminal facilities for the benefit of the 5 stock owning, and 2 non-stock owning railroads, and all 7 railroads had equal rights of use. The 1948 Agreement was to continue in effect indefinitely, but provided for its termination on or after January 1, 2007, by any Using Line serving 6-months’ written notice of its intent to terminate on the other Using Lines. As a result of several mergers, and most recently that of UP and SP, UPSP and BNSF are now HBT’s two remaining shareholders.

Historically, HBT operated: (1) a north-south running West Belt mainline between T&NO Junction, MP 11.1, on the south side of Houston just below New South Yard, its primary classification yard where it switches its own and BNSF’s traffic, and the point on the north side of Houston, MP 0.0, near its connection to UPSP and BNSF north and west of Belt Junction, MP 2.3; (2) an East Belt mainline that circles the center of Houston on the east and extends from Double Track Junction, MP 14.3, in the south to Belt Junction, MP 3.4 (MP 2.3 on the West Belt); and (3) the Columbia Tap, a 9.2-mile line that is not connected to either the East or West Belt, extending from an SP line at Pierce Junction. HBT also operates several industrial support yards to handle shipments originating or terminating on its track.¹⁰

Additionally, HBT dispatched trains and handled more than 100 daily movements including its own switching and interchange movements and through train movements for UPSP, BNSF, and Tex Mex.¹¹ HBT switched every movement to or from the industries on its lines and provided intermediate switching services. All HBT-served industries were open to UPSP, BNSF, and Tex Mex/KCS for a switch fee of \$235 per car.

On September 5, 1997, after approval of the merger, UP and SP, together owning 50% of HBT’s stock, and BNSF, owning the other 50% of HBT’s stock, entered into the challenged

¹⁰ The principal ones include Congress Yard on the West Belt in central Houston and the nearby Dallerup and Basin Yards on the East Belt.

¹¹ As a condition in the UPSP merger, Tex Mex was granted access to Houston area shippers switched by PTRA and HBT via trackage rights over UPSP’s Corpus Christi/Robstown-Beaumont line, subject to the restriction that the Tex Mex traffic using these trackage rights have a prior or subsequent movement over Tex Mex’s Laredo-Corpus Christi line. Decision No. 44, slip op. at 150. In Joint Petition for Service Order, STB Service Order No. 1518 (STB served Oct. 31, 1997) (Service Order No. 1518), the restriction was suspended, and UPSP was directed to release these shippers from their contracts so that those desiring to route traffic over Tex Mex and BNSF, in lieu of UPSP, could do so. The restriction went into effect again upon the expiration of the emergency service order. Service Order No. 1518 (Sub-No. 1), Joint Petition for a Further Service Order (STB served July 31, 1998).

Houston, Texas Trackage Rights Agreement (Trackage Rights Agreement)¹² which gave them nonexclusive, unrestricted local and overhead trackage rights over HBT's entire operation, as the first part of a planned "restructuring" of the Houston terminal.¹³ Then, on October 31, 1997, UPSP, BNSF, and HBT entered into a Management, Control, Switching and Maintenance Agreement (Management Agreement)¹⁴ under which they agreed to exercise the trackage rights granted them over specific portions of HBT's lines and to serve the shippers on those lines as HBT's agents.¹⁵

The Management Agreement also called for HBT's and UPSP's Houston area dispatchers to be consolidated into a new, centralized Houston control center at Spring, TX, where they would work along side each other and, for the first time, share advance information on incoming train movements.¹⁶ UPSP claims, and BNSF concurs, that consolidated dispatching will permit the dispatchers to plan and coordinate movements on HBT track within the Houston terminal with incoming and outgoing UPSP and BNSF movements. Eliminating HBT dispatchers, as a separate middle layer, and HBT, as a switching carrier, according to UPSP, will end many of the delays and much of the congestion that began in the summer of 1997, allowing UPSP and BNSF to serve

¹² STB Finance Docket Nos. 33461-63, verified notices of exemption filed Sept. 9, 1997, Exhibit 2.

¹³ At the time the Trackage Rights Agreement was entered into, UP had consummated its control of SP, but SP had not yet merged operationally with UP in Texas. Thus, Tex Mex/KCS challenged the actions of UP and SP separately and collectively in their petition to revoke and complaint. After February 1, 1998, however, SP ceased to exist as a separate, independent entity and, as a result, we are only considering Tex Mex/KCS's challenge to the actions of UPSP and BNSF.

¹⁴ A copy of the Management Agreement was submitted in UPSP's Reply filed February 23, 1998, Exhibit B.

¹⁵ BNSF was to operate both the Old and New South Yards (the first Houston yard space under its control) and serve the shippers on the portion of old Rock Island from Belt Junction, MP 3.4 on East Belt, west to MP 0.0, its northwest connection to HBT, and all but two shippers south of the Galveston, Houston, and Henderson Railroad Company (GH&H) line (MP 7.2 on the West Belt and MP 12.5 on the East Belt). UPSP was to operate the remainder of HBT's industrial support yards and serve the Columbia Tap as well as all other shippers on HBT's lines.

¹⁶ By letter filed February 18, 1998, in Service Order No. 1518, UPSP and BNSF announced their agreement to conduct joint dispatching operations at Spring. The letter specified that Tex Mex and KCS are "welcome to participate [in the joint dispatching center], and it would be very helpful if they would." UPSP Reply to February 13 petition, Exhibit C at 1. As we observed today in our decision in Union Pacific Corp.—Control and Merger—Southern Pacific Rail Corp. (Houston/Gulf Coast Oversight), Finance Docket No. 32760 (Sub-No. 26), Decision No. 10 (STB served Dec. 21, 1998), the Spring Center has been an operational success for many months, and we urge Tex Mex/KCS to accept UP's offer to participate in those operations.

HBT's shippers better, coordinate their movements more effectively, and operate more efficiently.¹⁷ UPSP also claims that resulting operating cost savings will be substantial and will permit the switching fees paid by shippers to be reduced from \$235 to \$200 a car.

UPSP states that it will no longer need HBT's dispatchers to transfer traffic between its own dispatchers, and that one of the three switches along with the second classification that HBT performed at New South Yard for every shipment that originated or terminated on its lines will be eliminated.¹⁸ By eliminating the extra switching, UPSP estimates that as much as 2-days transit time will be saved on virtually every car, loaded or empty, shipped or received by most of HBT's shippers. Additionally, UPSP claims that by eliminating the second classification several hundred cars a day will be removed from the New South Yard, which is already operating at capacity. In turn, UPSP claims that BNSF will be able to operate New South Yard more efficiently, reducing the need to hold traffic outside the yard and, as a consequence, the frequency of mainline traffic blockages.¹⁹

UPSP states that the planned restructuring was public knowledge for months. It claims that the arrangement was described to many Houston-area chemical shippers in a presentation to the Chemical Manufacturers Association on June 12, 1997. UPSP also claims that rail labor knew about the arrangement long before it was implemented and was closely involved in the planning with the understanding that: (1) HBT employees will follow their work and their employment will be protected; and (2) that every HBT operating craft employee on the affected lines will be hired by UPSP.

DISCUSSION AND CONCLUSIONS

¹⁷ UPSP claims that the restructuring will: (1) facilitate the more efficient use of its crews, cars, and locomotives; (2) increase their train crew's ability to reach their terminals within the Hours of Service Law; (3) reduce the number of track blockages and the use of its already congested yards by reducing the number of trains held for crews or power; and (4) result in fewer delays in the New South Yard vicinity by trains moving to and from Corpus Christi and Brownsville, TX.

¹⁸ For example, inbound UPSP or BNSF traffic will be classified and switched into blocks for movement to either the UPSP or BNSF Houston support yards, as appropriate, for a second switch and delivery. Before the restructuring, their inbound traffic was classified and switched into blocks for movement to HBT's New South Yard where there was a second classification and a switch into blocks for movement to an HBT support yard, for a third switch and delivery.

¹⁹ New South Yard is just to the north of T&NO Junction where there is a connection to: (1) the BNSF line that carries BNSF traffic to and from nearby Texas ports, including Galveston, and Corpus Christi, TX, via UPSP trackage rights, and UPSP traffic to and from Corpus Christi and Brownsville; and (2) the UPSP line that carries UPSP and Tex Mex traffic to and from Laredo and Robstown, TX.

Notices of exemption are interpreted literally to ensure the integrity of the expedited procedures of 49 CFR 1180.4(g)(1)(ii). Notices that contain false and/or misleading information are void ab initio and subject to summary revocation by the Board absent overriding concerns for administrative finality, repose, and detrimental reliance. See, e.g., Indiana Hi-Rail Corporation—Lease and Operation Exemption—Norfolk and Western Railway Company Line Between Rochester and Argos, IN, and Exemption from 49 U.S.C. 10761, 10762, and 11141, Finance Docket No. 32162 et al. (STB served Jan. 30, 1998), slip op. at 4-5.

Further, under 49 U.S.C. 10502(d), an exemption may be revoked, in whole or in part, if the Board finds that regulation of the transaction is necessary to carry out the RTP of 49 U.S.C. 10101. When, as here, an exemption has become effective, a revocation request is treated as a petition to reopen and revoke and, under 49 CFR 1115.3(b), must state in detail whether revocation is supported by material error, new evidence, or substantially changed circumstances. The party seeking revocation has the burden of proof and must present reasonable, specific concerns to demonstrate that reconsideration of the exemption is warranted and regulation of the transaction is necessary. See CSX Transp., Inc.—Aban.—In Randolph County, WV, 9 I.C.C.2d 447, 449 (1992); and I&M Rail Link LLC—Acquisition and Operation Exemption—Certain Lines of Soo Line Railroad Company d/b/a Canadian Pacific Railway, STB Finance Docket No. 33326 et al. (STB served Apr. 2, 1997) (I&M), slip op. at 6, aff'd sub nom. City of Ottumwa v. STB, 153 F.3d 879 (8th Cir. 1998). Our inquiry, when revocation is sought, is similar to the analysis for determining if an exemption is proper at the outset of a proceeding; it focuses on the sections of the RTP related to the underlying statutory sections from which the exemption was sought. See Missouri Pac. R. Co.—Aban. Exempt.—Counties in Oklahoma, 9 I.C.C.2d 18, 25 (1992); and I&M, slip op. at 6-7.

1. UNLAWFUL TRACKAGE RIGHTS, LEASE, AND/OR ACQUISITION OF JOINT USE

Tex Mex/KCS argue that the proposed restructuring of HBT's operations by UPSP and BNSF resulted in an "exclusive use" arrangement that was more akin to a lease and/or a joint use of HBT's property than to trackage rights and, therefore, was entered into without the Board's prior approval in violation of 49 U.S.C. 11323(a)(2) and (6). Relying on Railroad Consolidation Procedures—Trackage Rights Exemption, 1 I.C.C.2d 270 (1985) (Procedures), aff'd sub nom. Illinois Commerce Comm'n v. ICC, 819 F.2d 311 (D.C. Cir. 1987), Tex Mex/KCS contend that the trackage rights class exemption is premised on the fact that trackage rights: (1) generally give a carrier the right to operate over the lines of the owning carrier while the owning carrier continues to provide service (Procedures, supra, at 270 n.1); (2) tend to maintain the status quo or result in increased competition with respect to shippers' services and other rail carriers' markets (id. at 276); and (3) are unlikely to alter existing market shares and operational systems because a landlord carrier ordinarily would not allow a tenant carrier to exert a high degree of control (performing maintenance, operation, and dispatching) in the market (id. at 278).

Tex Mex/KCS argue that the challenged transactions contain none of those fundamental elements. Rather, they claim that the transactions are leases in substance because BNSF and UPSP

obtained exclusive use of HBT's lines²⁰ as well as control over all significant HBT functions (e.g., maintenance, operations, and dispatching) related to them.²¹ As a result, they argue that HBT's continued existence as a corporate shell and retention of the underlying common carrier obligation is meaningless because the fundamental characteristics of trackage rights are missing.²²

²⁰ Tex Mex/KCS rely on the October 20, 1997 letter from UPSP to HBT's former shippers (Tex Mex/KCS February 3 petition, Exhibit C) and the October 31 reply in opposition to the Petition for Cease and Desist Order (Verified Statements of Mr. J. B. Mathis, General Manager of HBT, at 2 and 7-9, and Mr. Jerry S. Wilmoth, Director of Joint Facilities for UP, at 2-3) where UPSP stated that: (1) it was joining with BNSF to divide HBT's yard operations and take over all of HBT's switching and interchange obligations; (2) it would be dispatching all movements over HBT; (3) it and BNSF would be responsible for carrying out HBT's contract obligations as HBT's "agents"; and (4) HBT would no longer conduct operations but would continue as a corporate entity and retain the underlying common carrier obligation.

²¹ Tex Mex/KCS rely on the terms of the Trackage Rights Agreement which essentially provide that: (1) the user will manage, operate and maintain owner's yard, industry and other support facilities [Agreement, Preamble p.1]; (2) the management, operation (including dispatching) and maintenance of the Joint Trackage shall at all times be under the exclusive direction and control of User [Agreement, Exhibit "B" section 2.4]; (3) the movement of equipment over and along the Joint Trackage shall at all times be under the exclusive direction and control of user [Agreement, Exhibit "B" section 2.4]; and (4) the user will employ all persons necessary to construct, operate, maintain, repair, and renew the Joint Trackage [Agreement, Exhibit "B" section 2.3]. The Trackage Rights Agreements continue indefinitely and do not terminate until the parties mutually consent [Agreement, Exhibit "B" section 9.1].

In specific terms, Tex Mex/KCS state that UPSP obtained exclusive control over the management, marketing, and operation of 9 of the 11 HBT lines into and out of Houston (over 90% of the HBT's rail operations and functions) and the dispatching for all HBT lines, and that BNSF obtained exclusive control over the management, marketing, and operation of the remainder of HBT's rail operations and functions.

Tex Mex/KCS also emphasize that UPSP's assumption of HBT's dispatching operations is significant because dispatching control is a dominant factor in distinguishing leases from trackage rights, citing Indiana Hi-Rail Corporation—Trackage Rights Exemption—Indiana Rail Road Company, Finance Docket No. 31594 (ICC served Aug. 22, 1990) (Hi-Rail); Gateway Eastern Railway Company—Acquisition and Operation Exemption—Lines of Consolidated Rail Corporation, Finance Docket No. 32304 (ICC served July 6, 1995) (Gateway Eastern); and Minnesota Northern Railroad, Inc.—Exemption—Acquisition and Operation of Rail Line and Incidental Trackage Rights from Burlington Northern Railroad Company, STB Finance Docket No. 33315 et al. (STB served Aug. 14, 1997) (Minnesota Northern).

²² They contend that: (1) HBT, as landlord, no longer conducts its own operations; (2) the status quo was significantly altered; (3) a neutral terminal carrier was effectively dissolved; and (4) the
(continued...)

Citing The Land Conservancy of Seattle and King County— Acquisition and Operation Exemption—The Burlington Northern and Santa Fe Railway Co., Finance Docket No. 33389 (STB served Sept. 23, 1997) (Conservancy), Tex Mex/KCS argue that a trackage rights class exemption may not be used when lease authority under, or an exemption from, 49 U.S.C. 11323(a)(2) or (6) is required. Whether intentional or not, they assert that, by filing the trackage rights class exemptions, UPSP and BNSF failed either to disclose the actual “lease-type” nature of the arrangement, including the change in operations and dispatching, or to discuss its impact, particularly in light of the nature and extent of “control” being exerted over HBT. Thus, they argue that the notices of exemption were false and misleading and that other railroads and the affected public were deprived of meaningful notice and a full opportunity to comment under the applicable provisions of 49 CFR 1180. As a consequence, they assert that the trackage rights notices of exemption are void ab initio and must be revoked and that UPSP and BNSF should be required to file applications under, or petitions for exemption from, 49 U.S.C. 11323(a)(2) and (6). We disagree.

As the rightful and only successors to the five original railroads that jointly owned HBT, pursuant to Houston and the 1948 Agreement, UPSP and BNSF already owned HBT’s assets, and the right granted in the Trackage Rights Agreement, to operate anywhere on HBT’s lines, was a right they already had under Houston and the 1948 Agreement.²³ Thus, the use of the trackage rights class exemption, 49 CFR 1180.4(g), was appropriate; the notices of exemption may not be declared void ab initio or rejected for being other than what they purported to be.²⁴

²²(...continued)

tenant has taken from the landlord the latter’s “control” over the maintenance, operation, and dispatching of its lines.

²³ Section 2.13(a)-(c) of the 1948 Agreement specifies that “each Using Line shall have . . . the equal right and privilege to use the Terminal in common with [HBT] and the other using lines;” that “[a]ll services performed by [HBT] for the account of the Using Lines shall be performed by [HBT] as agent for the Using Lines;” but that “[HBT] shall have the exclusive management and control of the operation, maintenance, repair, and renewal of the Terminal and every part thereof . . . shall establish rules and regulations governing the operation of trains within and upon the Terminal.” Tex Mex/KCS February 3 petition, Exhibit A.

²⁴ Nor do the trackage rights in some way result in leases solely because they were accompanied by the transfer of HBT’s dispatching obligations to UPSP. Tex Mex/KCS’s reliance on ICC and Board precedent to demonstrate that a change in dispatching is a dominant factor in distinguishing between trackage rights and leases lacks merit. Specifically, Tex Mex/KCS cite: (1) Gateway Eastern to show that a “change of dispatching is an indicator of control,” but the ICC basically ignored that the new rail carrier assigned the dispatching function to its rail carrier parent when it found, in connection with a petition to revoke a notice of exemption from 49 U.S.C. 10901, the new carrier financially and operationally independent of its parent, slip op. at 6-7; (2) Minnesota Northern to show that “the degree of control in overall operations, combined with who has the right
(continued...)

Similarly, we find no merit to Tex Mex/KCS's arguments that the trackage rights/restructuring arrangement involve an acquisition of joint use of HBT's properties, that was subject to the prior approval requirements of 49 U.S.C. 11323(a)(6), or that prior approval, as in The Atchison, Topeka and Santa Fe Railway Company and Gateway Western Railway Company—Lease Exemption—Kansas City Terminal Railway Company, Finance Docket No. 32238 (ICC served Feb. 24, 1994) (ATSF Lease), and Kansas City Terminal Railway Company and The Atchison, Topeka and Santa Fe Railway Company—Contract to Operate Exemption—In Kansas City, Mo. Finance Docket No. 32896 (STB served Nov. 20, 1996) (ATSF Operate), otherwise was required under various unspecified provisions of 49 U.S.C. 11323.

To acquire joint ownership in, or the joint use of a, railroad line, prior Board approval under 49 U.S.C. 11323(a)(6) is required if the railroad line is "owned or operated by another rail carrier [or carriers]." See e.g., Paducah & Louisville Railway, Inc.—Control Exemption—Paducah & Illinois Railroad Company, STB Finance Docket No. 33362 (STB served Aug. 25, 1997) (prior approval under section 11323(a)(6) required for a rail carrier to purchase an equal 1/3 interest in a rail line jointly owned by the seller and two other rail carriers where none of the owning carriers were related). HBT could not be considered "another rail carrier" under the terms of the statute because UPSP and BNSF, as the only successors to the original carrier applicants in Houston, already were jointly authorized to control HBT and to use HBT's facilities. Houston, 275 I.C.C. 318. Thus, prior Board approval under section 11323(a)(6) was not necessary for UPSP and BNSF to enter into the challenged trackage rights/restructuring arrangement for their joint use of HBT's railroad lines.

Additionally, it has long been the rule that when a carrier controls another carrier, meaningful competition is precluded and regulatory approval is not needed for the controlling carrier to increase its ownership interest in the controlled carrier or consolidate the controlled carrier into its own system. See Seaboard Coast Line R. Co.—Invest. Of Control, 360 I.C.C. 582, 588-89 (1979) (Seaboard) (ICC approval was not necessary for the controlling rail carrier to increase its ownership interest in the controlled rail carrier to 100% or to consolidate their two systems because full and unrestricted control authority already existed). Thus, neither ATSF Lease nor ATSF

²⁴(...continued)

to control dispatching, is a factor in determining the true nature of the transaction," but this was argued in support of revoking the notice of exemption from 49 U.S.C. 10901, and the Board simply found no evidence to support the claim and observed that it had been categorically denied, slip op. at 5; and (3) Hi-Rail to demonstrate "that the degree of control retained by the owning carrier is a distinction between a lease and trackage rights;" but the ICC found it "a sufficient answer . . . to note that [the acquiring carrier] lacks the 'full control' of the line that the [petitioner] asserts to be the criterion for distinguishing leases from trackage rights," slip op. at 2.

Operate offer support for Tex Mex/KCS's argument; unlike the restructuring at issue, they did not involve a preexisting joint control situation.²⁵

We also disagree with Tex Mex/KCS's claim that UPSP lacked authority, contractual or otherwise, to usurp HBT's dispatching responsibilities, citing: (1) the HBT/Tex Mex trackage rights agreement, which sought to ensure that all users were treated in a "non-discriminatory manner" by providing in section 2.4 of Exhibit "B" that HBT, not UPSP or an HBT agent, will complete the dispatching; (2) the Board-imposed conditions in Decision No. 44 and the emergency service provisions in Service Order No. 1518; and (3) the 1948 Agreement which obliges HBT to operate openly and impartially. The HBT/Tex Mex trackage rights agreement specifies that the terms and rights granted Tex Mex may not be assigned in whole or in part without HBT's consent, but HBT may assign the terms without restriction and the assignment shall be binding on the successors and assigns. See February 3 petition, Exhibit B (Terms for Texas Mexican Railway Company Trackage Rights, Exhibit B, section 10). Nor is there is anything in Decision No. 44, Service Order No. 1518, or the 1948 Agreement that specifically precludes, or is otherwise inconsistent with, the transfer of HBT's dispatching obligations to UPSP as its agent.

Further, the Management Agreement continues HBT's general obligation under the 1948 Agreement to operate openly and impartially with respect to its members' traffic.²⁶ Thus, UPSP and BNSF are mutually obligated to operate openly and impartially, and this obligation was carried forward in the Dispatching Protocols that are a part of the Management Agreement (UPSP Reply filed February 23, 1998, Exhibit B, Attachment 1). Additionally, as HBT's agent with responsibility for dispatching, UPSP is obligated to treat BNSF's traffic impartially, as required of HBT in the 1948 Agreement, and may not discriminate against Tex Mex's traffic moving under the terms of the HBT/Tex Mex trackage rights agreement negotiated pursuant to Decision No. 44.²⁷

²⁵ Neither The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) nor Gateway Western Railway Company owned more than a noncontrolling 12% interest in Kansas City Terminal Railway Company. We note, however, that as to Finance Docket No. 32896, a decision on whether Board approval is required, and if so the merits of the exemption, has not been issued; the November 20 decision that Tex Mex/KCS cite only granted an abeyance motion pending resolution of a contract issue under State law.

²⁶ The 1948 Agreement "grant[ed] to each Using Line . . . the equal right and privilege to use the terminal in common with [HBT] and with the other Using Lines." See Tex Mex/KCS, February 3 petition, Exhibit A, section 2.13. The Management Agreement specifies that the services to be performed by UPSP and BNSF as agents of HBT are "all in accordance with . . . and fulfillment of [HBT's] obligations under the 1948 Operating Agreement." See UPSP Reply filed February 23, 1998, Exhibit B at 1.

²⁷ Moreover, as already pointed out at n.16, supra, UPSP and BNSF agreed to operate the Spring dispatching center, and are doing so, as equal partners, and Tex Mex was invited to participate as

Finally, Tex Mex/KCS's contention, that the notices of exemption must be declared void ab initio and revoked because they contain false and misleading information, must be rejected as well. Tex Mex/KCS do not dispute that the notices of exemption contain adequate and accurate information as to the trackage rights agreements themselves. Rather, they argue that the notices of exemption disguised and/or failed to disclose the full nature of the restructuring (operational and dispatching).²⁸ The record, on the other hand, shows that the public and rail labor were given advance information. However, even if this were not the case, UPSP and BNSF were only obligated to publish an accurate description of the trackage rights agreements. They were not obligated to describe the broader transaction of which the trackage rights agreements were a part. As a consequence, the notices of exemption were valid and cannot be declared void ab initio or revoked on this basis, either.

²⁷(...continued)
well.

²⁸ Tex Mex/KCS rely on a number of ICC decisions that are inapposite to their contention that the trackage rights notices of exemption are void ab initio if they do not disclose the full nature of the transaction. Those decisions that resulted in revocations found: (1) a notice of exemption to abandon approximately 200 miles of rail line void ab initio based on a certification (allegedly attributable to an inadvertent error in designating mileposts) that no traffic had moved, when in fact 3 shipments had moved over the line's 0.71-mile easternmost segment, during the 2-year period covered by the certification, Save the Rock Island Committee, Inc. v. St. Louis Southwestern Railway Co., AB-39 (Sub-No. 18X) (ICC served Apr. 1, 1994); (2) the acquisition of railroad assets under 49 U.S.C. 10901 to be a sham because the acquiring entity, a noncarrier, was created solely to evade labor protection and not for any substantial business reasons, Sagamore National Corporation—Acquisition and Operation Exemption—Lines of Indiana Hi-Rail Corporation, Finance Docket No. 32523 (ICC served Aug. 26, 1994) (Sagamore); and (3) the proposed abandonment of a rail line, less than 2 months after being acquired by a noncarrier intent on converting the right-of-way to trail use, a misuse of the Board's acquisition and operation procedures under 49 U.S.C. 10901, Conservancy, supra.

Otherwise, in Burlington Northern Railroad Company—Exemption—Operation of Property of Lake Superior Terminal and Transfer Railway Company, Finance Docket No. 30592, (ICC served Oct. 22, 1985) (Lake Superior), the ICC declined to revoke an exemption under former 49 U.S.C. 11343(a)(2) for one of three owning carriers to operate the lines of a switching carrier that was to be dissolved at an unspecified future time; and in D&H Ry—Lease & Trackage Rights Exempt.—Springfield Term., 4 I.C.C.2d 322, 327 (1988), aff'd sub nom. RLEA v. United States, 675 F.2d 1248 (D.C. Cir. 1982), a series of lease and trackage rights arrangements between corporate family members, "collectively [found to] constitute a substantial undertaking [with] an impact on all of the rail employees [of the corporate family]," were revoked to the extent necessary to impose employee protective conditions under former 49 U.S.C. 11347.

2. UNLAWFUL DISCONTINUANCE AND/OR ACQUISITION OF CONTROL

We also reject Tex Mex/KCS's other arguments that the trackage rights notices of exemptions must be revoked under 49 U.S.C. 10502(d) because HBT failed to seek or obtain Board approval under 49 U.S.C. 10903 et seq. for its resulting discontinuance of operations, and because they resulted in UPSP, acting alone or with BNSF, exercising unlawful control or joint control over HBT without seeking or obtaining prior Board approval under 49 U.S.C. 11323(a)(3) and (6).

a. Unlawful discontinuance. Tex Mex/KCS originally alleged that HBT was being dissolved. They now argue that HBT discontinued providing rail service in violation of the prior approval requirements of the 49 U.S.C. 10903 et seq. presumably because HBT apparently has continued to exist as a corporate entity. Indeed, HBT claims that UPSP and BNSF are acting as its agents and that it retains the residual common carrier obligation. UPSP Opposition to Cease and Desist Order, Verified Statement of Mr. Wilmoth at 2.

The leases, trackage rights, and similar operational arrangements that rail carriers enter into do not extinguish the granting carrier's common carrier obligation.²⁹ The grantor retains the underlying common carrier obligation and becomes obligated to provide service or enter into new arrangements for others to provide service when these arrangements terminate. The common carrier obligation to serve continues indefinitely; it may be suspended only if formal discontinuance authority or an exemption is granted, Preseault v. ICC, 494 U.S. 1, 5 n.3 (1990), and it may be extinguished only if formal abandonment authority or an exemption is granted, Busboom Grain Co., Inc. v. ICC, 830 F.2d 74, 75 (7th Cir. 1987).

Because there is no suspension of the grantor's common carrier obligation to serve in these kinds of transactions, there is no discontinuance within the meaning of 49 U.S.C. 10903 et seq. and, as a result, no need for the grantor to seek discontinuance authority or an exemption. The Board is simply approving an arrangement that will result in a change of operators, not in a termination of the common carrier obligation. We are not aware of a single instance where authority or an exemption to discontinue service was sought by a grantor in connection with leases, trackage rights, or other Board approved arrangements of this nature.

²⁹ When a noncarrier acquires an active rail line it becomes a common carrier, even if it does not intend to operate the line itself, because "by acquiring full ownership . . . it necessarily [assumes] responsibility for contracting with, and ensuring continued rail service by, a rail operator." Southern Pacific Transp. Co.—Abandonment, 8 I.C.C.2d 495, 503 (1992) (citing City of Austin, TX—Acquisition—Southern Pacific Transportation Company, Finance Docket No. 30861(A) (ICC served Nov. 4, 1986)). By contracting with others to operate the line, it becomes a nonoperating common carrier. Similarly, a common carrier such as HBT can enter into an arrangement, subject to Board approval or an exemption, for another carrier or carriers to fulfill its common carrier obligations and it would thereby become a nonoperating common carrier.

Here, HBT ceased operations upon entering into the trackage rights arrangements with UPSP and BNSF. There was no discontinuance with respect to HBT's common carrier obligation; the services it was responsible for providing continued to be provided by its agents without interruption, and it retained the underlying obligation.³⁰ As a consequence, HBT did not need to obtain discontinuance authority.³¹

³⁰ See Lake Superior, supra, at n.29, where the ICC, in granting an exemption for one of three owning carriers to operate the lines of a switching carrier, declined to impose labor protective conditions in connection with allegations that the switching carrier was to be dissolved and this would constitute a discontinuance, stating that:

Since the contemplated transaction proposes neither the abandonment by LST&T of its line nor a discontinuance of its service, imposition of the Oregon Short Line [360 I.C.C. 91 (1979)] labor protective conditions to which formal abandonment or discontinuance of service transactions are normally subject would not be appropriate [slip op at 3].

³¹ The many cases cited by Tex Mex/KCS for the contrary proposition are inapposite. Tex Mex/KCS rely on Missouri Pacific Railroad Company and Houston Belt & Terminal Railway Company—Construction and Operation—Exemption—Houston, TX, Finance Docket No. 30821 (Sub-No.1) (ICC served Nov. 18, 1996), where the ICC, in connection with a relocation project that involved trackage rights and an abandonment, exempted Missouri Pacific Railroad Company (MP) and HBT from 49 U.S.C. 10901 to construct and operate a short segment of connecting track between the Columbia Tap and an SP line; and Houston Belt & Terminal Railway Company—Discontinuance Exemption—In Harris County, TX, Docket No. AB-423 (Sub-No. 1X) (ICC served Apr. 26, 1995) and Missouri Pacific Railroad Company— Abandonment and Discontinuance of Operations Exemption—In Houston, Harris County, TX, STB Docket No. AB-3 (Sub-No 139X) et al. (STB served Dec. 31, 1996), two cases where, in contrast to the matter here, HBT was exempted from 49 U.S.C. 10903 to discontinue permanently the common carrier obligation it had acquired to lease and operate, respectively, MP's Settegast Yard and a small segment of MP's Columbia Tap.

Tex Mex/KCS also rely on such cases as Thompson v. Texas Mexican Ry. Co., 328 U.S. 134 (1946); Chicago and N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981); Hanson Natural Resources Company—Non-Common Carrier Status—Petition for a Declaratory Order, Finance Docket No. 32248 (ICC served Nov. 15, 1994); and Chicago R. I. & P. R. Co. Abandonment, 363 I.C.C. 150 (1980). These cases support the principle that rail lines may not be abandoned and rail service may not be discontinued unless, under 49 U.S.C. 10903, the Board finds the proposed abandonment and/or discontinuance consistent with the present or future public convenience and necessity or grants an exemption; they offer no guidance as to what constitutes a discontinuance under section 10903.

b. Unlawful control. By exercising exclusive control over HBT's operations and facilities and by subsequently eliminating HBT as the neutral train dispatcher for the Houston terminal area and relocating its dispatching services to UPSP's Spring dispatching center, Tex Mex/KCS contend that UPSP individually, or UPSP and BNSF jointly, obtained unlawful control of HBT in violation of the prior approval requirements of 49 U.S.C. 11323(a)(3) and (b)(3). They also claim that the elimination of HBT as a neutral terminal switching carrier effectively destroyed the basis for all prior ICC decisions that had granted common control approval to the UPSP and BNSF predecessors. We disagree.

Unlike the many cases Tex Mex/KCS rely on, UPSP and BNSF were jointly in control of HBT prior to entering into the challenged trackage rights/restructuring arrangement.³² As the rightful, and indeed the only, successors to the original railroads that jointly owned HBT, UPSP and BNSF each owned a 50% interest in HBT. Thus, they jointly possessed full and effective control over HBT, and, with that control, they jointly retained full authority to restructure HBT's operations (operational switching and dispatching) without need for prior Board approval. As we previously stated, once control authority exists, carriers do not need regulatory approval to make structural changes to the operations of the entities they control. See, e.g., Seaboard, 360 I.C.C. at 590-91. Accordingly, we find no merit to Tex Mex/KCS's claim that UPSP and BNSF violated the prior approval requirements of 49 U.S.C. 11323(a)(3) and (b)(3) when they restructured HBT's operations.

Nor does the restructuring undermine the basis for the previous ICC decisions that granted common control approval to the predecessors of UPSP and BNSF. The Houston decision did not restrict the owning carriers' exercise of control authority over HBT, and, as long as HBT's

³² Tex Mex/KCS acknowledge that UPSP and BNSF each have a 50% interest in HBT's stock, but emphasize that neither was granted "control" authority by the Board and that both have denied that they "control" HBT, citing Burlington Northern Inc., & Burlington Northern R.R.—Control & Merger—Santa Fe Pacific Corp. & Atchison, Topeka & Santa Fe Ry., Finance Docket No. 32549 (ICC served Aug. 23, 1995), aff'd sub nom. Western Resources, Inc. v. STB, 109 F.3d 782 (D.C. Cir. 1997); and Decision No. 44 (Merger Application, Vol. 1, pp. 58-71, filed Nov. 30, 1995) (UP stated that, through MP, it owned a 50% interest in HBT).

Tex Mex/KCS's reliance on BN-Santa Fe and Decision No. 44 is misleading. In BN-Santa Fe, BN and Santa Fe each had a noncontrolling 25% interest in HBT prior to their merger, and, in view of the fact that UP, through MP, controlled the other 50% of HBT stock, they stated that "their combined control of the other 50% will not enable them to 'control' HBT as that word is used in [former] 49 U.S.C. 11343." The ICC agreed with BN and Santa Fe concluding that their "apparent opinion is at least superficially plausible, and, in any event, no party . . . has claimed that applicants will 'control' HBT in the aftermath of the BNI/SFP merger." BN-Santa Fe, supra, at n.17. Thus, the statements in BN-Santa Fe and Decision No. 44 were, and remain accurate: BNSF and UPSP jointly control HBT; and neither has unilateral control of HBT. See, e.g., BN-SLSE, 366 I.C.C. at 866.

obligations under the common carrier provisions of 49 U.S.C. 11101(a) and the 1948 Agreement are being met, UPSP and BNSF, as the only remaining joint owners, are not restricted in the exercise of their control authority.

3. RAIL TRANSPORTATION POLICY

Tex Mex/KCS note that the Board afforded Tex Mex trackage rights over UPSP lines as a merger condition “to ensure the continuation of an effective alternative to UPSP’s routing into the border crossing at Laredo” and to protect the essential service Tex Mex provides to the more than 30 shippers located on its line, Decision No. 44 at 148-49. They claim that these objectives have been undermined by the recent congestion and service problems in Houston and by the elimination of competition that resulted from UPSP becoming the dominant carrier in the Houston market. They maintain that Tex Mex and Houston’s shippers are experiencing significant negative impacts as a result of UPSP’s dominance;³³ that, instead of the benefits predicted for Tex Mex’s “through train operations,” Tex Mex’s traffic is being handled in an inefficient and discriminatory manner on a daily basis; and that, as a direct result of the delays and/or discrimination, Tex Mex has incurred more than \$800,000 of additional expenses in conducting trackage rights operations under its agreement with HBT.³⁴

Accordingly, Tex Mex/KCS argue that the trackage rights exemptions should be revoked because the HBT restructuring violates those aspects of the RTP, 49 U.S.C. 10101, that are intended: (1) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers [section 10101(4)]; (2) to foster sound economic conditions in transportation and ensure effective competition and coordination between rail carriers [section 10101(5)]; (3) to encourage honest and efficient management of railroads [section 10101(9)]; and (4) to avoid undue concentrations of market power and prohibit unlawful discrimination [section 10101(12)].

³³ Tex Mex/KCS note that shippers have submitted letters in support of neutrally managed switching and terminal rail facilities in Houston and that one of the shippers, Intermodal, was told, during an October 30, 1997 meeting with UPSP operating personnel, that it would be worse off if it supported the inclusion of other carriers in the Houston market. Petition for Cease and Desist Order, Exhibit 3.

³⁴ Tex Mex/KCS acknowledge that it is difficult to determine the percentage of increased expenses directly attributable to the HBT restructuring. They maintain that the restructuring and the service problems it has caused in Houston have made it extremely difficult for Tex Mex to provide a competitive alternative for Mexico-bound traffic, that Tex Mex’s essential services are being jeopardized by UPSP’s actions, and that these issues should be addressed in our merger oversight proceedings, see n.35, infra.

No credible evidence has been submitted in this proceeding to establish that UPSP has been handling Tex Mex's traffic over HBT lines in an intentionally inefficient and/or discriminatory manner or that the HBT restructuring is responsible for the alleged behavior. Similarly, the record does not establish a substantive connection between the HBT restructuring and the congestion and service related problems experienced by Tex Mex and Houston's shippers.³⁵ To the contrary, the record suggests that the HBT restructuring: (1) was intended, and appears to have been reasonably designed, to facilitate the more efficient movement of traffic within and through the Houston terminal; (2) has allowed a reduction in switching charges; and (3) was not calculated to have, and does not appear to be having, an adverse effect on competition.

Further, in Service Order No. 1518, Supplemental Order No. 1 (STB served Dec. 4, 1997), slip op. at 5, we directed UPSP to give BNSF and Tex Mex representatives full access to the Spring dispatching center as neutral observers. It is not contested that UPSP and BNSF made a similar offer to Tex Mex and KCS with respect to the joint dispatching operations they subsequently established at Spring.³⁶ The record indicates that Tex Mex/KCS generally have not taken advantage of these opportunities,³⁷ and UPSP has denied that Tex Mex was subjected to discrimination or suffered in any way as a direct result of the restructuring [UPSP Reply to February 13 petition, Verified Statement of Mr. Mathis (Exhibit B) at 10-13].³⁸ To the contrary, UPSP claims that Tex Mex has benefitted from the HBT restructuring; it obtained access at reduced fees to all HBT shippers via UPSP and BNSF switching, and a more efficient connection with PTR A via UPSP intermediate switching, notwithstanding that it had no contractual or other right to the connection.

³⁵ Indeed, the arguments Tex Mex/KCS make here are similar to many they made in Houston/Gulf Coast Oversight, where we considered, under our continuing oversight jurisdiction, whether the rail service crisis in Houston was attributable to competitive harm that may have resulted from the UP/SP merger and whether further merger conditions were required. In that proceeding, Tex Mex/KCS, along with other proponents of the so-called Consensus Plan, asked, inter alia, for the restoration of neutral switching over HBT lines by PTR A or another neutral party.

³⁶ See n.16, supra.

³⁷ In his Verified Statement, Mr. Mathis stated that:

Tex Mex also has full access to the dispatching center at Spring under the Board's December 4 o not stationed an employee at the dispatching center and has seldom even visited the center. Nor am I aware of any complaint made by Tex Mex about the dispatching of HBT lines subsequent to the HBT restructuring [UPSP Reply to February 13 petition, Exhibit B].

³⁸ UPSP attributes the difficulties Tex Mex has encountered in exchanging car interchange data with PTR A to Tex Mex's refusal to develop appropriate systems for sharing hazardous shipment data, UPSP Reply to February 13 petition, Verified Statement of Mr. Mathis (Exhibit B) at 13-15, and otherwise claims that Tex Mex never informed HBT that it was experiencing discrimination.

Accordingly, the evidence of record does not support the requested revocation of the trackage rights notices of exemption and/or regulation of the transactions to carry out the RTP of 49 U.S.C. 10101.³⁹ The evidence here simply does not establish that the problems experienced in the Houston-Gulf Coast area are attributable to, or that Tex Mex was subjected to discrimination or suffered in any way as a direct result of, the trackage rights on, or the restructuring of, HBT.

While we have thoroughly analyzed each Tex Mex/KCS argument offered in these proceedings because of our concern about service in and around Houston, we must observe that the type of operational and dispatching changes over already jointly owned or controlled properties as we have here would not normally trigger extensive regulatory oversight. See, e.g., American Train Dispatchers Ass'n v. I.C.C., 671 F.2d 580 (D.C. Cir. 1982).

It is ordered:

1. Tex Mex/KCS's February 3, 1998 petition to consolidate STB Finance Docket Nos. 33461, 33462, and 33463 is granted.

2. Tex Mex/KCS's February 23, 1998 reply and UPSP's March 23, 1998 comment are accepted into the record.

3. Tex Mex/KCS's motion to compel discovery is denied.

4. Tex Mex/KCS's petition to declare the trackage rights notices of exemption issued in these proceedings void ab initio and/or revoke them is denied, and their complaint in STB Finance Docket No. 33507 is discontinued.

5. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

³⁹ Because further discovery related to the RTP issues Tex Mex/KCS raise here is unnecessary and likely to be burdensome and duplicative of the material that was available to support the similar arguments advanced in Houston/Gulf Coast Oversight, we are denying Tex Mex/KCS's motion to compel discovery. Otherwise, Tex Mex/KCS's other arguments (e.g., that the trackage rights notices of exemption are void ab initio under 49 CFR 1180.4(g); that they were unauthorized leases or acquisitions of joint use; or that they resulted in, or were part of, an unauthorized restructuring, discontinuance, or acquisition of control) are legally deficient, and their discovery request, to the extent it relates to these issues, cannot be justified.