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SERVICE DATE – JANUARY 8, 2016

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE AND CERTIFICATE OF INTERIM  
TRAIL USE OR ABANDONMENT

Docket No. AB 33 (Sub-No. 156)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT—IN HARRIS, FORT  
BEND, AUSTIN, WHARTON, AND COLORADO COUNTIES, TEX.

Docket No. AB 33 (Sub-No. 253X)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT EXEMPTION—IN  
COLORADO AND WHARTON COUNTIES, TEX.

Docket No. FD 35846

METROPOLITAN TRANSIT AUTHORITY OF HARRIS COUNTY, TEX.—ACQUISITION  
EXEMPTION—UNION PACIFIC RAILROAD COMPANY (RIGHT TO RESTORE RAIL  
SERVICE OVER RAILBANKED RIGHT-OF-WAY IN HARRIS, FORT BEND, AUSTIN,  
WHARTON, AND COLORADO COUNTIES, TEX.)

Docket No. FD 35847

FORT BEND COUNTY TOLL ROAD AUTHORITY—ACQUISITION EXEMPTION—  
METROPOLITAN TRANSIT AUTHORITY OF HARRIS COUNTY, TEX. (RIGHT TO  
RESTORE RAIL SERVICE OVER A RAILBANKED RIGHT-OF-WAY IN HARRIS, FORT  
BEND, AUSTIN, WHARTON, AND COLORADO COUNTIES, TEX.)

Digest:<sup>1</sup> This decision finds that the Metropolitan Transit Authority of Harris  
County, Tex. (METRO) does not have, and never had, the right to restore rail  
service over a rail-banked right-of-way, and the decision therefore allows Fort  
Bend County Toll Road Authority (FBCTRA) to withdraw its request to acquire  
that right from METRO. The decision also grants a request to substitute  
FBCTRA for METRO as the trail user on the rail-banked right-of-way.

Decided: January 6, 2016

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the  
convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement  
on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

## BACKGROUND

This decision addresses a series of related transactions for which Board authority is being sought arising out of four separate proceedings. The procedural history of each of these proceedings is discussed below.

*Docket Nos. AB 33 (Sub-No. 156) and AB 33 (Sub-No. 253X), Abandonment and Rail Banking*

In these two proceedings, approximately 58 miles of rail line near Houston, Tex., known as the Westpark Line (the Line), between milepost 3.48 near Bellaire Junction in Houston, Tex., and milepost 61.2 near Eagle Lake, Tex., were authorized to be abandoned by Union Pacific Railroad Company (UP). See Union Pac. R.R.—Aban.—in Harris, Fort Bend, Austin, Wharton, & Colo. Ctys., Tex., AB 33 (Sub-No. 156) (STB served Nov. 8, 2000) (from milepost 3.48 near Bellaire Junction in Houston, to milepost 52.9 near Chesterville); Union Pac. R.R.—Aban. Exemption—in Colo. & Wharton Ctys., Tex., AB 33 (Sub-No. 253X) (STB served Feb. 15, 2008) (from milepost 52.9 near Chesterville to milepost 61.2 near Eagle Lake). Subsequently, the Board issued a Certificate of Interim Trail Use (CITU) in AB 33 (Sub-No. 156) and a Notice of Interim Trail Use (NITU) in AB 33 (Sub-No. 253X) to the Metropolitan Transit Authority of Harris County, Tex. (METRO).<sup>2</sup> METRO and UP then entered into an agreement to rail bank the Line pursuant to § 8(d) of the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d).<sup>3</sup>

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<sup>2</sup> METRO had already acquired the right-of-way from UP's predecessor, the Southern Pacific Transportation Company (SP), subject to an easement reserved to SP for it to continue to provide common carrier rail service, in 1992. The sale was the subject of a declaratory order proceeding before the Interstate Commerce Commission (ICC), the Board's predecessor, wherein the ICC determined that the purchase of the right-of-way, with the operating easement reserved by SP, was not subject to its jurisdiction. See Metro. Transit Auth. of Harris Cty., Tex.—Declaratory Order, 9 I.C.C.2d 559 (1993). The abandonment authority sought and obtained by UP in AB 33 (Sub-No. 156) and AB 33 (Sub-No. 253X) was for the easement that it inherited as SP's successor-in-interest.

<sup>3</sup> Under the Trails Act, the Board must “preserve established railroad rights-of-way for future reactivation of rail service” by prohibiting abandonment where a trail user offers to assume managerial, tax, and legal liability for the right-of-way for use in the interim as a trail. The statute provides that, if such interim use is subject to restoration or reconstruction for railroad purposes, the “interim use shall not be treated, for purposes of any law or rule of law as an abandonment . . .” Instead, the right-of-way is “rail banked,” which means that the abandoning railroad is relieved of its current obligation to provide service over the line but may reassert control to restore service on the line in the future, and a bona fide third-party petitioner, under appropriate circumstances, can request authority to restore rail service.

To invoke the Trails Act, a prospective trail user files a Statement of Willingness to assume responsibility for management of, legal liability for, and payment of taxes on, the right-of-way and an acknowledgment that interim trail use is subject to restoration of rail service at

(continued . . .)

Docket No. FD 35846, Acquisition of Right to Reactivate

On July 29, 2014, METRO sought authority in Docket No. FD 35846 (FD 35846 Notice) to obtain from UP the right to restore rail service over the Line. The Board accepted the FD 35846 Notice because it appeared that METRO had complied with the requirements of the class exemption at 49 C.F.R. § 1150.31-33, including a statement by METRO that it had entered into an agreement with UP to acquire the right to restore rail service. See 49 C.F.R. § 1150.33(c). On August 28, 2014, the FD 35846 Notice became effective, thereby authorizing METRO to acquire from UP the right to reactivate the Line, in addition to continuing to serve as the trail user for the Line. Metro. Transit Auth. of Harris Cty., Tex.—Acquis. Exemption—Union Pac. R.R., FD 35846 (STB served Aug. 14, 2014).

Docket No. FD 35847, Acquisition of Right to Reactivate

Also on July 29, 2014, Fort Bend County Toll Road Authority (FBCTRA) filed a notice of exemption in Docket No. FD 35847 (FD 35847 Notice) seeking authority to obtain from METRO the right to restore rail service over a portion of the Line, from milepost 20.42 on the Harris County-Fort Bend County line, to milepost 61.2 near Eagle Lake, Tex., a distance of 40.78 miles (the Subject ROW).<sup>4</sup> FBCTRA states that the FD 35847 Notice is contingent upon the FD 35846 Notice first becoming effective.<sup>5</sup> FBCTRA's proposed acquisition from METRO of the right to reactivate rail service over the Subject ROW is part of a broader transaction in which FBCTRA intends to purchase from METRO 480.59 acres of real property in Fort Bend, Austin, Wharton, and Colorado Counties, Tex., including the Subject ROW.

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(. . . continued)

any time. 49 C.F.R. § 1152.29(a), (d). If the railroad agrees to negotiate, the Board issues a CITU (in abandonment application proceedings) or a NITU (in abandonment exemption proceedings) for the line. 49 C.F.R. § 1152.29(c)(1), (d)(1). The CITU/NITU permits parties to negotiate for a 180-day period (which can be extended by Board order) to reach a rail banking/interim trail use agreement. Id. There is no substantive difference between rail banking authorized under a NITU and a CITU.

<sup>4</sup> Originally, the FD 35847 Notice referred to the Subject ROW as extending from milepost 20, approximately 2,020 feet east of the Harris County-Fort Bend County line, to milepost 61.2 near Eagle Lake, in Colorado County, Tex., a distance of 41.2 miles in Harris, Fort Bend, Austin, Wharton, and Colorado Counties, Tex. On May 20, 2015, METRO and FBCTRA filed errata stating that they erroneously included 0.42 miles that are not part of the Subject ROW, and that this stretch actually begins at milepost 20.42 at the Harris-Fort Bend County line, to milepost 61.2 near Eagle Lake, in Colorado County, Tex., a distance of 40.78 miles in Fort Bend, Austin, Wharton, and Colorado Counties, Tex.

<sup>5</sup> Although the FD 35846 Notice became effective on August 28, 2014, the FD 35847 Notice was held in abeyance, by decision served on August 27, 2014, to address issues concerning rail banking and the Joint Petition.

Docket Nos. AB 33 (Sub-No. 156) and AB 33 (Sub-No. 253X), Substitution of Trail User

FBCTRA and METRO filed a related Joint Petition, also on July 29, 2014, to vacate and reissue the NITU and CITU permitting rail banking/interim trail use in Docket Nos. AB 33 (Sub-No. 253X) and AB 33 (Sub-No. 156), respectively, to substitute FBCTRA for METRO as the trail user for the Subject ROW. In the Joint Petition, the petitioners state that FBCTRA's immediate development plans include the expansion of the existing Westpark Tollway for a 13-mile stretch beginning at milepost 20.42 at the Harris County-Fort Bend County line. Within this 13-mile stretch, the petitioners state that FBCTRA intends to preserve 26 feet of the original 100-foot wide Subject ROW for trail use and possible future restoration of rail service. In a decision served on September 19, 2014, METRO and FBCTRA were directed to submit, by October 21, 2014, a detailed discussion demonstrating that the 26-foot-wide right-of-way retained for rail banking/interim trail use would be of sufficient width to permit future rail service.<sup>6</sup>

Subsequent Filings

On November 10, 2014, METRO and FBCTRA filed a clarification (November 10 Clarification)<sup>7</sup> stating that FBCTRA would take the property and right-of-way subject to all conditions and exceptions set forth in the recorded land documents covering the property and right-of-way. METRO and FBCTRA further state that the following two conditions, set forth in the original sales agreement for the Subject ROW from SP to METRO and the rail banking agreement between METRO and UP, respectively, would apply:

The Property conveyed herein is expressly restricted so that, and by Grantee's acceptance of delivery of this Deed Grantee expressly covenant that, neither Grantee nor any other person or entity other than Grantor, its licensees and successors, shall have the right to use any part of the Railroad Easement or any other part of the Property for purposes of providing, or the right to hold itself out as providing, freight rail operations or other railroad service provided by common carrier railroads.

(November 10 Clarification 6-7.)

5. Conditions and Exceptions.

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<sup>6</sup> On October 20, 2014, the Board granted METRO's and FBCTRA's request to extend the deadline to February 18, 2015.

<sup>7</sup> Filings, such as this one, can be found on the Board's website by searching the record of any of the four dockets in this proceeding. For the purposes of this decision, filings that are not found in all four dockets will include a docket number when cited.

d. Union Pacific reserves and retains unto itself, its successor and assigns, the following interests reserved in the Vesting Deed: . . . the right to enforce the restrictive covenant set forth in the Vesting Deeds prohibiting the use of the Railroad Easement for freight service except with the prior written consent of Union Pacific.

(November 10 Clarification 7 (emphasis not included).)

The November 10 Clarification raised questions about whether UP had in fact contractually agreed to convey a right to reactivate to METRO.<sup>8</sup> Moreover, it did not directly answer the concerns regarding the width of the Subject ROW. Therefore, by another decision served on January 26, 2015, METRO and FBCTRA were also directed to submit a more detailed explanation as to what reactivation rights METRO holds in light of UP's retained rights, as well as the information pertaining to the width of the right-of-way originally requested in the Board's September 19 decision.

UP filed comments on May 19, 2015, stating that it retains, and has not waived by agreement, the right to reinstate common carrier by railroad freight operations in the future on all or any portions of the Line. UP adds that it has reserved and retains unto itself, its successors and assigns: “. . . the right to enforce the restrictive covenant set forth in the Vesting Deeds prohibiting the use of the Railroad Easement for freight service except with the prior written consent of Union Pacific.” (UP Comments 5 (emphasis not included).)

On May 19, 2015, FBCTRA filed a motion to withdraw the FD 35847 Notice seeking authority to acquire METRO's reactivation rights, stating that it has determined that acquisition of the reactivation rights over the Subject ROW is not necessary at this time. (FBCTRA Motion to Withdraw 3, May 19, 2015, Docket No. FD 35847.)

On the same day, in Docket No. AB 33 (Sub-No. 156), et al., METRO and FBCTRA filed a combined response to the Board's request for more information. METRO and FBCTRA explain that FBCTRA intends to set aside a 26-foot-wide “rail transportation corridor” within the existing 100-foot right-of-way that will remain available for future rail service, without the need to remove or reroute any substantial portion of the planned Westpark Tollway expansion. (Joint METRO & FBCTRA Reply 4, May 19, 2015, Docket No. AB 33 (Sub-No. 156), et al.) The

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<sup>8</sup> The November 10 Clarification also suggests that UP has the right to prevent any other rail service provider from restoring freight rail service over the rail-banked Line. However, the right to reactivate a rail-banked line is not an exclusive right, and thus UP could not prevent any other service provider from seeking Board authorization to restore active rail service on all or parts of the rail-banked Line in the future if UP does not exercise its right to reinstate rail service. See 16 U.S.C. § 1247(d); King Cty., Wash.—Acquis. Exemption—BNSF Ry., FD 35148, slip op. at 3-4 (STB served Sept. 18, 2009); Ga. Great S. Div.—Aban. & Discontinuance of Serv., 6 S.T.B. 902, 907 (2003).

parties claim that a right-of-way width of 26 feet is sufficient and adequate to accommodate the restoration of rail service here, because UP operated freight rail service over a 25-foot-wide Railroad Easement along this corridor for nearly nine years. (Id. at 9.)

The parties also note that FBCTRA's use of all 100 feet of the Subject ROW is subject to possible future reconstruction and reactivation of rail service. (Id. at 7-8, 10.) Moreover, METRO and FBCTRA state that FBCTRA will acquire sufficient property on either side of the Subject ROW to create a 300-foot wide transportation corridor, thereby enabling FBCTRA to design the toll road expansion so that only 141 feet of the 300-foot corridor, on average, will be paved. (Id. at 10.) According to the parties, the unpaved portions of the corridor could be used for structures and facilities necessary for the potential reactivation of rail service. (Id.)

Finally, on May 20, 2015, METRO and FBCTRA filed a motion to file comments late and comments in response to the Board's request for a more detailed explanation of what reactivation rights METRO holds in light of UP's retained rights.<sup>9</sup> METRO alleges that under its agreement with UP, METRO holds the nonexclusive and unexercised right to reactivate freight service, subject to Board approval of the FD 35846 Notice. METRO also states that its right to reactivate would be subject to the regulatory rights provided in the Trails Act and that such rights apply to the existing 100-foot-wide right-of-way on the Line. METRO lastly notes that its right to reactivate would also be subject to the conditions in the original sales agreement for the Subject ROW, and the rail banking agreement between METRO and UP, discussed above. (Joint METRO & FBCTRA Reply 11-12, May 20, 2015.)

For the reasons discussed below, the Board finds the FD 35846 Notice to be void ab initio, grants FBCTRA's motion to withdraw the FD 35847 Notice, and grants the Joint Petition to vacate and reissue the existing CITU and NITU to substitute FCBTRA for METRO as the trail user, because the requirements of 49 C.F.R. § 1152.29(d)(2) have been met.

## DISCUSSION AND CONCLUSIONS

FD 35846 Notice. Under 49 C.F.R. § 1150.32(c), an exemption is void ab initio<sup>10</sup> if the party's verified notice was based on false or misleading information. In applying this standard, the Board examines the false or misleading information to determine whether it is material to the exemption sought. U.S. Rail Corp.—Lease & Operation Exemption—Shannon G., LLC, FD 35042 (STB served Oct. 8, 2008). A statement is material if, for example, the transaction would not have otherwise qualified for an exemption. Berkshire Scenic Ry. Museum, Inc. v. ICC, 52 F.3d 378 (1st Cir. 1995).

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<sup>9</sup> METRO's and FBCTRA's motion to file comments late is unopposed and, in the interest of a complete record, the Board accepts the comments.

<sup>10</sup> Authority sought pursuant to a notice of exemption found to be void ab initio is considered as never having taken effect. See S.F. Bay R.R.-Mare Island—Operation Exemption—Cal. N. R.R., FD 35304, slip op. at 2 n.5 (STB served Dec. 6, 2010).

We find that METRO's notice in Docket No. FD 35846 materially misrepresented the facts upon which the Board permitted the notice of exemption to become effective. The Board's regulations at 49 C.F.R. § 1150.33(c) require a statement that "an agreement has been reached or details about when an agreement will be reached." In the FD 35846 Notice, METRO states: "[t]he agreements between UP and METRO for METRO's acquisition of UP's right to restore rail service over the [Line] were reached in May 2001 and December 2008." (FD 35846 Notice at 5.) But as the contracts between the parties demonstrate, UP never transferred or agreed to transfer the right to restore rail service to METRO. (November Clarification 6-7; UP Comments 5-6.) Specifically, the language in the deed in which UP's predecessor, SP, conveyed the ROW to METRO clearly states that no party other than SP "shall have the right to use any part of the Railroad Easement . . . for purposes of providing, or the right to hold itself out as providing, freight rail operations or other railroad service provided by common carrier railroads." (November Clarification 6-7.) Then, as part of the subsequent rail banking agreement between UP and METRO, UP expressly reserved and retained the right to enforce that term from the deed. Accordingly, the right to reactivate was never conveyed to METRO.

Despite the terms of those agreements, METRO stated in its verified FD 35846 Notice that agreements between UP and METRO for METRO's acquisition of UP's right to restore service had been reached. Because the statement required by 49 C.F.R. § 1150.33(c) regarding an agreement with UP is false and misleading, and that information is material to the exemption authority sought, the FD 35846 Notice fails to qualify for an exemption under 49 C.F.R. § 1150.31 and the exemption is void ab initio under 49 C.F.R. § 1150.32(c). See Utah S. R.R.—Change in Operators Exemption—Iron Bull R.R., FD 35558, slip op. at 4-5 (STB served Sept. 21, 2012). As such, the exemption is considered as never having taken effect.

FD 35847 Notice. FBCTRA states in the FD 35847 Notice that the requested exemption is contingent upon the effectiveness of the exemption requested in the FD 35846 Notice. Because we find the FD 35846 Notice to be void ab initio, METRO has no authority to acquire the reactivation right for the Line from UP. Thus, we will grant FBCTRA's motion to withdraw the FD 35847 Notice.

AB 33 (Sub-No. 156) and AB 33 (Sub-No. 253X). When considering requests for NITUs or CITUs providing a party time to negotiate rail banking/interim trail use agreements—or to vacate and reissue trail use conditions in order to substitute a different trail user—the Board confirms that: (1) the trail user meets the statutory and regulatory requirements to be a trail user; (2) the abandoning railroad agrees to the request; and (3) nothing occurs that would preclude the railroad's right to reassert control over the right-of-way at some future time to restore rail service or the ability of a bona fide third-party petitioner, under appropriate circumstances, to request authority to restore rail service. See Citizens Against Rails to Trails v. STB, 267 F.3d 1144, 1149-50 (D.C. Cir. 2001); King Cty. Wash.—Acquis. Exemption—BNSF Ry., FD 35148, slip op. at 3 (STB served Sept. 18, 2009); Ga. Great S. Div.—Aban. & Discontinuance of Serv., 6 S.T.B. 902, 907 (2003); Idaho N. & Pac. R.R.—Aban. & Discontinuance Exemption—in Wash. & Adams Ctys., Idaho, 3 S.T.B. 50, 59 (1998); Iowa S. R.R.—Exemption—Aban., 5 I.C.C.2d 496 (1989), aff'd Goos v. ICC, 911 F.2d 1283 (8th Cir. 1990).

Here, the parties have met their obligations under the Trails Act and 49 C.F.R. § 1152.29(d)(2) by providing evidence that FBCTRA's construction of an expanded toll road over a portion of the Subject ROW would not preclude the right of UP to reassert control over the right-of-way at issue at some future time to restore rail service, or the ability of a bona fide third-party petitioner, under appropriate circumstances, to request authority to restore rail service. To support their contention that 26 feet of the Subject ROW would be sufficient to accommodate potential rail service here, METRO and FBCTRA provide evidence that UP and its predecessor operated in this corridor using only 25 feet of right-of-way for nearly nine years. They also state that FBCTRA intends to create a 300-foot-wide transportation corridor, on which only 141 feet, on average, will be paved, thereby providing land that could be used for structures and facilities necessary for potential future reactivation. Finally, they point to prior case law issuing trail conditions where, as here, a right-of-way will be used for mixed highway (or light rail) and recreational use.<sup>11</sup> (Joint METRO & FBCTRA Reply 6-10, May 19, 2015, Docket No. AB 33 (Sub-No. 156), et al.)

Because METRO and FBCTRA have complied with the requirements of 49 C.F.R. § 1152.29(d)(2) and made an adequate showing that constructing the planned Westpark Tollway expansion project over a portion of the Subject ROW would be consistent with rail banking/interim trail use in this case—and UP does not object—the Board will (1) vacate the CITU in Docket No. AB 33 (Sub-No. 156) and the NITU in Docket No. AB 33 (Sub-No. 253X), under which METRO has been the trail user; and (2) reissue the CITU and NITU in those proceedings, substituting FBCTRA as the trail user.

It is ordered:

1. The FD 35846 Notice is void ab initio.
2. FBCTRA's motion to withdraw the FD 35847 Notice is granted.
3. METRO and FBCTRA's joint petition to vacate and reissue the CITU and NITU in AB 33 (Sub-No. 156) and AB 33 (Sub-No. 253X) to substitute FBCTRA for METRO as the trail user is granted.
4. A replacement NITU and CITU applicable to FBCTRA for the Subject ROW are issued.
5. Interim trail use/rail banking is subject to the future restoration of rail service and to the new user's continuing to meet the financial obligations for the right-of-way.

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<sup>11</sup> See CSX Transp., Inc.—Aban. Exemption—in Monroe & Owen Ctys., Ind., AB 55 (Sub-No. 514X) (STB served Sept. 30, 1997).

6. If the trail user intends to terminate trail use, it must send the Board a copy of this decision and notice and certificate and request that it be vacated on a specified date.

7. This decision is effective on its date of service.

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