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SERVICE DATE – JULY 23, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35008

UTAH TRANSIT AUTHORITY—ACQUISITION EXEMPTION—UNION  
PACIFIC RAILROAD COMPANY

STB Finance Docket No. 35002

SAVAGE BINGHAM & GARFIELD RAILROAD COMPANY—ACQUISITION  
AND OPERATION EXEMPTION—UNION PACIFIC RAILROAD COMPANY<sup>1</sup>

Decided: July 20, 2007

Utah Transit Authority (UTA) filed a motion to dismiss the notice of exemption issued in Utah Transit Authority—Acquisition Exemption—Union Pacific Railroad Company, STB Finance Docket No. 35008 (Utah Transit Acquisition), contending that the Board lacks jurisdiction over the transaction. The motion to dismiss will be granted, but Savage Bingham & Garfield Railroad Company—Acquisition and Operation Exemption—Union Pacific Railroad Company, STB Finance Docket No. 35002 (SB&G Acquisition), the proceeding in which the transaction involved here was first addressed, will be reopened for imposition of an oversight condition.

BACKGROUND

UTA, an instrumentality of the State of Utah and a provider of passenger transit service in the Salt Lake City, UT area, is in the process of constructing, and plans to operate, a new light rail system. See Utah Transit Authority—Acquisition Exemption—Line of Union Pacific Railroad Company, STB Finance Docket No. 32186 (ICC served Dec. 31, 1992, reconsideration denied, Apr. 14, 1993). These proceedings involve the latest track acquisitions in this project. In this transaction, Union Pacific Railroad Company (UP) seeks to transfer certain freight operations to Savage Bingham & Garfield Railroad Company (SBGR) and the underlying property to UTA. The transaction was structured to proceed on two fronts.

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<sup>1</sup> These proceedings are not consolidated; they are being handled together for administrative convenience.

To initiate the first part of the transaction, SBGR, a noncarrier, on February 27, 2007, invoked the class exemption under 49 CFR 1150.31 to acquire from UP and operate freight easements over a number of rail lines and track, including the portion of the Bingham Industrial Lead (the Lead) extending westerly from milepost 0.00 at Midvale Yard to milepost 6.60 at Bagley, in Salt Lake County, UT. See SB&G Acquisition, served and published at 72 FR 12261 on March 15, 2007. In the notice, SBGR stated that, in a separate transaction, UP would: (1) convey the right-of-way of the Lead to UTA; (2) reserve an operating easement over the Lead; and (3) convey that operating easement to SBGR. Further, SBGR stated that it would enter into an Administration and Coordination Agreement (ACA) with UTA to govern the rail freight services SBGR would provide over the Lead and related lines during specified time periods when UTA's planned passenger rail services will not be in operation.

On March 22, 2007, Utah Shipper Coalition (the Coalition)<sup>2</sup> petitioned the Board to stay: (1) consummation of UP's sale of the Lead to UTA until UTA files a notice of exemption for the acquisition and/or a motion to dismiss the notice on jurisdictional grounds; and (2) SBGR's acquisition from UP of freight easements to operate over the Lead and related rail lines, pending an investigation into whether the freight operating window agreed to by UTA and UP would permit the Coalition's members to receive adequate rail freight service. The Coalition argued that the record was not sufficient for the Board to determine whether UTA's proposed passenger service would adversely affect rail freight service.

In a decision served on March 28, 2007, the exemption in STB Finance Docket No. 35002 was stayed pending further action by the Board. The effect of the stay was to bar SBGR from proceeding with the transaction until UTA obtained either Board approval or a Board finding that its approval is not needed. To enable the Board to determine whether the proposed transaction would allow SBGR to fulfill its common carrier obligations, UTA was directed to include with its submission a copy of the ACA it planned to enter into with SBGR and a copy of any other related agreements not previously submitted.

In the second part of the transaction, UTA, on April 16, 2007,<sup>3</sup> invoked the class exemption under 49 CFR 1150.31 to acquire from UP the "remaining width" of the same

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<sup>2</sup> The Coalition is composed of the following shippers: American Welding & Tank; Frito-Lay, Inc.; Mastercraft Cabinets; SME Steel; BMC Lumber; Interstate Brick; and US Navy—Alliant Techsystems. They are all located on the Lead, and all of them have used rail service in the past (except Mastercraft Cabinets) and anticipate using rail service in the future.

<sup>3</sup> The notice was filed on March 27, 2007, and was supplemented at the Board's request on April 16, 2007, with a letter further describing the track being acquired.

portion of the Lead at issue in STB Finance Docket No. 35002.<sup>4</sup> See Utah Transit Acquisition served on April 24, 2007, and published at 72 FR 21069 on April 27, 2007. UTA attached a copy of what it described as the current version of its agreement with UP for the transaction (referred to as the Eight Amendment to the Purchase and Sale Agreement (PSA)).

UTA filed a motion to dismiss the notice of exemption in Utah Transit Acquisition for lack of Board jurisdiction on April 20, 2007. On April 23, 2007, the Coalition filed a petition requesting: (1) consolidation of Utah Transit Acquisition and SB&G Acquisition; and (2) a procedural schedule giving it 60 days to conduct discovery. The Coalition also requested a stay of the effectiveness of the notice of exemption in Utah Transit Acquisition,<sup>5</sup> to which UTA filed a letter in opposition on April 20, 2007. UTA, UP, and SBGR filed a joint reply objecting to the Coalition's proposed modified procedure schedule on April 26, 2007, and a joint motion for a protective order on April 27, 2007. The Coalition filed a reply in opposition to, and SBGR filed a reply in support of, UTA's motion to dismiss on April 27, 2007, and May 2, 2007, respectively. UTA filed a supplemental submission in support of its motion to dismiss on May 14, 2007, and an errata submission on May 15, 2007.

On June 1, 2007, the Coalition and SBGR separately submitted statements notifying the Board that the parties had reached a settlement agreement. The Coalition requested leave to withdraw its petitions to stay the transactions and advised that it now supported the exemption in SB&G Acquisition and no longer opposed the motion to dismiss in Utah Transit Acquisition. SBGR requested that the Board dissolve the stay in SB&G Acquisition, subject to the terms of the settlement agreement, and grant the motion to dismiss in Utah Transit Acquisition. Also on June 1, 2007, UTA filed a second supplemental submission in support of its motion to dismiss. Attached to this second supplemental submission was a "revised, final draft for execution" of the ACA, which incorporated the terms of the settlement agreement.

On June 15, 2007, UTA filed a petition asking the Board to issue a decision by June 21, 2007, that would: (1) vacate the stay in SB&G Acquisition, (2) grant the motion to dismiss in Utah Transit Acquisition, and (3) grant the motion for a protective order in

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<sup>4</sup> According to UTA, the remaining width is a 35-foot wide strip of land—the portion of the right-of-way on which the rail and supporting operating infrastructure are located. UTA previously acquired a 35-foot wide strip of the Lead right-of-way. See Utah Transit Authority—Acquisition Exemption—Certain Assets of Union Pacific Railroad Company, STB Finance Docket No. 34170 (STB served May 22, 2002).

<sup>5</sup> The Coalition originally requested the stay on April 17, 2007, but no action was taken on the request because the Coalition had failed to recite any of the stay criteria and had acknowledged that the stay imposed in SB&G Acquisition operated to prevent the transaction in Utah Transit Acquisition from going forward. See Utah Transit Acquisition, slip op. at n.4 (STB served Apr. 24, 2007).

both proceedings. Also on June 15, 2007, UTA filed a letter of support by UP, SBGR, and the Coalition for the relief sought in the petition.

In a decision served on June 19, 2007, the Board vacated the stay in SB&G Acquisition and granted the Coalition's request for leave to withdraw its petition for stay in Utah Transit Acquisition.<sup>6</sup> The Board also denied as moot the Coalition's requests to consolidate these proceedings and to adopt a procedural schedule, and granted the motion for a protective order. We are now granting UTA's motion to dismiss.

## DISCUSSION AND CONCLUSIONS

The remaining question here is whether the Board's regulatory approval is required for UTA to acquire the Lead. The acquisition of an active rail line and the common carrier obligation that goes with it ordinarily require Board approval under 49 U.S.C. 10901, even if the acquiring entity is a noncarrier, including a state. See Common Carrier Status of States, State Agencies, 363 I.C.C. 132, 135 (1980), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). Board authorization is not required, however, when the common carrier rights and obligations that attach to the line will not be transferred. See Maine DOT—Acq. Exemption, ME Central R. Co., 8 I.C.C.2d 835 (1991) at 836-37.

UTA states that it seeks to acquire the Lead only for the purpose of providing commuter rail operations and that it will not acquire either the right or the obligation to conduct freight rail service of any kind. As such, UTA asserts that it will not become a rail carrier subject to the Board's jurisdiction as a result of this transaction. UTA contends that, pursuant to the PSA, UP will retain a permanent, exclusive, assignable freight operating easement giving it the right to provide rail service over the Lead. UTA adds that, after the sale of the Lead is consummated, UP will transfer the right to provide freight rail service to SBGR, which will then be responsible for fulfilling the common carrier freight obligations.

UTA states that the ACA will govern the coordination of freight and passenger operations on the Lead and related lines, and will both confirm that SBGR will acquire the "exclusive right and obligation to provide Freight Rail Service" on the Lead and allocate to UTA the exclusive right to conduct passenger service. According to UTA, the

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<sup>6</sup> On June 22, 2007, the Coalition sought Board reconsideration of the June 19, 2007 decision. The Coalition contends that its request to withdraw its petitions to stay was predicated on the Board adopting an "oversight" condition negotiated in the settlement agreement. If a decision adopting the oversight condition were to be issued promptly, however, the Coalition stated that it would not seek to have the stay reinstated. UTA filed a reply on June 25, 2007, and UP filed a reply on June 27, 2007. Because this decision grants the request to impose the oversight condition in SB&G Acquisition, the Coalition's request to reinstate the stay in that proceeding will be dismissed as moot.

ACA divides the Lead track into three categories: exclusively passenger track; exclusively freight track; and joint track. The joint track is divided into an exclusively freight period between 12:00 midnight and 5:00 a.m., Monday through Friday, and an exclusively passenger period at all other times. UTA may reduce this freight window on certain evenings (estimated to be fewer than six per year) when special events occur in Salt Lake City, but it is required to give SBGR 30 days' advance notice when possible.

Citing Metro Regional Transit Authority–Acquisition Exemption–CSX Transportation, Inc., STB Finance Docket No. 33838 (STB served Oct. 10, 2003) (Metro), UTA contends that the Board has held that the common carrier obligations were not transferred in instances where freight operations were limited to certain specific hours. Also, according to UTA, the ACA specifically acknowledges that SBGR has determined that the exclusive 5-hour freight window will not prevent it from fulfilling its common carrier obligations and specifies that it is incumbent on SBGR to fulfill its obligations within that window.

UTA states that SBGR has secured UP's agreement to prepare, before the freight window opens, two blocks of cars at its Roper Yard for delivery to SBGR and Utah Railway Company (URC), an agent for BNSF Railway Company (BNSF).<sup>7</sup> URC has access to the Lead between milepost 0.18 at Midvale and milepost 4.66 at Welby Junction and serves two shippers on one of the related lines.<sup>8</sup> This blocking arrangement, UTA claims, will avoid potential congestion and ensure that SBGR will be able to complete scheduled freight service within the 5-hour freight window.

SBGR states that the traffic volume on the Lead is small and will not be impaired by the 5-hour freight window. With a 2006 traffic volume of less than 1,600 carloads of local traffic and 4,500 carloads of overhead interchange traffic, SBGR claims that the average daily traffic will be about 23 carloads, only 6 of which must be forwarded to or received from shippers on the Lead. SBGR further states that speeds along the Lead will be increased from 10 mph to 30 mph and that the three carriers that will access the Lead (SBGR with full access and URC and SLCS with partial access) have agreed, pursuant to the ACA, to adopt a Track Warrant Control System, which will permit them to coordinate their operations and thereby ensure that freight services will be completed within the 5-hour freight window.

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<sup>7</sup> UTA also submitted a copy of a letter from BNSF, dated October 10, 2006, which confirms that the proposed 5-hour freight window is acceptable to BNSF based on the current level of operations required to meet the needs of its customers.

<sup>8</sup> URC is an affiliate of Salt Lake City Southern Railroad Company (SLCS), a railroad agent for UP. SLCS will interchange UP traffic hauled by SBGR and operate over a 3,550-foot segment of the Lead, serving two team tracks on an as needed basis. URC and SLCS are owned by Genesee & Wyoming Inc., a noncarrier that owns short line and regional freight railroads in the United States and abroad.

Additionally, SBGR states that it has agreed to an oversight condition in SB&G Acquisition. That condition, which was the basis for the settlement agreement, would extend for a 2-year period after UTA's commencement of passenger operations over the Lead. Under the condition, the Coalition or its individual members may petition the Board for a determination that the 5-hour freight window requires expansion to permit SBGR to fulfill its common carrier obligation with respect to the Lead. SBGR states that the ACA, to which UTA is a party, has been amended to require the expansion of the window if the Board determines that it is insufficient.<sup>9</sup> Further, SBGR states that it and UTA have agreed to amend the ACA to provide: (1) for a limited expansion of the freight window, if requested on 72 hours' advance notice, to permit SBGR to operate on not more than 12 Sundays per calendar year; and (2) for UTA to bear the cost of substitute service to the Coalition's members if such service is required during the construction of the track improvements necessary for passenger service over the Lead. UTA claims that the ACA, as revised, confirms that nothing with respect to the acquisition in Utah Transit Acquisition will interfere with SBGR's ability to fulfill its common carrier obligations.

UTA submitted a draft copy of the Dispatching and Track Protocols (Protocols) that UP, SBGR, BNSF and URC have agreed upon. The Protocols describe how the parties will coordinate freight operations on the Lead and related lines (Common Trackage) prior to UTA constructing passenger improvements on the Lead, and how the parties will coordinate freight operations within the designated nighttime window once construction of the passenger improvements commences. Under the Protocols, UTA is required to perform the dispatching obligations so as to ensure "the safe coordination of freight passenger service, the equal, flexible, and efficient treatment of freight trains on the Common Trackage, and the protection of each Freight Operator's ability to comply with its common carrier obligations."

According to UTA, the transaction documents confirm that UTA is not acquiring the rights and obligations that are essential to providing freight service over the Lead, and that UP or its transferee, SBGR, will have the sole right and obligation to provide that service. In addition to Metro, supra, UTA cites a number of other cases to support its contention that the responsibility for maintaining, and dispatching freight operations over, the Lead, and the right to construct additional track or track improvements on the right-of-way, do not result in transferring the common carrier obligation or constitute an acquisition of a railroad line subject to the Board's jurisdiction when, as here, the freight railroad retains a permanent, exclusive, irrevocable freight operating easement.<sup>10</sup> Thus,

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<sup>9</sup> As noted, a copy of the amended ACA was submitted in UTA's second supplemental submission.

<sup>10</sup> New Mexico Department of Transportation—Acquisition Exemption—Certain Assets of BNSF Railway Co., STB Finance Docket No. 34793 (STB served Feb. 6, 2006) (responsibility for track maintenance); Los Angeles County Transportation Commission—Petition for Exemption—Acquisition from Union Pacific Railroad

(continued . . .)

UTA maintains that it will not become a rail carrier providing transportation subject to the Board's jurisdiction and that, as a result, the transaction is not subject to Board regulation.

The record, as supplemented by the settlement agreement, demonstrates that UTA will not acquire control over SBGR's operation of the Lead. The record does not offer a detailed statement of the shippers' needs, the constraints of the 5-hour window on freight operations, or the demands upon SBGR and the shippers resulting from limiting freight operations to the hours between midnight and 5 a.m. But the record does indicate that every one of the Coalition shippers on the Lead has examined the proposed service and its own needs. Having evaluated their needs, the Coalition shippers have negotiated revisions to the PSA and ACA sufficient to satisfy them that the service they will receive will be adequate. Thus restricted by the settlement agreement it has negotiated, UTA is unable to affect materially the service SBGR will provide to its customers. UP has retained both the intent and the unconditional ability to continue to assume and exercise its common carrier rights and obligations, and it has agreed to transfer those rights and obligations unimpaired to SBGR.

SBGR will continue to provide freight service over the Lead and, to ensure that SBGR will be able to comply with its common carrier obligations, we will grant the parties' request to reopen SB&G Acquisition to impose the negotiated oversight condition.

Under these circumstances, we find that UTA will not become a rail carrier subject to the Board's jurisdiction as a result of this transaction. Therefore, this transaction does not require Board authorization. UTA's notice of exemption in Utah Transit Acquisition will be dismissed and that proceeding will be discontinued. SB&G Acquisition will be reopened as discussed above.

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

It is ordered:

1. UTA's motion to dismiss the notice of exemption in Utah Transit Acquisition is granted, and the proceeding is discontinued.

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(continued . . .)

Company, STB Finance Docket No. 32374 et al. (STB served July 23, 1996) (responsibility for dispatching); and Metro-North Commuter Railroad Company—Acquisition and Operation Exemption—Line of Norfolk Southern Railway Company and Pennsylvania Lines LLC, STB Finance Docket No. 34293 (STB served May 13, 2003) (right to make improvements).

2. SB&G Acquisition is reopened and the notice of exemption is conditioned by providing for a 2-year period after the commencement of passenger operations for the Coalition or its individual members to petition the Board for a determination that the freight window requires expansion to permit SBGR to fulfill its common carrier obligations.

3. The Coalition's request to reinstate the stay in SB&G Acquisition is dismissed as moot.

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

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams  
Secretary