

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35002

SAVAGE BINGHAM & GARFIELD RAILROAD COMPANY—ACQUISITION
AND OPERATION EXEMPTION—UNION PACIFIC RAILROAD COMPANY

Decided: March 28, 2007

The Utah Shipper Coalition (Coalition)¹ has filed a petition to stay the effective date of the notice of exemption filed in this proceeding by Savage Bingham & Garfield Railroad Company (SBGR). The exemption is due to go into effect on March 29, 2007. A stay will be issued pending further order of the Board.

BACKGROUND

By notice filed on February 27, 2007, SBGR, a noncarrier, invoked the class exemption at 49 CFR 1150.31 to acquire from Union Pacific Railroad Company (UP) and operate freight easements upon, over, and across: (1) UP's rail lines between milepost 4.66 at Welby and milepost 17.10 at Magna (Garfield Branch), and between milepost 0.00 at Kearns and milepost 2.01 at Bacchus (Bacchus Branch); (2) UP's rail line between milepost 0.18 at Midvale and milepost 6.60 at Bagley Spur (Bingham Industrial Lead); and (3) various UP wye, yard, and team tracks in the vicinity of Midvale (Midvale Trackage); a total of 20.87 miles, all in Salt Lake County, UT.

SBGR stated that it would interchange traffic at UP's Roper, UT rail yard and would enter into a freight operating agreement and related agreements with UP governing SBGR's operations over the Bacchus and Garfield Branches and the Midvale Trackage. Additionally, SBGR stated that in a separate transaction UP would: (1) convey the right-of-way of the Bingham Industrial Lead to Utah Transit Authority (UTA); (2) reserve an operating easement over the Bingham Industrial Lead; and (3) convey the operating easement over the Bingham Industrial Lead to SBGR. Moreover, SBGR would enter into an Administration and Coordination Agreement with UTA which would govern the rail freight services SBGR would provide over the Bingham Industrial Lead during specified periods when UTA's planned passenger light rail services were not in operation.

¹ The Coalition is composed of the following shippers: American Welding & Tank; Frito-Lay, Inc.; Mastercraft Cabinets; SME; BMC Lumber; Interstate Brick; and US Navy—Alliant Techsystems.

By petition filed on March 22, 2007, Coalition asks the Board to stay: (1) consummation of UP's sale of the Bingham Industrial Lead's track assets to UTA until UTA files a notice of exemption for such 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 three rail lines pending an investigation into whether the freight operating window agreed to by UTA and UP would permit adequate rail freight service on those rail lines for Coalition members.

Coalition contends that the record is not sufficient to permit a determination that the passenger service UTA plans to provide over the Bingham Industrial Lead would adversely affect rail freight service. According to Coalition, its members account for a minimum of 2,660 carloads per year, and many of them require service every weekday. Coalition also notes that Utah Railway Company controls the yard at Midvale and provides substantial rail service on the rail lines at issue. The resulting traffic density and congestion, Coalition argues, requires substantial operating time to provide rail freight service.

On March 26, 2007, SBGR, UTA, and UP filed separate replies in opposition to the petition to stay. SBGR contends that a stay is not necessary because it has been informed that UTA intends to file a notice of exemption and a motion to dismiss before any change in service occurs. SBGR stresses that its assumption of the common carrier obligations related to the rail assets would not occur, and its service would not commence, until the effective date of the notice of exemption that UTA would file, and until the Board has had a full opportunity to review the joint use arrangements on the Bingham Industrial Lead.

UTA similarly notes that both this transaction and the asset acquisition transaction between UTA and UP that would be the subject of a separate proceeding have been delayed to allow the parties to discuss further the concerns Coalition raised in its stay petition. UTA also asserts that it would comply fully with the pertinent statutory and regulatory requirements when the terms of the UTA-UP transaction are finalized.

UP contends that Coalition members would not be adversely affected by this transaction, by the sale of the Bingham Industrial Lead to UTA, or by UTA's planned institution of passenger service. Accordingly, UP contends that this petition for stay should be denied.

Subsequently, on March 27, 2007, UTA filed a notice of exemption under 49 CFR 1150.31 in STB Finance Docket No. 35008 to acquire from UP the remaining width of a portion of the Bingham Industrial Lead extending from milepost 0.0 at Midvale to milepost 6.60 at Bagley.² UTA attached a copy of what it describes as the current version of its agreement with UP for that transaction, which it says it expects to consummate no sooner than April 27, 2007. Because it maintains that the acquisition does not require Board authorization, UTA states that it will shortly be filing a motion to dismiss this notice.

² According to UTA, it acquired a 35-foot wide strip of the Bingham Industrial Lead right-of-way in 2002 pursuant to a notice of exemption in STB Finance Docket No. 34170 that was subsequently dismissed by the Board as not requiring regulatory approval.

DISCUSSION AND CONCLUSIONS

A noncarrier, including a state, must seek approval under 49 U.S.C. 10901 when acquiring a freight rail line that has not been abandoned, see Common Carrier Status of States, State Agencies, 363 I.C.C. 132, 133 (1980), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). However, such approval is not required when common carrier rights and obligations would not be transferred with the physical assets. See Maine, DOT—Acq. Exemption, ME. Central R. Co., 8 I.C.C.2d 835 (1991) (State of Maine). But as the Interstate Commerce Commission stated in State of Maine, at 838, all sale transactions should be submitted to the agency in advance, together with the agreement between the railroad acquiring the easement and the entity acquiring the right-of-way, so that this agency can be assured that the arrangement is not one that requires regulatory oversight and authorization. UTA had stated that it intended to make such a submission, but it did not file its notice of exemption in STB Finance Docket No. 35008 until March 27, 2007, and it has not yet filed its intended motion to dismiss.

UTA and SBGR contend that there is no need for a stay because these transactions have been postponed. This argument, however, overlooks the fact that this notice of exemption would become effective on March 29, 2007, unless it is stayed. A stay of the exemption sought by SBGR, on the other hand, would provide time for the Board to determine whether SBGR's obligations to the shippers and receivers who use this line for rail freight service could and would be met. The Board must determine whether the parties' agreements impose any restrictions on SBGR's use of the line and whether such restrictions would unreasonably burden its freight service. Accordingly, the requested stay will be granted pending further order of the Board.

Before SBGR may proceed with this transaction, UTA must obtain either Board approval for the proposed acquisition or a Board finding that it may acquire these rail assets without need for Board approval. UTA should include with its submission a copy of the Administration and Coordination Agreement it plans to enter into with SBGR and a copy of any other related agreements not previously submitted that would allow the Board to ascertain whether the proposed transaction would enable SBGR to fulfill the common carrier obligations it seeks to acquire.

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

It is ordered:

1. The effective date of the notice of exemption in this proceeding is stayed pending further order of the Board.

2. This decision is effective on its service date.

By the Board, Charles D. Nottingham, Chairman.

Vernon A. Williams
Secretary