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SERVICE DATE - AUGUST 13, 1999

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33694

CITY OF OAKLAND, A MUNICIPAL CORPORATION OF THE STATE OF CALIFORNIA,
ACTING BY AND THROUGH ITS BOARD OF PORT COMMISSIONERS--ACQUISITION
EXEMPTION--UNION PACIFIC RAILROAD COMPANY

Decided: August 10, 1999

On December 11, 1998, the City of Oakland, a municipal corporation of the State of California, acting by and through its Board of Port Commissioners (Port of Oakland or petitioner), filed a verified notice of exemption under 49 CFR 1150.31 to acquire the physical assets of a rail line and the underlying right-of-way from Union Pacific Railroad Company (UP), between milepost 4.97 and milepost 5.80, in Oakland, CA, a distance of approximately 0.83 miles. Notice of the exemption was served by the Board on January 6, 1999, and published in the Federal Register on January 7, 1999 (64 FR 1069). On March 10, 1999, the Port of Oakland filed a petition to dismiss the notice, asserting that it will acquire certain physical assets and real property but not the right to conduct common carrier freight operations, that it will not become a common carrier as a result of the transaction, and that the transaction is not subject to Board jurisdiction. The petition to dismiss will be granted for the reasons next discussed.

BACKGROUND

The Port of Oakland states that, on December 23, 1998, it and UP entered into a Purchase and Sale and Lease Termination Agreement and Escrow Instructions (the Agreement), pursuant to which petitioner agreed to purchase from UP approximately 34 acres of land. Petitioner also agreed to the early termination of port leases for approximately 91 acres in Oakland. According to the Port of Oakland, the UP acres will be consolidated with the contiguous land petitioner presently leases and is acquiring as a result of the closing of the Navy's Fleet and Industrial Supply Center in Oakland. The Port of Oakland further asserts that, as a result of the Agreement, UP will construct new replacement rail facilities at the former Southern Pacific Transportation Company intermodal yard (former SP Yard) located next to petitioner's terminals. The UP acres will be included in the Port of Oakland's maritime development project.

The Port of Oakland indicates that, pursuant to the Agreement, it acquired from UP fee title to six parcels (Parcels 2, 3, 6, 7, 8 and 9) of real property, three of which (Parcels 2, 3 and 9) contain certain track structures, including the line currently operated by UP. Petitioner further indicates that, as to these parcels, it acquired all of UP's interest in the real estate, tracks, switches, grade crossing materials, and other trackage appurtenances (with certain specified exceptions). The Port of Oakland adds, however, that, under the Agreement, UP retained the following permanent, exclusive freight rail easements: (a) in Parcel 2, over the side track in order to continue providing

rail freight service to the one remaining shipper, Unicold Corporation (Unicold), located at the end of the side track (Unicold trackage);¹ (b) in Parcel 3, over the main line tracks utilized to access UP's intermodal rail facilities, as well as storage and switching tracks;² (c) in Parcel 3, over the main line track utilized to access Unicold located at the end of the Unicold trackage;³ (d) in Parcel 9,⁴ over the main line track utilized to access UP's intermodal rail facilities, as well as storage and switching tracks;⁵ and (e) in Parcel 9, over the main line track utilized to access Unicold located at the end of the Unicold trackage and Schnitzer Steel, a shipper located adjacent to Parcel 9. According to the Port of Oakland, under these easements, UP retains the right to operate over and maintain, repair and replace the trackage.

Petitioner adds that, as part of their overall arrangement, it and UP also entered into a Reciprocal Operating Agreement pursuant to which UP has the right, but not the obligation, to operate over the Port trackage. Also, the Port of Oakland has the right, but not the obligation, to designate itself or another party as an additional operator over the UP trackage.⁶ The reciprocal rights granted by this particular agreement are limited to overhead traffic.

¹ The Port of Oakland indicates that, once Unicold relocates or ceases using rail service, this trackage will be deemed abandoned by UP and the easement will terminate. Petitioner asserts that UP need not seek abandonment authority from the Board because the trackage is non-jurisdictional pursuant to 49 U.S.C. 10906, and because it is part of multi-tracked mainline. At least one mainline track will remain in service. The mainline track is part of a planned relocation project that will not adversely affect shippers.

² Petitioner avers that, once UP has relocated its intermodal facilities to the former SP Yard, UP will no longer have any need for this trackage and it will be deemed abandoned by UP and the easement will terminate. See note 1.

³ The Port of Oakland states that once all shippers served by the Unicold trackage cease using rail service, UP will no longer have any need for this trackage and is obligated to seek abandonment authority from the Board. Upon the effective date of that approval, this easement will terminate.

⁴ UP retained ownership of one of two parallel mainline tracks traversing Parcel 9.

⁵ According to petitioner, once UP has relocated its intermodal facilities to the former SP Yard, UP will no longer have any need for this trackage and it will be deemed abandoned by UP and this easement will terminate. See note 1.

⁶ To the extent that the Port of Oakland chooses to exercise this contractual option so as to designate an existing carrier to operate over UP lines, that presumably would require our authority under 49 U.S.C. 11323 or 10902.

According to the Port of Oakland, because of the nature and terms of the transaction, the asset acquisition is not subject to Board jurisdiction and the consummation of the acquisition would not make petitioner a common carrier, citing Maine, DOT--Acq. Exemption, Me. Central R. Co., 8 I.C.C.2d 835 (1991) (State of Maine). The Port of Oakland avers that it will not conduct freight operations or hold itself out to the public as willing to do so, but will merely own the real and personal property. UP will be the only common carrier on the subject line performing freight operations after consummation of the transaction.

DISCUSSION AND CONCLUSIONS

The Port of Oakland's petition to dismiss will be granted and the proceeding discontinued. The primary issue here is whether we must exercise jurisdiction over the proposed transfer of rail assets from UP, a rail carrier, to The Port of Oakland, a noncarrier. Acquisition of an active rail line by a noncarrier ordinarily requires Board approval under 49 U.S.C. 10901. That is because the new owner is normally presumed to succeed the former owner in the obligation to ensure that service is provided.

Here, however, the circumstances of this transaction do not require any form of Board action. On the basis of representations made by petitioner and our review of the various agreements submitted into the record, we find that the Port of Oakland will not conduct any operations over the subject line and will not hold itself out to do so. By merely acquiring certain rail assets from UP, petitioner will not, in fact, become a carrier or acquire a common carrier obligation. The record indicates that the Port of Oakland has simply acquired six parcels of land in the Port area, three of which happen to contain track structures currently operated by UP.⁷

Conversely, the evidence indicates that UP will have the ability and obligation to provide unrestricted freight service as a railroad common carrier over the line. UP has retained sufficient unconditional easements to enable it to perform its common carrier obligation, and the pertinent agreements have given UP more than sufficient power over the operation and maintenance of the line to avoid any undue interference by the Port of Oakland. Specifically, the record indicates that UP has retained the exclusive right to provide local freight service over, and to maintain, repair and replace, the rail line.

⁷ Although the agreements have given petitioner the right to designate itself or a third party as an additional operator over the UP trackage, we note the Port of Oakland's statement that such rights are to be limited to overhead operations, are intended largely to facilitate intra-Port operations not subject to the Board's jurisdiction, and would be exercised by it only by designating a third party as the additional operator. See Motion to Dismiss, pp.12-13. Of course, in the unlikely event that petitioner decides at some future date to become a common carrier railroad, it would need to obtain prior Board approval.

The termination of UP's easements, as provided for in the Agreement, lies outside our jurisdiction because the track is either spur, storage, switching, or side track outside our abandonment jurisdiction or track that parallels other track within the same right-of-way that will be maintained, also outside our jurisdiction over abandonments. We note that petitioner represents that the easements will remain in place for as long as a need for rail service exists, which means until we authorize abandonment of the line that remains subject to our jurisdiction for purposes of abandonment.

For these reasons, we will grant the relief sought by the Port of Oakland.⁸

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

It is ordered:

1. The Port of Oakland's petition to dismiss the verified notice of exemption is granted.
2. The proceeding is discontinued.
3. This decision is effective on its date of service.

By the Board, Chairman Morgan, Vice Chairman Clyburn and Commissioner Burkes.

Vernon A. Williams
Secretary

⁸ By letter submitted January 11, 1999, the United Transportation Union (UTU) protests the Port of Oakland's proposal, arguing that the Board lacks authority to exempt any railroad from the labor protective conditions of 49 U.S.C. 11326. Board authorization (whether by approval or exemption) is not required for the Port of Oakland's acquisition. Moreover, as discussed above, even if Board authorization were required, the statutory provision that would govern would not be sections 11323 through 11326, but rather section 10901, which expressly precludes the imposition of labor protective conditions. See 49 U.S.C. 10901(c).