

42827
EB

SERVICE DATE – FEBRUARY 26, 2013

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 33 (Sub-No. 309X)

UNION PACIFIC RAILROAD COMPANY—
ABANDONMENT OF FREIGHT EASEMENT—
IN ALAMEDA COUNTY, CAL.

Docket No. AB 980 (Sub-No. 2X)

SANTA CLARA VALLEY TRANSPORTATION AUTHORITY—
ABANDONMENT OF COMMON CARRIER SERVICE—
IN ALAMEDA COUNTY, CAL.

Digest:¹ Union Pacific Railroad Company is permitted to end its responsibility to provide freight rail service over its freight easement, and Santa Clara Valley Transportation Authority is permitted to end its common carrier obligation to provide freight rail service, over a 1.97-mile line it owns in Alameda County, Cal. The tracks will be rebuilt and incorporated into the Bay Area Rapid Transit System.

Decided: February 25, 2013

By a joint petition filed on December 12, 2012, Union Pacific Railroad Company (UP) and Santa Clara Valley Transportation Authority (SCVTA) (collectively, Petitioners) seek exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10903 for UP to abandon its freight easement, and for SCVTA, the line's owner, to abandon its common carrier obligation, over a 1.97-mile portion of the San Jose Industrial Lead, between mileposts 5.38 and 7.35, near the Warm Springs freight rail station in the City of Fremont, in Alameda County, Cal. (the Line). Petitioners also seek exemption from 49 U.S.C. § 10904 (offer of financial assistance (OFA) provisions) and 49 U.S.C. § 10905 (public use provisions). Notice of the exemptions was served and published in the Federal Register on December 31, 2012 (77 Fed. Reg. 77,183).

¹ 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).

The Line is contiguous to an 8.95-mile line segment of the San Jose Industrial Lead, extending between mileposts 7.35 and 16.30, for which Petitioners have previously been granted abandonment authority. See Union Pac. R.R.—Aban. of Freight Easement—in Alameda and Santa Clara Cntys. Cal., AB 33 (Sub-No. 303X), and Santa Clara Valley Transp. Auth.—Aban. of Common Carrier Service—in Alameda and Santa Clara Cntys. Cal., AB 980 (Sub-No. 1X) (STB served July 23, 2012). The right-of-way of that line segment, as well as the right-of-way of the Line at issue here, is to be used in an extension of the Bay Area Rapid Transit System (BART), the Bay Area’s public rapid transit system.

On January 18, 2013, SCVTA filed a motion requesting expedited consideration of this abandonment petition. SCVTA states that construction for the BART project is scheduled to occur within the right-of-way of the Line during the first quarter of 2013, and that expedited consideration is warranted to permit construction to continue without delay. SCVTA states that UP supports the request.

For the reasons discussed below, we will grant the exemption from 49 U.S.C. § 10903, thereby authorizing UP to abandon its freight easement and SCVTA to abandon its common carrier obligation, subject to standard employee protective conditions. Petitioners’ request for exemption from the OFA process will also be granted, and their request for exemption from the public use provisions of 49 U.S.C. § 10905 will be denied as moot. Finally, we will grant SCVTA’s request for expedited consideration and make the exemption effective on 15 days’ notice.

BACKGROUND

SCVTA purchased the Line from UP in December of 2002, at which time UP retained a freight easement over the Line.² Petitioners state that the Line, which is surrounded by existing streets, highways, mass transportation services, utilities and recreational public parks, is no longer needed to provide freight rail service to shippers. According to Petitioners, during a portion of the last two years, the Line was used to provide service to a bulk transloading company—Truck Rail Handling, Inc. (TRH)—which leased several UP yard tracks located between the main track of the Line and UP’s immediately adjacent and parallel Warm Springs Subdivision. UP states that service to TRH is now provided via a recently constructed connection to the yard tracks from the Warm Springs Subdivision. Petitioners add that the Fremont/Warm Springs area will continue to receive rail service from UP on lines adjacent to or in the vicinity of the Line; that all overhead traffic through Fremont/Warm Springs now moves over UP’s Warm Springs Subdivision; and that, because development in the area serviced by the Line is shifting to non-rail-oriented industries, no new rail shippers are expected to locate on the

² See Santa Clara Valley Transp. Auth.—Acquis. Exemption—Union Pac. R.R., FD 34292 (STB served Dec. 26, 2002, and Apr. 30, 2003).

Line.³ SCVTA states that it intends to retain and rebuild the Line for future inclusion into BART.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10903, a rail line may not be abandoned without prior approval from the Board. Under 49 U.S.C. § 10502, however, the Board must exempt a transaction or service from regulation when it finds that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny of the proposed abandonment of UP's freight easement and SCVTA's common carrier obligation under 49 U.S.C. § 10903 is not necessary in this case to carry out the rail transportation policy. The Line is not needed for continued freight rail service and the tracks are expected to be rebuilt for future inclusion into BART. By minimizing the administrative expense of the application process, an exemption will expedite regulatory action and reduce regulatory barriers to exit, in accordance with 49 U.S.C. §§ 10101(2) and (7). An exemption will also foster sound economic conditions and encourage efficient management by permitting the rationalization of an unnecessary rail line, consistent with 49 U.S.C. §§ 10101(5) and (9). Other aspects of the rail transportation policy will not be adversely affected by the use of the exemption process.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power because there are no longer any active shippers on the Line.⁴ All local and overhead traffic will continue to move over adjacent or nearby UP lines. Additionally, no party has filed in opposition to the proposed abandonment of the Line. Nevertheless, to ensure that TRH is informed of our action, we will require UP and SCVTA to serve a copy of this decision on the customer so that TRH will receive it within five days of the service date of this decision, and to certify contemporaneously to the Board that they have done so.

Exemption from 49 U.S.C. § 10904. Under 49 U.S.C. § 10904, a financially responsible person may offer to purchase, or subsidize continued rail operations over, a rail line sought to be abandoned. The Board has granted exemptions from the OFA provisions of 49 U.S.C. § 10904 when the record shows that the right-of-way is needed for a valid public purpose and there is no

³ UP notes that BNSF Railway Company also serves the Fremont/Warm Springs area over UP lines as per existing agreements.

⁴ Because we find that regulation of the proposed abandonment of the Line is not necessary to protect shippers from the abuse of market power, we need not determine whether the proposed abandonment is limited in scope.

overriding public need for continued rail service. See, e.g., Norfolk S. Ry.—Aban. Exemption— in Norfolk & Va. Beach, Va., AB 290 (Sub-No. 293X) (STB served Nov. 6, 2007). In support of their request, Petitioners assert that an exemption is needed so the tracks can be rebuilt for future inclusion into BART. No party has filed in opposition to the Petitioners' request for exemption from §10904.

Petitioners have justified an exemption from the OFA process. They have demonstrated that the Line is needed for inclusion in BART, a valid public purpose. Likewise, there is no overriding public need for continued rail service. As noted above, the Line's former customer is being served via a recently constructed connection between the yard tracks leased by TRH and UP's Warm Springs Subdivision, and other local and overhead traffic in the area will continue to move over other UP lines. With regard to future rail service needs, Petitioners state that development in the Fremont/Warm Springs area served by the Line is shifting away from rail-oriented industries, decreasing the likelihood that rail-oriented shippers would locate on the Line. Accordingly, we find that a valid public purpose is present, and there is no overriding public need for continued freight rail service here.

We conclude that applying the OFA provisions in this situation is not necessary to carry out the rail transportation policy. Allowing the abandonment exemption to become effective expeditiously, without first being subject to these provisions, will minimize the need for Federal regulatory control over the rail transportation system, expedite the regulatory action, and reduce regulatory barriers to exit, consistent with 49 U.S.C. §§ 10101(2) and (7). Other aspects of the rail transportation policy will not be adversely affected. As discussed above, regulation is not necessary to protect shippers from an abuse of market power because there are no shippers on the Line. Thus, the record here establishes that the proposed exemption from 49 U.S.C. § 10904 meets the criteria of 49 U.S.C. § 10502.

Exemption from 49 U.S.C. § 10905. Petitioners also seek exemption from the public use provisions of 49 U.S.C. § 10905. Because requests for a public use condition were due by January 22, 2013, and none were received, Petitioners' request for exemption from § 10905 will be denied as moot.

Employee Protection. Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, the Board will impose the employee protective conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979).

Environmental Review. Petitioners have submitted a combined environmental and historic report and have notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed abandonments. See 49 C.F.R. § 1105.11. The Board's Office of Environmental Analysis (OEA) has examined the environmental and historic report, investigated the record, and analyzed the probable effects of the proposed action on the quality of the human environment.

OEA served an Environmental Assessment (EA) in this proceeding on January 4, 2013, recommending that no environmental conditions be imposed on any decision granting abandonment authority. Comments to the EA were due by January 21, 2013. No comments to the EA were received. Accordingly, based on OEA's recommendation, we conclude that the proposed abandonment, if implemented, will not significantly affect either the quality of the human environment or the conservation of energy resources.

Expedited Handling. As noted, SCVTA has requested expedited consideration because construction for the BART project is scheduled to begin within the right-of-way of the Line during the first quarter of 2013. Given that no party has filed in opposition to the proposed abandonment and that no shippers should be adversely affected by the abandonment proposal, we agree that expedited consideration is warranted to permit construction of the BART extension to continue without delay. We, therefore, will make the abandonment exemptions effective 15 days from the service date of this decision rather than the typical 30 days.

It is ordered:

1. Under 49 U.S.C. § 10502, we exempt from the prior approval requirements of 49 U.S.C. § 10903 the abandonment by UP of its freight easement and by SCVTA of its common carrier obligation over the Line, subject to the employee protective conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979).
2. Petitioners' request for exemption from the provisions of 49 U.S.C. § 10904 is granted.
3. Petitioners' request for exemption from the provisions of 49 U.S.C. § 10905 is denied as moot.
4. Petitioners are directed to serve a copy of this decision on TRH so that it is received within five days of the service date of this decision, and to certify contemporaneously to the Board that they have done so.
5. The exemptions will be effective on March 13, 2013. Petitions to stay must be filed by March 5, 2013, and petitions to reopen must be filed by March 8, 2013.
6. Pursuant to the provisions of 49 C.F.R. § 1152.29(e)(2), Petitioners shall each file a notice of consummation with the Board to signify that they have exercised the authority granted and fully abandoned the Line. If consummation has not been effected by Petitioners' filing of a notice of consummation by February 26, 2014, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory

barrier to consummation exists at the end of the one-year period, the notice of consummation must be filed no later than 60 days after the satisfaction, expiration, or removal of the legal or regulatory barrier.

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