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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Docket No. AB 33 (Sub-No. 277X)

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UNION PACIFIC RAILROAD COMPANY  
– ABANDONMENT EXEMPTION –  
IN LAFOURCHE PARISH, LA

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**UNION PACIFIC RAILROAD COMPANY'S  
MOTION TO MODIFY NOTICE OF EXEMPTION**

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Union Pacific Railroad Company (“UP”) submits this motion to modify the abandonment authorized by the Board in a notice of exemption served November 14, 2011.<sup>1</sup> The exemption involves the portion of UP’s Lockport Branch extending from milepost 1.7 near Raceland, Louisiana, to milepost 14.2 near Jay, Louisiana (the “Line”). In a decision served January 27, 2012, the Board postponed the effective date of the exemption so it could resolve claims by BNSF Railway Company (“BNSF”) and Valentine LLC (“Valentine”) that UP should not be allowed to consummate the abandonment because BNSF had authority to operate over the Line. UP now asks the Board to modify the notice of exemption to permit only UP’s discontinuance of service over the Line, and UP commits that it will not salvage track material on the Line without further authorization from the Board. This modification and commitment address the concerns

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<sup>1</sup> UP recognizes that this proceeding has been held in abeyance pursuant to a joint request by UP and BNSF Railway Company (“BNSF”). UP has informed BNSF that it no longer wants this proceeding held in abeyance and would be filing this motion with the Board.

that BNSF and Valentine have raised, while also allowing UP to continue to evaluate its future plans for the Line.<sup>2</sup>

## I. BACKGROUND

On September 29, 2011, Louisiana & Delta Railroad, Inc. (“LDRR”) and UP filed a Combined Notice of Exemption seeking, respectively, an exemption to discontinue operations over, and abandon, the portion of the Lockport Branch extending from milepost 1.7 near Raceland, Louisiana, to milepost 14.2 near Jay, Louisiana. LDRR had leased and operated the Lockport Branch since January 17, 1992, under an agreement with a UP predecessor railroad, Southern Pacific Transportation Company (“SP”). In their Combined Notice of Exemption, which was published in the *Federal Register* on November 14, 2011, LDRR and UP certified that no local or overhead traffic had moved over the Line for at least two years.

On December 6, 2011, BNSF filed a letter claiming that it had “Board-sanctioned authority” to serve all present and future shipper facilities on the Line as a result of the Board’s decision in *The Burlington Northern & Santa Fe Railway Company and Union Pacific Railroad Company – Acquisition Exemption – Lines Between Dawes, TX, and Avondale, LA*, FD 33630 (STB served Sept. 29, 1998). BNSF argued that the Board could grant UP the requested exemption, but should preclude UP from consummating the abandonment until BNSF discontinued its authority to serve customers on the Line.

On January 6, 2012, BNSF filed a letter repeating its claim that it had “Board authority” to operate over the Line and its argument that the Board should not allow UP to consummate the abandonment “until such time as BNSF discontinues its operating authority over the line.”

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<sup>2</sup> UP also asks that it be granted leave to amend its petition for exemption, filed September 29, 2011, if such an amendment is technically required for the Board to modify the exemption already granted.

On January 27, 2012, the Board issued an order that postponed the effective date of the exemption and required UP and BNSF to file copies of materials they had referred to or relied upon in their prior submissions, along with any additional evidence and arguments they wished to file to support their positions.

On February 6, 2012, Valentine filed a letter asserting that BNSF had authority to access customers on the Line and, as a result, “UP can be authorized to discontinue rail service over the [Line], but physical abandonment of the line must be conditioned on BNSF’s consummation of discontinuance of its service over the [Line] pursuant to Board-authorized access rights.”

On February 9, 2012, UP and BNSF filed evidence and argument addressing BNSF’s claim to have Board-authorized rights to serve customers on the Line. BNSF urged the Board “not to permit UP to consummate the abandonment of the [Line] until BNSF first abandons or discontinues its operating rights or joint use of the [Line].”

On February 21, 2012, BNSF filed a verified notice of exemption for trackage rights over the Line in Finance Docket No. 35601.<sup>3</sup> On March 15, UP filed a petition to reject that notice of exemption and stay the effective date of the exemption.<sup>4</sup> On March 19, BNSF filed a reply.<sup>5</sup>

On March 21, 2012, the Chairman postponed the effective date of the trackage rights exemption in Finance Docket No. 35601 so that the matters raised in both the trackage rights and the abandonment proceeding could be considered together. *BNSF Ry. – Trackage Rights Exemption – Union Pac. R.R.*, FD 35601 (STB served Mar. 21, 2012).

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<sup>3</sup> Verified Notice of Exemption Pursuant to 49 C.F.R. § 1180.2(d)(2), *BNSF Ry. – Trackage Rights Exemption – Union Pac. R.R.*, FD 35601 (Feb. 21, 2012).

<sup>4</sup> Petition to Reject Notice of Exemption and Petition for Stay of Effective Date of Exemption, *BNSF Ry. – Trackage Rights Exemption – Union Pac. R.R.*, FD 35601 (Mar. 15, 2012).

<sup>5</sup> Reply to Petition to Reject and Request for Stay, *BNSF Ry. – Trackage Rights Exemption – Union Pac. R.R.*, FD 35601 (Mar. 19, 2012).

On June 14, 2012, the Board granted a joint motion by UP and BNSF to hold the abandonment and trackage rights proceedings in abeyance while the parties tried to negotiate a private resolution of the issues raised by the proceedings. *Union Pac. R.R. – Aban. Exemption – In LaFourche Parish, LA.*, AB 33 (Sub-No. 277X) & *BNSF Ry. – Trackage Rights Exemption – Union Pac. R.R.*, FD 35601 (STB served June 14, 2012).

UP and BNSF have not been able to negotiate a private resolution of this matter. In addition, during the negotiating process, UP began to re-evaluate its decision to abandon the Line. UP has now determined that it does not want to consummate the abandonment. Instead, UP wants only to discontinue service, while leaving the track and other assets in place. This would allow UP to preserve the Line for potential future use.

## **II. ARGUMENT**

UP's motion is consistent with Board precedent and resolves the concerns raised by BNSF and Valentine regarding the consequences that might ensue if UP were allowed to consummate the abandonment of the Line.

### **A. Board precedent supports modification of UP's exemption authority.**

The Board consistently grants requests by applicants to withdraw or modify abandonment exemptions. When the Board authorizes a railroad to abandon a line, its authority is permissive, not mandatory. In other words, the railroad can choose to exercise that authority or not. Because railroads are not compelled to abandon lines, the Board typically allows them to withdraw their requests for abandonment authority at any time before they consummate the abandonment. *See, e.g., Norfolk S. Ry. – Aban. Exemption – In Kanawha County, W. VA*, AB 290 (Sub-No. 267X) (STB served June 25, 2010); *Norfolk S. Ry. – Aban. Exemption – In Orange County, NY*, AB 290 (Sub-No 283X) (STB served Sept. 15, 2008); *Norfolk S. Ry. – Aban. Exemption – In Bergen*

*County, NJ*, AB 290 (Sub-No. 288X) (STB served May 14, 2008); *Almono LP – Aban.*

*Exemption – In Allegheny County, PA*, AB 842X (STB served Jan. 28, 2004).

In cases involving requests to modify abandonment exemptions, the Board has recognized that changing abandonment authority to discontinuance authority *narrows* the authorization a railroad has previously received, and thus a railroad that has met the criteria for abandoning a line should be entitled to discontinue service over the line instead. For example, in *BNSF Railway Co. – Abandonment Exemption – In Fergus County, MT*, AB 6 (Sub-No. 434X) (STB served June 6, 2007), BNSF sought authority to discontinue service over a portion of a line that was covered by an abandonment exemption that had become effective one year earlier. The Board granted BNSF’s request to modify its authority, explaining that the request was reasonable because it “narrow[ed] the authorization previously received”:

The Board’s grant of regulatory approval through a carrier’s filing a notice of exemption permits, but does not require the transaction to proceed. BNSF’s request for modification, which narrows the authorization previously received, is reasonable and will be granted. *Id.*, slip op. at 2.

The Board has reached the same result on a number of other occasions. *See, e.g., BNSF Ry. – Aban. Exemption – In Dawson & McCone Counties, MT*, AB 6 (Sub-No. 424X), slip op. at 1 (STB served Jan. 8, 2007) (“BNSF’s request for modification that narrows the authorization it previously received is reasonable and will be granted.”); *Union Pac. R.R. – Aban. Exemption – In Yuma & Maricopa Counties, AZ*, AB 33 (Sub-No. 178X), slip op. at 1 n.1 (STB served Dec. 23, 2002) (granting motion to modify notice of exemption to reflect discontinuance of service over the line at issue rather than authority to abandon the line).

UP’s request for modification of its exemption authority in this proceeding is consistent with modifications the Board has granted in other cases. UP has not abandoned the Line, so it

can still elect not to exercise the authority it received through its Notice of Exemption in this proceeding, and UP is now seeking narrower authorization than it previously received. There would be no purpose in requiring UP to withdraw its request for abandonment authority and submit an entirely new request for narrower authority.<sup>6</sup>

**B. Granting UP's request to modify its exemption authority would resolve concerns raised by BNSF and Valentine.**

The objections BNSF and Valentine raised to UP's abandonment of the Line do not apply to a UP discontinuance of service over the Line. BNSF's and Valentine's concerns relate to how UP's consummation of the abandonment would affect BNSF's alleged rights to operate over the Line. Valentine had no objection to a simple discontinuance of service by UP. In fact, Valentine said in its February 6 letter to the Board that "UP can be authorized to discontinue rail service" over the Line. BNSF also had no objection to UP's cessation of service over the Line. Rather, BNSF's concerns were that UP's consummation of the abandonment would remove the Board's jurisdiction over the Line and allow UP to engage in salvage activities.

If the Board modifies UP's exemption authority so UP can discontinue service over the Line rather than abandon the Line, subject to a no-salvage condition, the Board would not lose jurisdiction over the Line, and UP could not salvage the Line. UP would have to return to the Board and seek additional authority before it could salvage or abandon the Line. *See BNSF Ry. – Abandonment Exemption – In Fergus County, MT*, slip op. at 2 ("As a result, BNSF will no longer have authorization to abandon the portion of the line [at issue] without first seeking Board authority and complying with all applicable regulations."). Modifying UP's exemption authority as UP has requested should resolve the issues that have stalled this proceeding.

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<sup>6</sup> However, if the Board does deny this motion, UP asks the Board to allow UP to withdraw its Notice of Exemption and relinquish the abandonment authority it obtained in this proceeding.

Modifying UP's exemption authority in this proceeding would also allow the Board to lift the housekeeping stay in Finance Docket No. 35601. In Finance Docket No. 35601, BNSF filed a verified notice of exemption for trackage rights to bolster its argument in this proceeding that the Board should preclude UP from consummating its abandonment of the Line. However, UP's right to discontinue service on the Line would not be affected by a Board decision allowing the trackage rights exemption to take effect, so if the Board grants UP's request to modify the notice of exemption in this proceeding, there would no longer be a need for a stay in Finance Docket No. 35601. UP does not agree that BNSF has a right to operate over the Line using trackage rights. UP believes the access provisions of the parties' agreement regarding the joint ownership of the former-SP line between Dawes, Texas, and Avondale, Louisiana, would preclude any such operations. But, as Board precedent makes clear, publication of a notice of exemption for BNSF trackage rights over the Line would not constitute any finding by the Board concerning its jurisdiction over the parties' agreement or BNSF's right to operate over the Line. Nor does it provide any basis for BNSF to claim the Board has determined that BNSF is entitled to conduct such operation. *See, e.g., Gen. Ry. d/b/a Iowa N.W. R.R. – Exemption for Acquisition of Railroad Line – in Osceola & Dickinson Counties, IA*, FD 34867, slip op. at 4 (STB served June 15, 2007) (“Allowing the notice of exemption in this proceeding to become effective will not affect the contract interpretation issues that involve state law.”). Accordingly, if the Board publishes a notice of exemption in Finance Docket No. 35601, it should take the same steps it has taken in prior cases to stress that “the Board has made no determination, one way or the other, concerning” BNSF's right to operate over the Line. *See, e.g., Sioux Valley Reg'l R.R. Auth. – Trackage Rights Exemption – Lines of the State of South Dakota*, FD 34646, slip op. at 4

(STB served Jan. 19, 2005); *see also MRC Reg'l R.R. Auth. – Trackage Rights Exemption – Lines of the State of South Dakota*, FD 34630, slip op. at 4 (STB served Dec. 29, 2004) (same).

### III. CONCLUSION

For the foregoing reasons, the Board should grant UP's motion to modify the notice of exemption in this proceeding and authorize UP to discontinue operations over the Line.

Respectfully submitted,



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September 20, 2012

## CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September, 2012, I caused a copy of Union Pacific Railroad Company's Motion to Modify Notice of Exemption to be served by e-mail or first-class mail, postage prepaid on all parties of record in this proceeding.



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Michael L. Rosenthal