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May 19, 2015

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ENTERED

Office of Proceedings
May 19, 2015
Part of Public Record

Via E-Filing

The Honorable Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E. Street, S.W., Room #100
Washington, DC 20423-0001

METROPOLITAN TRANSIT AUTHORITY OF HARRIS)
COUNTY, TEXAS – ACQUISITION EXEMPTION –)
UNION PACIFIC RAILROAD COMPANY’S RIGHT TO)
RESTORE RAIL SERVICE OVER RAIL BANKED)
RIGHT-OF-WAY IN HARRIS, FORT BEND, AUSTIN)
WHARTON, AND COLORADO COUNTIES, TEXAS)

Finance Docket No. 38546

FORT BEND COUNTY TOLL ROAD AUTHORITY –)
ACQUISITION EXEMPTION – METROPLITAN)
TRANSIT AUTHORITY OF HARRIS COUNTY,)
TEXAS’S RIGHT TO RESTORE RAIL SERVICE OVER)
RAIL BANKED RIGHT-OF-WAY IN HARRIS, FORT)
BEND, AUSTIN, WHARTON, AND COLORADO)
COUNTIES, TEXAS)

Finance Docket No. 35847

UNION PACIFIC RAILROAD COMPANY –)
ABANDONMENT – HARRIS, FORT BEND, AUSTIN,)
WHARTON, AND COLORADO COUNTIES, TX)

AB-33 (Sub-No. 156)

UNION PACIFIC RAILROAD COMPANY –)
ABANDONMENT EXEMPTION – IN COLORADO)
AND WHARTON COUNTIES, TX)

AB-33 (Sub-No. 253X)

RE: UNION PACIFIC RAILROAD COMPANY’S COMMENTS IN AB 33 (SUB-NO. 156) AND AB 33 (SUB-NO. 253X)



Dear Ms. Brown:

The Union Pacific Railroad Company ("UP") respectfully submits the following comments as permitted by the Board in its decision in the above referenced matters having a service date of January 26, 2015.

Sincerely,

UNION PACIFIC RAILROAD COMPANY

A handwritten signature in black ink that reads "Mack H. Shumate, Jr." in a cursive script.

Mack H. Shumate, Jr.
Senior General Attorney

cc: Thompson Coburn, LLP

**BEFORE THE
SURFACE
TRANSPORTATION BOARD**

METROPOLITAN TRANSIT AUTHORITY OF HARRIS)
COUNTY, TEXAS – ACQUISITION EXEMPTION –)
UNION PACIFIC RAILROAD COMPANY’S RIGHT TO) Finance Docket No. 38546
RESTORE RAIL SERVICE OVER RAIL BANKED)
RIGHT-OF-WAY IN HARRIS, FORT BEND, AUSTIN)
WHARTON, AND COLORADO COUNTIES, TEXAS)

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BEND, AUSTIN, WHARTON, AND COLORADO)
COUNTIES, TEXAS)

UNION PACIFIC RAILROAD COMPANY –)
ABANDONMENT – HARRIS, FORT BEND, AUSTIN,) AB-33 (Sub-No. 156)
WHARTON, AND COLORADO COUNTIES, TX)

UNION PACIFIC RAILROAD COMPANY –)
ABANDONMENT EXEMPTION – IN COLORADO) AB-33 (Sub-No. 253X)
AND WHARTON COUNTIES, TX)

UNION PACIFIC RAILROAD COMPANY’S COMMENTS

COMMENT SUMMARY:

The Union Pacific Railroad Company (“UP”) respectfully submits the following comments as permitted by the Board in its decision in the above referenced matters having a service date of January 26, 2015: 1) UP concurs with the Board’s finding that in a series of transactions dating back to 2000 approximately 58 miles of rail line near Houston, Texas known as the West Park Line, (the “West Park Line” or “Line”) were authorized to be abandoned by UP and rail banked pursuant to the National Trail System Act, 16 U.S.C. Section 1247(d) (“Trail Acts”); 2) UP retains and has not waived by agreement the right to reinstate common carrier by railroad freight operations in the future, if needed, on all or any portions of the Line at issue in the above-captioned proceedings; and 3) Union Pacific reserves and retains unto itself, its

successors and assigns, the following interest reserved in the Vesting Deeds: ... the right to enforce the restrictive covenant set forth in the Vesting Deeds prohibiting the use of the Railroad Easement for freight service except with the prior written consent of Union Pacific.

HISTORIC SUMMARY:

On December 30, 1992, the Metropolitan Transit Authority of Harris County, Texas (“Metro”) and the Southern Pacific Transportation Company (“SP”) the predecessor in interest by merger to UP, entered into a Purchase and Sale Agreement (“Purchase and Sale Agreement”) covering the West Park Line. Under the Purchase and Sale Agreement, SP retained the exclusive right to provide freight service on the Line unless applicable governmental requirements required Metro to provide such freight service. On December 30, 1992, Metro and SP also entered into a document referenced as the Relocation Agreement (the “Relocation Agreement”). Under the Relocation Agreement, SP was paid by Metro for certain relocation and replacement costs incurred by SP in connection with the acquisition of the Line by Metro and the relocation of SP’s operations.

Prior to final closing under the Purchase and Sale Agreement, certain disputes arose between Metro and SP which caused Metro to file a lawsuit styled as, Metropolitan Transit Authority of Harris County, Texas v. Southern Pacific Transportation Company, Civil Action No. H-94-1015 and caused SP to file a lawsuit styled as, Southern Pacific Transportation Company v. Metropolitan Transit Authority of Harris County, Texas, Civil Action No. H-94-1014. Both of these suits were filed in the United States District Court for the Southern District of Texas. The lawsuits were consolidated in Southern Pacific Transportation Company v. Metropolitan Transit Authority of Harris County, Texas, CA No. H-94-1014.

The parties resolved their differences and on April 12, 1997 entered into a Settlement and Release Agreement (the “Settlement and Release Agreement”). The terms of the Settlement and Release Agreement supersede and control any contrary or conflicting provisions of the Relocation Agreement and the Purchase and Sale Agreement. Exhibit D to the Purchase and Sale Agreement is entitled Special Warranty Deed and Grant of Easement dated December 31, 1992 (the “Special Warranty Deed and Grant of Easement”). In this document, the SP specifically retained a railroad easement for freight operations on the Line. Moreover, the document provides that the railroad easement shall terminate automatically at such time as an order, decision or notice of the Interstate Commerce Commission (now, the Surface Transportation Board) granting authority for grantor, SP, to abandon all of its freight rail services on the property has become effective and has been voluntarily consummated by the SP. To date, Union Pacific as successor in interest to SP has never consummated the abandonment under 49 C.F.R. § 1152.29.

On May 25, 2001, a letter agreement was entered into between UP and Metro. The letter agreement confirms in part that Metro and UP have agreed to implement their respective obligations under the aforementioned Settlement and Release Agreement. The letter agreement also provides that UP will complete an abandonment/discontinuance proceeding before the Surface Transportation Board and that UP will assign and quit claim to Metro pursuant to the National Trails Act any remaining right, title and interest of UP in the West Park Line including

but not limited to the 25 foot wide railroad easement for freight operations reserved in the deeds conveying the West Park Line to Metro in 1992. At the same time UP ceased all remaining freight operations on the West Park Line.

On June 19, 2001, UP, as successor in interest to SP, and Metro entered into an Interim Trail Use/Rail Banking Agreement and Assignment and Deed without Warranty (the "Interim Trail Use Agreement"). This Interim Trail Use Agreement provides in part that, "UP does hereby assign, convey and transfer unto Metro that part of the railroad easement for freight operations upon, over, under and across the Line together with all of UP's other rights, title and interest in and to the Line and all operating rights and other rights of use relating to the Line save and except any part of the Harris County Toll Road Property." UP did reserve certain rights to itself under the Interim Trail Use Agreement (1) UP reserved the minerals and mineral rights, mineral interest and royalties on the Line; (2) UP reserved fee interest to the land on which another UP mainline crosses over the Line and (3) UP reserved the right to enforce the restrictive covenant set forth in the vesting deeds prohibiting the use of the railroad easement for freight operations except with the prior written consent of UP. Nowhere in the Interim Trail Use Agreement does UP give up its rights as the abandoning carrier to reactivate rail service on the Line.

On November 14, 2006, Metro filed a notice of intent (the "Notice of Intent") to terminate trail use with regard to a portion of the Line and served UP with such Notice of Intent. See STB Docket No. AB 33 Sub No. 156. In this filing, Metro sought authority from the Board to substitute approximately 29 acres of the original right of way of the Line for adjacent property owned by the Harris County Toll Road Authority. The objective was to permit the Harris County Toll Road Authority to construct a toll plaza on the 29 acres and preserve the right to reestablish rail operations on the Line by substituting the adjacent property transferred from the Harris County Toll Road Authority to Metro.

By decision of the Surface Transportation Board with a late release date of December 1, 2006, the Board authorized the requested transaction and removed the subject 29 acres from the Interim Trail Use Agreement under 49 C.F.R. 1152.29(c)(2). UP did not file any objection to Metro's Notice of Intent. There was no need to consummate any abandonment of the portion of the Line removed from interim trail use because it was substituted with the adjacent property. Therefore, UP's ability to reinstitute rail operations on the Line was preserved.

On July 29, 2014 both Metro and the Fort Bend County Toll Road Authority (the "FBCTRA") filed separate verified Notices of Exemption (the "Notices of Exemption") for the acquisition from UP of UP's right to restore rail service on the Line. In both Notices of Exemption Metro in F.D. No. 35846 and FBCTRA in F.D. No. 35847 state that pursuant to aforesaid Interim Trail Use/Rail Banking Agreement and Assignment and Deed without Warranty, Metro became the interim trail user and the holder of the restoration rights for what Metro and FBCTRA refer to as "Sub-No. 156 ROW" or the Line. In neither matter was UP served with a copy of the Notice of Exemption by Metro or FBCTRA.

UNION PACIFIC COMMENTS:

UP contacted Metro and sought explanation for the filing of the two Notices of Exemption. Metro informed UP that in light of the Board's decision in King County, Wash. – Acquisition Exemption – BNSF Railway, STB Finance Docket No. 35148 (STB served Sept. 18, 2009) (King County) and the requirements for an exemption from 49 U.S.C. § 10901 under 49 C.F.R. § 1150.31 for acquisition by a non carrier of the restoration rights over a rail banked right of way, Metro was within its contractual rights and was subject to the obligation to file said Notices of Exemption.

Rather than challenge Metro's contractual claim to be the holder of the restoration rights on the Line, UP informed Metro that UP did not specifically state in the Interim Trail Use/Rail Banking Agreement and Assignment and Deed Without Warranty, as BNSF did in King County, that UP transferred its "residual common carrier rights and obligations," including UP's right to reinstate rail service in the future on the Line. UP also informed Metro of UP's contractual right in the Interim Trail Use/Rail Banking Agreement and Assignment and Deed Without Warranty, specifically, "Union Pacific reserves and retains unto itself, its successors and assigns, the following interests reserved in the Vesting Deeds: ... the right to enforce the restrictive covenant set forth in the Vesting Deeds prohibiting the use of the Railroad Easement for freight service except with the prior written consent of Union Pacific." See Clarification Regarding 49 C.F.R. §1150.31 filed by Metro and FBCTRA with the Board in this matter on November 10, 2014 at p. 7.

As a result of this discussion between Metro and UP, Metro and FBCTRA filed with the Board the Clarification Regarding 49 C.F.R. §1150.31 Verified Notices of Exemption Filed by Metropolitan Transit Authority of Harris County, Texas, and Fort Bend County Toll Road Authority and Joint Petition to Vacate and Reissue Notice of Interim Trail Use and Certificate of Interim Trail Use (the "Clarification").

The footnote on page 9 of the Clarification was inserted at the request of UP: (1) to acknowledge preservation by Metro and FBCTRA of UP's railroad operation reinstatement rights as a common carrier with regard to the Line and (2) to affirm that UP never consummated abandonment of the Line and while UP did transfer all of its real and personal property interest in the Line to Metro and did transfer all of its active interests as a common carrier for freight operations on the Line, UP did not waive its rights under law to reinstate rail service on all or any portion of the Line provided UP reacquired the Line or the portion of the Line UP needed to so reinstate such rail service. By their filings Metro and FBCTRA do not take the position that UP has waived its existing rights under law to reinstate rail service. UP retains and has not waived by agreement the right to reinstate common carrier by railroad freight operations in the future, if needed, on all or any portion of the Line at issue in the above-captioned proceedings. In connection with any such restoration of railroad freight operations, however, UP acknowledges that it will continue to be obligated to pay the property owner for the use of the Line for restored freight service and for the capital costs and expenses for any loss to the property owner's existing facilities in or adjacent to the Line where freight services are restored.

It is also UP's understanding as provided at page 10 of the Response of Metropolitan

Transit Authority of Harris County, Houston, Texas and Fort Bend County Toll Road Authority to the Board's Decision Dated September 19, 2014 that (1) "...should reactivation become necessary or desired along the improved segment of the Subject ROW, the obvious and preferred location to reactivate service (for any carrier or METRO) would be on the 26-foot-wide Rail Preservation Corridor. If that Rail Preservation Corridor is insufficient, the carrier could utilize a part of the larger 300-foot corridor or, if necessary, reactivate service on whatever portion of the 100-foot Subject ROW as is necessary to support the reactivated rail service." and (2) at footnote 16 on page 10 that, "METRO and FBCTRA are **not** and do **not** by any of the filings herein intend to become, railroads with a common carrier obligation to provide freight service. Further, METRO and FBCTRA have **not** and do **not** intend to operate freight service over any portion of the Westpark Line."

This right to restore freight service is part of the common carrier right originally granted by the Board and can only be eliminated by proper consummation of abandonment or by separate Board action. The Clarification is also needed to verify that, the Special Warranty Deed and Grant of Easement dated December 30, 1992 is subject to the following contractual condition and exception, **Union Pacific reserves and retains unto itself, its successor and assigns, the following interests reserved in the Vesting Deed: ... the right to enforce the restrictive covenant set forth in the Vesting Deeds prohibiting the use of the Railroad Easement for freight service except with the prior written consent of Union Pacific.** See Clarification at p. 7.

If further support of this position, UP relies in part upon the Board's decision in Iowa Southern Railroad Company – Exemption – Abandonment in Pottawattomie, Mills, Fremont and Page Counties, IA (not printed), STB Docket No. AB-298 (Sub No. 1X) served December 12, 1988. In this matter, the Commission modified an existing Notice of Interim Trail Use to allow the first reconstruction and reactivation of a rail-banked line since the Commission's implementation of the Trails Act. Interim trail use over the line had been instituted by the Iowa Natural Heritage Foundation (INHF), which had purchased the right-of-way from the Iowa Southern Railroad (IS). INHF and CBEC Railway jointly requested the reactivation. Because rail banking is voluntary, the Commission found that where, as here, the original owning carrier continues to exist, it must concur in the reactivation. Accordingly, the Commission required IS to file a letter of concurrence. The Commission noted that the request for construction and operation of the line relieved IS of any further common carrier obligation to provide service over the line.

Metro states in its Clarification that:

As such, Metro's request for retroactive authority to acquire certain of the rights transferred to it by UP in 2001 and 2008, FBCTRA's request for authority to acquire those rights from Metro, and the parties' joint request to vacate and reissue the NITU and CITU covering the Subject ROW to reflect FBCTRA as the interim trail user are subject to the restrictive covenant set forth in the Vesting Deeds and confirmed in the Interim Trail Use/Rail Banking Agreements and Assignments and Deeds Without Warranty, which covenant prohibits use of the Subject ROW for freight rail service except with prior written consent of UP. (See Clarification at p. 9).

A railroad's choice to accept an NITU or a CITU and to eventually enter into an Interim Trail Use/Rail Banking Agreement is voluntary on the railroad's part. (See 49 C.F.R. §1152.29(b)(1)(ii)) If a railroad chooses not to negotiate a trail deal, after the period for public use expires, and all outstanding conditions to abandonment consummation are satisfied, the railroad is free to consummate the abandonment and all common carrier interest current and residual is terminated and otherwise cancelled. Marvin M. Brandt v. United States, 572 U.S. (2014). Therefore, if a railroad chooses to impose legally enforceable contractual requirements in the trail use negotiations and the trail sponsor agrees to such contractual requirements, such contractual agreement should be enforced by the Board. Contractual requirements may offer the only means for a railroad to protect the remainder of its franchise and enter into a Trail Use Agreement also. If the Board were to determine that legally enforceable contractual requirements will not be upheld, than railroads would have no alternative than to reject requests for trail use agreements.

Even in situations where multiple Offers of Financial Assistance are considered in a matter seeking authority to abandon a line, the railroad is permitted to choose which Offer of Financial Assistance ("OFA") it prefers to negotiate. (See 49 C.F.R. §1152.27(k)(1)). In this way, the abandoning railroad may protect its franchise by negotiating with the offeror of an OFA that makes most economic sense for the abandoning railroad.

UP already has Board authority to operate the subject line as a Line of Railroad that is subject to Board authority. An Interim Trail Use Agreement merely discontinues common carrier operation on the Line, it does not consummate abandonment of the Line. If a third party desires to operate a Line of Railroad that is covered by an Interim Trail Use Agreement, the third party has to seek and receive common carrier operating authority from the Board. If the abandoning railroad such as UP in this matter, chooses to reinstate railroad operations on a Line covered by an Interim Trail Use Agreement, all the railroad needs to do is serve notice on the trail group, pay for the Line and reinitiate rail service. No additional authority from the Board is necessary. However, if the abandoning railroad chooses not to reinstate rail service any other person is free to seek such authority from the Board. (King County, WA Acquisition Exemption – BNSF Railway Company – STB Finance Docket No. 35148 (STB served Sept. 18, 2009). UP's contractual right set forth and reserved in the vesting deeds which prohibits the use of the Railroad Easement for freight service except with the prior written consent of UP as agreed to and reaffirmed in the Interim Trail Use Agreement, is a contractual agreement between Metro and UP, and with the assignment from Metro to FBCTRA, a contractual agreement between FBCTRA and UP, also. It does not prevent another person or railroad from seeking authority from the Board to reinstate service on the Line, but it does give UP the right to announce to the Board UP is reinstating service on the Line itself thereby rendering any third party petition to reinstitute service moot since UP already has Board authority to operate the Line.

Respectfully submitted

UNION PACIFIC RAILROAD COMPANY



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