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May 20, 2015

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VIA ELECTRONIC FILING

The Honorable Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20024

ENTERED
Office of Proceedings
May 20, 2015
Part of
Public Record

Re: STB Finance Docket No. 35846, *Metropolitan Transit Authority of Harris County, Texas--Acquisition Exemption--Union Pacific Railroad Company's Right to Restore Service over Rail Banked Right-of-Way in Harris, Fort Bend, Austin, Wharton, and Colorado Counties, Texas*

STB Finance Docket No. 35847, *Fort Bend County Toll Road Authority--Acquisition Exemption-- Metropolitan Transit Authority of Harris County, Texas's Right to Restore Service over Rail Banked Right-of-Way in Harris, Fort Bend, Austin, Wharton, and Colorado Counties, Texas*

STB Docket No. AB-33 (Sub-No. 156), *Union Pacific Railroad Company--Abandonment--in Harris, Fort Bend, Austin, Wharton, and Colorado Counties, Tx*

STB Docket No. AB-33 (Sub-No. 253X), *Union Pacific Railroad Company--Abandonment Exemption--in Colorado and Wharton Counties, Tx*

Dear Ms. Brown:

Enclosed please find a combined response from Metropolitan Transit Authority of Harris County, Houston, Texas and Fort Bend County Toll Road Authority to the Board's Decision Dated January 26, 2015 in the above-referenced proceedings.

Very truly yours,

Thompson Coburn LLP

By 

Thomas Sean McGowan

Enclosure

The Honorable Cynthia T. Brown
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**BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, D.C.**

Metropolitan Transit Authority)	
of Harris County, Texas – Acquisition)	
Exemption -- Union Pacific Railroad)	
Company’s Right to Restore Rail)	Finance Docket No. 35846
Service over Rail Banked)	
Right-of-Way in Harris, Fort Bend,)	
Austin, Wharton, and Colorado)	
Counties, Texas)	

Fort Bend County Toll Road)	
Authority – Acquisition Exemption –)	
Metropolitan Transit Authority)	
of Harris County, Texas’s Right to Restore Rail)	Finance Docket No. 35847
Service over Rail Banked)	
Right-of-Way in Harris, Fort Bend,)	
Austin, Wharton, and Colorado)	
Counties, Texas)	

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

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

**RESPONSE OF THE METROPOLITAN TRANSIT AUTHORITY OF HARRIS
COUNTY, HOUSTON, TEXAS AND FORT BEND COUNTY TOLL ROAD
AUTHORITY TO THE BOARD’S DECISION DATED JANUARY 26, 2015**

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Authority of Harris County,
Houston, Texas and Fort Bend
County Toll Road Authority

Dated: May 20, 2015

**BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, D.C.**

Metropolitan Transit Authority)	
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COUNTIES, TX)	

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COLORADO AND WHARTON COUNTIES, TX)	

**RESPONSE OF THE METROPOLITAN TRANSIT AUTHORITY OF HARRIS
COUNTY, HOUSTON, TEXAS AND FORT BEND COUNTY TOLL ROAD
AUTHORITY TO THE BOARD’S DECISION DATED JANUARY 26, 2015**

On May 19, 2015, Union Pacific Railroad Company (UP) addressed the Surface Transportation Board's (Board's) January 26, 2015 Decision and concluded that its retained rights are consistent with the National Trails System Act, 16 U.S.C. §§ 1241-1251 (Trails Act). The Metropolitan Transit Authority of Harris County, Texas (METRO)¹ and the Fort Bend County Toll Road Authority (FBCTRA)² provide this further Response to the Board's January 26, 2015 Decision entered in the above-referenced dockets.

Background

METRO is the current owner of and interim trail user on a 57.72-mile line of railroad known as the Bellaire Subdivision, extending from milepost 3.48 near Bellaire Junction in Houston, Harris County, Texas, to milepost 61.2, near Eagle Lake, Colorado County, Texas in Harris, Fort Bend, Austin, Wharton, and Colorado Counties (the Westpark Line).³ METRO purchased the Westpark Line and improvements from Southern Pacific Transportation Company (SP) in December 1992, subject to the following restrictive covenant set forth in the special warranty deeds (Vesting Deeds) to METRO from SP:

The Property conveyed herein is expressly restricted so that, and by Grantee's acceptance of delivery of this Deed Grantee expressly covenants that, neither Grantee nor any other person or entity other than Grantor, its licensees and successors, shall have the right to use any part of the Railroad Easement or any other part of the Property for purposes of providing, or the right to hold itself out

¹ METRO, a non-carrier, is a metropolitan transit authority created under the laws of Texas as a public body corporate and politic.

² FBCTRA, a non-carrier, is a Texas local government corporation created by and acting on behalf of Fort Bend County, Texas.

³ The entire line of railroad—from milepost 3.48 at Dunlavy Street in Houston along Westpark Boulevard to milepost 61.2 at Eagle Lake—has been referred to as the “Westport Line,” the “Bellaire Branch,” and the “Bellaire Subdivision” in prior filings for AB-33 (Sub-No. 156). In AB-33 (Sub-No. 253X), a portion of the line of railroad at issue was referred to as the “Chesterville Industrial Lead,” extending from milepost 52.9 near Chesterville, to milepost 61.2 near Eagle Lake, in Colorado and Wharton Counties, Texas.

as providing, freight rail operations or other railroad service provided by common carrier railroads.⁴

In 2001, the foregoing restrictive covenant was amended to provide that it is perpetual, pursuant to an Amendment to Railroad Easement.⁵ Hereinafter, this restrictive covenant, as amended, is referred to as the Restrictive Covenant.

The Railroad Easement is defined in the Vesting Deeds as:

the portion of the Property located within an area twelve and one-half feet (12.5') on either side of the center line of the existing railroad tracks attached to the Land, together with access thereto across all other Property as reasonably necessary for Grantor's use and enjoyment of this Railroad Easement;⁶

Following METRO's purchase of the Westpark Line, SP (and then UP⁷) continued conducting freight operations and operating as a common carrier on the Railroad Easement. *See generally Metropolitan Transit Authority of Harris County, TX-Petition for Declaratory Order*, 9 I.C.C.2d 559, F.D. 32260 (Apr. 15, 1993) (finding that METRO-SP transaction was not subject to the jurisdiction of the Commission).

Between 2000 and 2008, UP sought to abandon the Westpark Line. In 2000, UP sought to abandon a 49.42-mile stretch of the Westpark Line. *See Union Pacific Railroad Company—Abandonment—in Harris, Fort Bend, Austin, Wharton, and Colorado Counties, Tex.*, AB-33

⁴ *Special Warranty Deed and Grant of Easement* dated December 30, 1992.

⁵ Amendment to Railroad Easement dated as of May 31, 2001, recorded as follows: Recorded on 6/19/2001 under Clerk's File No. V119622, Official Public Records, Harris County, Texas; Recorded on 6/19/2001 under File No. 2001054961, Official Public Records, Fort Bend County, Texas; Recorded on 6/19/2001 under File No. 013479, Official Public Records, Austin County, Texas; Recorded on 6/21/2001 in Vol. 416, Pg. 343, Official Public Records, Wharton County, Texas; Recorded on 6/21/2001 in Vol. 374, Pg. 89, Official Public Records, Colorado County, Texas.

⁶ *Special Warranty Deed and Grant of Easement* dated December 30, 1992.

⁷ Union Pacific Railroad Company (UP) succeeded to SP's rights under the Railroad Easement.

(Sub-No. 156). On November 8, 2000, the Board issued its decision and a certificate of interim trail use (CITU) for the portion of the Westpark Line stretching from milepost 3.48 near Bellaire Junction in Houston, to milepost 52.9, near Chesterville.⁸ In 2008, UP sought to abandon the remaining 8.3 miles of the Westpark Line, between milepost 52.9 near Chesterville in Wharton County, Texas, and milepost 61.2 near Eagle Lake in Colorado County, Texas. *See Union Pacific Railroad Company—Abandonment Exemption—in Colorado and Wharton Counties, Tex.*, AB-33 (Sub-No. 253X). On March 24, 2008, the Board issued its decision and a notice of interim trail use (NITU) for the last 8.3 miles of the Westpark Line.

While these abandonment proceedings were before the Board, in May 2001 and December 2008, METRO and UP concluded two Interim Trail Use/Rail Banking Agreements and Assignments and Deeds Without Warranty (the Trail Use Agreements). Under these Trail Use Agreements, METRO became the interim trail user for the 100-foot-wide Westpark Line and the owner of the Railroad Easement and all of UP's other rights, title, and interests in and to the Westpark Line, including all operating rights and other rights of use relating to the Westpark Line, save and except certain specific interests and rights reserved by UP. Specifically, UP reserved the following limited right to enforce the Restrictive Covenant, as set forth in the Trail Use Agreements:

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**

⁸ On December 1, 2006, the Board issued a decision granting METRO's request to vacate the CITU for a portion of the 100-foot wide right-of-way solely in Harris County, Texas, but that modification is not at issue here.

Railroad Easement for freight service except with the prior written consent of Union Pacific.⁹

Hereinafter, this reserved right is referred to as the UP Enforcement Right. While the right to enforce the Restrictive Covenant focuses on the 25-foot-wide Railroad Easement on the Westpark Line, the Vesting Deeds do permit relocation of the 25-foot-wide Railroad Easement by METRO within the entire 100-foot-wide Westpark Line so long as the relocation does not interfere with the freight railroad operations. Therefore, while the current existing 25-foot-wide Railroad Easement area is the most likely operational area for any reactivation of freight railroad operations on the Westpark Line, there exists the right for METRO to shift such freight operations to any location within the 100-foot-wide Westpark Line so long as the relocation does not interfere with the freight railroad operations.

On July 29, 2014, METRO and FBCTRA initiated and/or sought to reopen proceedings before the Board to effectuate METRO's planned transfer to FBCTRA of its ownership rights in and trail-user status over the portion of the Westpark Line lying in Harris, Fort Bend, Austin, Wharton, and Colorado Counties, Texas, from "milepost 20, approximately 2,020 feet east of the Harris County-Fort Bend County line, to milepost 61.2 near Eagle Lake, in Colorado County, Texas, a distance of 41.2 miles in Harris, Fort Bend, Austin, Wharton, and Colorado Counties, Texas (the Subject ROW)."¹⁰ METRO will retain all of its rights in the original Westpark Line

⁹ *Interim Trail Use/Rail Banking Agreement and Assignment and Deed Without Warranty* at para. 5.d, dated May 31, 2001 (emphasis added); *Interim Trail Use/Rail Banking Agreement and Assignment and Deed Without Warranty* at para 4.c, dated December 18, 2008 (emphasis added).

¹⁰ See *Union Pacific Railroad Company—Abandonment—in Harris, Fort Bend, Austin, Wharton, and Colorado Counties, Tex.*, AB-33 (Sub-No. 156); *Union Pacific Railroad Company—Abandonment Exemption—in Colorado and Wharton Counties, Tex.*, AB-33 (Sub-No. 253X).

Note: FBCTRA recently learned that this description, as initially referenced in the *Joint Petition to Vacate and Reissue CITU and NITU*, dated July 29, 2014 at pp. 4 and 5 filed in STB Dockets AB-33 (Sub-No. 156) and AB-33 (Sub-No. 253X), and the *Clarification*, dated November 10, 2014 at p. 4

located in Harris County, Texas (from milepost 3.48 to milepost 20.43 at the Harris County/Fort Bend County line), referred to herein as the METRO ROW. METRO and FBCTRA each initiated an exemption proceeding seeking authority from the Board to acquire all the rights transferred by UP to METRO, and sought to be transferred by METRO to FBCTRA, in the Trail Use Agreements.¹¹ METRO believes that these rights include: (1) the right to install and operate passenger/commuter transit rail service in the 100-foot-wide right-of-way along the Westpark Line, subject to Board approval, if necessary, and (2) the nonexclusive and unexercised right to reactivate freight rail service on the Westpark Line, subject to UP's Enforcement Rights within the Railroad Easement,¹² and further subject to Board approval, the Restrictive Covenant, and the regulatory rights granted by the Trails Act to an entity seeking to reactivate rail service.

On November 10, 2014, METRO and FBCTRA filed a supplemental pleading in the above-referenced dockets. The supplemental pleading, entitled Clarification Regarding 49 C.F.R.

filed in STB Dockets AB-33 (Sub-No. 156), AB-33 (Sub-No. 253X), FD 35846, and FD 35847, is incorrect. A more accurate description is as follows: "milepost 20.42 on the Harris County-Fort Bend County line, to milepost 61.2 near Eagle Lake, in Colorado County, Texas, a distance of 40.78 miles in Fort Bend, Austin, Wharton, and Colorado Counties, Texas (the Subject ROW)."

¹¹ See *Metropolitan Transit Authority of Harris County, Tex.—Acquisition Exemption—Union Pacific Railroad Company (Right to Restore Rail Service over Railbanked Right-of-Way in Harris, Fort Bend, Austin, Wharton, and Colorado Counties, Tex.)*, FD 35846; *Fort Bend County Toll Road Authority—Acquisition Exemption—Metropolitan Transit Authority of Harris County, Tex. (Right to Restore Rail Service over a Railbanked Right-of-Way in Harris, Fort Bend, Austin, Wharton, and Colorado Counties, Tex.)*, FD 35847.

Note: On May 19, 2015, FBCTRA filed a separate pleading withdrawing its Verified Notice of Exemption to Acquire METRO's Right to Restore Service Over Railbanked Right of Way in Harris, Fort Bend, Austin, Wharton and Colorado Counties, Texas, filed in STB Finance Docket No. 35847 on July 29, 2014. FBCTRA has determined that acquisition of such rights is unnecessary at this time.

¹² 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.

§ 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), contained additional information regarding the parties' understanding with respect to the acquisition and transfer of the restoration rights along the Westpark Line.

Board's September 19, 2014 Decision (Decision I)

In its September 19, 2014 decision (Decision I), the Board stated that based on the pleadings, it appears that only a 26-foot-wide right-of-way was retained for interim trail use and rail banking. The Board directed METRO and FBCTRA to submit "a more detailed discussion as to why the remaining 26-foot right-of-way would be adequate to accommodate future rail service."¹³ In a response filed May 19, 2015, METRO and FBCTRA informed the Board that METRO and FBCTRA do not seek to *narrow* the width of the Subject ROW nor do they seek to *remove* any portion of the Subject ROW or the METRO ROW from the National Trails System. Rather, METRO and FBCTRA intend for the entire 100-foot width of the Subject ROW and the remaining width of the Harris County ROW (milepost 3.48 to milepost 20.42) to continue to be a rail-banked right-of-way in the National Trails System. METRO and FBCTRA executed an Interlocal Agreement to provide for the development of transportation projects permitted by, and the cooperative preservation of the Subject ROW (milepost 20.42 through milepost 61.2) and the METRO ROW (milepost 3.78 through milepost 20.42) under, the Trails Act and its implementing regulations, while providing for the transfer of ownership and control of the

¹³ The Board directed the parties to respond to Decision I by October 21, 2014. On October 17, 2014, METRO and FBCTRA requested an extension of time to respond to Decision I. The Board granted that request on October 20, 2014, extending the deadline to reply until February 18, 2015. On February 17, 2015, METRO and FBCTRA requested a second extension of time. The Board granted that request on February 18, 2015, extending the deadline to reply to May 19, 2015.

Subject ROW and assignment of the trail use agreement for the Subject ROW to FBCTRA. In the Interlocal Agreement, METRO and FBCTRA have pledged to maintain the Subject ROW and METRO ROW for future rail transit use. In addition, FBCTRA will be contractually required to preserve a 26 foot corridor at all times within the existing 100 feet of the Subject ROW (the Rail Preservation Corridor), and to connect it to the METRO ROW at grade and providing for appropriate curvatures for future rail use in the entire length of the Subject ROW and METRO ROW so that it is feasible to install and operate commuter rail in the future. As the replacement interim trail user in the Subject ROW, it is not FBCTRA's intent that FBCTRA fulfill its Trails Act obligation by narrowing the width of the Subject ROW to only 26 feet.

Board's January 26, 2015 Decision (Decision II)

On January 26, 2015, the Board issued a decision (Decision II) directing METRO and FBCTRA to submit by February 18, 2015 "a more detailed explanation as to what reactivation rights METRO holds in light of UP's retained rights." Decision II also invited METRO, FBCTRA, and UP to submit comments on "UP's apparent retained right to veto reactivation." On February 17, 2015, METRO and FBCTRA requested an extension of time to respond to Decision II, as well as a previous Decision I entered by the Board in the abandonment dockets on September 19, 2014. The Board granted that request on February 18, 2015, extending the deadline to reply to Decision I and Decision II to May 19, 2015.

As METRO and FBCTRA addressed Decision I in a separate filing, this filing only addresses Decision II.

Response

METRO Holds Reactivation Rights To The Westpark Line, Subject To The Restrictive Covenant And The Regulatory Right Of A Carrier Under The Trails Act To Restore Rail Service On The Westpark Line.

Pursuant to the various transactions and documents outlined above and discussed in the parties' other filings, METRO currently owns the Westpark Line. METRO's ownership rights include: (1) the right to install and operate passenger/commuter transit rail service in the 100-foot-wide right-of-way along the Westpark Line, and (2) the nonexclusive and unexercised right to reactivate freight rail service on the Westpark Line, subject to UP's Enforcement Rights relating to the Restrictive Covenant within the Railroad Easement. These rights are subject to Board approval, where necessary, the Restrictive Covenant within the Railroad Easement, and the regulatory rights granted by the Trails Act to an entity seeking to reactivate rail service.

METRO's right to install and operate passenger/commuter transit service applies to the entire 100-foot width of the Subject ROW and the remaining width of the METRO ROW. As discussed above, METRO and FBCTRA propose to transfer the Subject ROW subject to the contractual obligation to preserve the Rail Preservation Corridor for commuter/passenger rail transit service. As the replacement interim trail user, FBCTRA does not intend to narrow the width of the Subject ROW to only 26 feet. Rather, by specifically carving out the 26 feet of the Rail Preservation Corridor in the Subject ROW, FBCTRA is fulfilling its Interlocal Agreement contractual obligation to METRO to preserve a 26-foot-wide corridor for rail transit in any development of the Subject ROW.

METRO is of the opinion that it holds nonexclusive and unexercised right to reactivate freight service, subject to the two conditions (Board approval and regulatory rights granted by the Trails Act) and that such right applies to the existing 100-foot-wide right-of-way on the Westpark Line subject to UP's Enforcement Rights. Any entity, including UP, seeking to

reactivate freight service would also be subject to METRO's rights and would be obligated to compensate METRO or the then owner of the Subject ROW full and fair compensation for use of any part of the 100-foot-wide Westpark Line for such freight rail service. Any other entity, including METRO, seeking to reactivate freight service in the Railroad Easement would also be subject to UP's Enforcement Rights as to the Restrictive Covenant in the Railroad Easement and the Trails Act.¹⁴ However, as stated above, METRO does not, by any of its filings, intend to become a railroad with a common-carrier obligation to provide freight service over any portion of the Westpark Line.

Under the Vesting Deeds and the Interim Trail Use Agreements, UP holds a state law right to enforce the Restrictive Covenant within the Railroad Easement, as defined in those documents. UP's Enforcement Rights within the Railroad Easement, and METRO's rights within the Westpark Line, are consistent with the requirement that all interim trail use is subject to potential reactivation of the right-of-way for rail service. Its purpose and effect is not to veto the reactivation of rail service.

Conclusion

METRO holds rail service rights and reactivation rights in the Westpark Line. It holds the right to install and operate passenger/commuter transit rail service along the Westpark Line, subject to Board approval, if necessary, and also the right to reactivate freight rail service on the Westpark Line, subject to Board approval, the Restrictive Covenant, and the regulatory rights granted by the Trails Act to an entity restoring rail service. METRO's rights in and to the Westpark Line and the conditions upon METRO's rights, namely the Restrictive Covenant, are

¹⁴ The Parties understand that their statutory rail banking obligations extend to the entire 100-foot right-of-way and that the entire width is subject to restoration for freight rail service.

consistent with the requirement that all interim trail use is subject to potential reactivation of the right-of-way for rail service.

Therefore, based on the parties' previous filings and the information contained herein, METRO and FBCTRA respectfully request that the Board: (1) reopen proceedings in AB-33 (Sub-No. 156) and AB-33 (Sub-No. 253X), (2) partially vacate the CITU issued on November 8, 2000, as modified on December 1, 2006, in AB-33 (Sub-No. 156), with respect to the Subject ROW (milepost 20.42 to milepost 52.9) but not with respect to the Harris County ROW (milepost 3.48 to milepost 20.42), under which METRO has been operating as trail user, (3) vacate the NITU issued on March 24, 2008 in AB-33 (Sub-No. 253X) (milepost 52.9 to milepost 61.2), under which METRO has been operating as trail user, (4) reissue a CITU in AB-33 (Sub-No. 156) to FBCTRA with respect to a portion of the Subject ROW (milepost 20.42 to milepost 52.9), and (5) reissue a NITU in AB-33 (Sub-No. 253X) to FBCTRA for milepost 52.9 to milepost 61.2.

Should further information be required, please contact the undersigned.

Respectfully submitted,



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Dated: May 20, 2015

Certificate of Service

I hereby certify that on May 20, 2015, I served a copy of the foregoing *Response* on the following:

By first class mail, postage prepaid:

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