

216187

FOUR PENN CENTER
SUITE 200
1600 JOHN F. KENNEDY BLVD.
PHILADELPHIA, PA 19103-2808
TELEPHONE 215.563.9400
FACSIMILE 215.665.9988
WWW.GGELAW.COM

GC&E GOLLATZ
GRIFFIN
& EWING
ATTORNEYS - AT - LAW

ERIC M. HOCKY
DIRECT DIAL 215.320.3720
emhocky@ggelaw.com

April 5, 2006
VIA: electronic filing

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
Mercury Building, #711
1925 K Street, N.W.
Washington, DC 20423-0001

Re: STB Finance Docket No. AB-33 (Sub-No. 239X)
Union Pacific Railroad Company -
Discontinuance Exemption -
In Oklahoma City, Oklahoma (Old Rock Island Main)

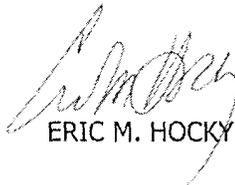
Dear Secretary Williams:

Enclosed for filing please find:

- (1) Petition of Oklahoma Department of Transportation to Revoke or Reopen, and
- (2) Environmental Comments of Oklahoma Department of Transportation and Petition for Stay.

This letter and the pleadings are being filed electronically in accordance with the Board's rules.

Respectfully,



ERIC M. HOCKY

Attachments

cc: Robert T. Opal (via email with attachments)

GOLLATZ, GRIFFIN & EWING, P.C.

WEST CHESTER

PHILADELPHIA

WILMINGTON

Before the
SURFACE TRANSPORTATION BOARD

STB Docket No. AB-33 (Sub-No. 239X)

UNION PACIFIC RAILROAD COMPANY
-- DISCONTINUANCE EXEMPTION --
IN OKLAHOMA CITY, OKLAHOMA
(OLD ROCK ISLAND MAIN)

**PETITION OF OKLAHOMA DEPARTMENT OF TRANSPORTATION
TO REVOKE OR REOPEN**

Eric M. Hocky, Esq.
Gollatz, Griffin & Ewing, P.C.
Four Penn Center, Suite 200
1600 John F. Kennedy Blvd.
Philadelphia, PA 19103
(215) 563-9400

Dated: April 5, 2006

Before the
SURFACE TRANSPORTATION BOARD

Docket No. AB-33 (Sub-No. 239X)

UNION PACIFIC RAILROAD COMPANY
-- DISCONTINUANCE EXEMPTION --
IN OKLAHOMA CITY, OKLAHOMA
(OLD ROCK ISLAND MAIN)

**PETITION OF OKLAHOMA DEPARTMENT OF TRANSPORTATION
TO REVOKE OR REOPEN**

In accordance with the notice served by the Board on March 16, 2006, and 49 CFR 1152.50(d)(3), Oklahoma Department of Transportation ("ODOT") hereby petitions the Board to revoke or reopen the exemption notice filed by Union Pacific Railroad Company ("UP") in this proceeding. ODOT is simultaneously filing a separate Petition for Stay and Environmental Comments.

Background

Union Pacific Railroad Company ("UP") has filed a notice of exemption to discontinue its operations over a 0.42 mile segment of rail line located in Oklahoma City, Oklahoma. As noted in the UP Notice of Exemption, the line is owned by ODOT and leased to UP. *See* UP Notice of Exemption at 3. In addition to UP, BNSF has trackage rights over the line. *Id.* at 3-4. ODOT does not have common carrier obligations with respect to the line. There is a historic city street bridge owned by Oklahoma City over the line, and ODOT has been made a party to a dispute between the City and UP about

whether and to what extent UP should contribute to the reconstruction of the bridge. ODOT believes that UP is seeking the discontinuance in this proceeding to avoid potential obligations to Oklahoma City with respect to the bridge, and to avoid its contractual obligations to ODOT under the 1982 Lease-Purchase and Operating Agreement between ODOT and Oklahoma, Kansas and Texas Railroad Company ("Lease-Purchase").¹

Petition to Revoke

The Board retains the power to revoke an exemption at any time. 49 USC 10502(d); 49 CFR 1121.4(f). In this proceeding, as more fully set forth in ODOT's Environmental Comments and Petition for Stay being filed simultaneously with this Petition, UP has not consulted with the required affected parties, has not prepared an environmental or historic report, and thus has failed to comply with the Board's environmental and historic regulations at 49 CFR Part 1105. Without compliance with the Board's regulations, the environmental protections that were built in to the class exemption to protect the public interest will not be satisfied. Accordingly, the Board should revoke the UP Notice of Exemption for UP's failure to comply with the Board's regulatory requirements.²

Petition to Reopen

If the Board determines not to revoke the exemption, then ODOT requests that the Board reopen the proceeding and impose the following conditions on UP's proposed discontinuance:

¹ UP is the successor to OKT under the Lease-Purchase. UP Notice of Exemption at 3.

² Although it did not do so in this instance, the Office of Proceedings has the power to reject notices of exemption for noncompliance with the environmental rules. 49 CFR 1107(b)(15).

(1) *UP may not consummate the proposed discontinuance while BNSF retains trackage rights over the line.*

In abandonment cases, the Board does not permit a carrier to abandon a line of railroad when the line is subject to trackage rights. *See CSX Transportation, Inc. – Abandonment Exemption – In Raleigh County, WV*, STB Docket No. AB-55 (Sub-No. 552X) (November 25, 1998), 1998 STB LEXIS 919, at *3 (existence of trackage rights over the line is a regulatory barrier to consummation); *Lake Superior & Ishpeming Railroad Company – Abandonment and Discontinuance of Service Exemption – In Marquette County, MI*, STB Docket No. AB-68 (Sub-No. 4X) (May 26, 2004); *Missouri Pacific Railroad Company – Abandonment Exemption – In Osage, Lyon and Morris Counties, KS*, ICC Docket No. AB-2 (Sub-No. 111X) (December 7, 1993). This insures that there is a line of railroad subject to Board (and Federal Railroad Administration) jurisdiction while the trackage rights carrier is authorized to operate over the line. In this case, because ODOT does not have underlying common carrier authority with respect to the line, discontinuance of the line by UP as the operator of the line should be treated equivalently to an abandonment. *See generally Seminole Gulf Railway, Inc. – Abandonment – In Lee County, FL*, STB Docket No. AB-400 (Sub-No. 2X) (December 22, 1994), 1994 ICC LEXIS 278, at *9-*12. If UP is permitted to consummate its discontinuance, there will be no underlying common carrier obligations with respect to the line other than the trackage rights carrier. Accordingly, in this case, UP should not be permitted to consummate the discontinuance while BNSF has trackage rights over the line.

(2) *The discontinuance exemption authorizes UP to discontinue its common carrier obligation to operate the line, but does not affect any private contractual rights between UP and ODOT under the Lease-Purchase, or other private contractual arrangements.*

ODOT believes that UP may be seeking to avoid its obligations under the Lease-Purchase by discontinuing its carrier obligations. However, the Lease-Purchase has no provisions for removing a line from the application of the Lease-Purchase as a result of a discontinuance. The Board does not have jurisdiction to interpret or enforce the Lease-Purchase or other private contractual arrangements. *See The Kansas City Southern Railway Company – Adverse Discontinuance Application – A Line of Arkansas and Missouri Railroad Company*, STB Docket No. AB-103 (Sub-No. 14) (March 26, 1999), at 7. The decision to allow an abandonment or discontinuance (or in this case an exemption) reflects a determination only that the public convenience and necessity do not require the carrier to continue to provide common carrier service to or over the line in question. The Board should clarify in any decision authorizing the discontinuance, that the discontinuance by UP does not affect UP's private contractual obligations.

Conclusion

For the foregoing reasons, Oklahoma Department of Transportation requests that the Board revoke the notice of exemption filed by Union Pacific Railroad Company in this proceeding. Alternatively, Oklahoma Department of Transportation requests that the Board reopen this proceeding and impose the requested conditions on the discontinuance exemption authority sought by Union Pacific Railroad Company.

Respectfully submitted,



Eric M. Hocky, Esq.
Gollatz, Griffin & Ewing, P.C.
Four Penn Center, Suite 200
1600 John F. Kennedy Blvd.
Philadelphia, PA 19103
(215) 563-9400

Dated: April 5, 2006

Certificate of Service

I hereby certify that on the 5th day of April , 2006, a copy of the foregoing Petition of Oklahoma Department of Transportation for Stay and Environmental Comments was served electronically on:

Robert T. Opal
General Commerce Counsel
Union Pacific Railroad Company
1400 Douglas Street, STOP 1580
Omaha, NE 68179
rtopal@up.com

Dated: April 5, 2006


Eric M. Hocky

Before the
SURFACE TRANSPORTATION BOARD

Docket No. AB-33 (Sub-No. 239X)

UNION PACIFIC RAILROAD COMPANY
-- DISCONTINUANCE EXEMPTION --
IN OKLAHOMA CITY, OKLAHOMA
(OLD ROCK ISLAND MAIN)

**ENVIRONMENTAL COMMENTS OF
OKLAHOMA DEPARTMENT OF TRANSPORTATION
AND PETITION FOR STAY**

Eric M. Hocky, Esq.
Gollatz, Griffin & Ewing, P.C.
Four Penn Center, Suite 200
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Dated: April 5, 2006

Before the
SURFACE TRANSPORTATION BOARD

STB Docket No. AB-33 (Sub-No. 239X)

UNION PACIFIC RAILROAD COMPANY
-- DISCONTINUANCE EXEMPTION --
IN OKLAHOMA CITY, OKLAHOMA
(OLD ROCK ISLAND MAIN)

**ENVIRONMENTAL COMMENTS OF
OKLAHOMA DEPARTMENT OF TRANSPORTATION
AND PETITION FOR STAY**

In accordance with the notice served by the Board on March 16, 2006, and 49 CFR 1152.50(d)(3), Oklahoma Department of Transportation (“ODOT”) hereby petitions the Board for a stay of the discontinuance exemption based on the environmental comments set forth herein. ODOT is simultaneously filing a separate Petition to Revoke or Reopen.

Background

Union Pacific Railroad Company (“UP”) has filed a notice of exemption to discontinue its operations over a 0.42 mile segment of rail line located in Oklahoma City, Oklahoma. As noted in the UP Notice of Exemption, the line is owned by ODOT and leased to, and operated by, UP pursuant to the 1982 Lease-Purchase and Operating Agreement between ODOT and Oklahoma, Kansas and Texas Railroad Company (“Lease-Purchase”).¹ In addition to UP, BNSF has trackage rights over the line. *Id.* at 3-4. ODOT does not have common carrier obligations with respect to the line. There is a

¹ UP is the successor to OKT under the Lease-Purchase. UP Notice of Exemption at 3.

historic city street bridge owned by Oklahoma City over the line, and ODOT has been made a party to a dispute between the City and UP about whether and to what extent UP should contribute to the reconstruction of the bridge.

Environmental Comments

In this proceeding, the applicant UP claims that because this is a discontinuance exemption, no environmental or historic documentation is required. UP Notice of Exemption at 6.² ODOT believes the Board's environmental and historic regulations provide otherwise.

In situations such as this where the underlying owner of the line does not have common carrier obligations, the discontinuance of operations by the operator of the line should be treated equivalently to an abandonment since there will be no remaining operator of the line. *See generally Seminole Gulf Railway, Inc. – Abandonment – In Lee County, FL*, STB Docket No. AB-400 (Sub-No. 2X) (December 22, 1994), 1994 ICC LEXIS 278, at *9-*12.

The Board's regulations provide generally that environmental assessments will be prepared for both abandonments and discontinuances of freight service. 49 CFR 1105.6(b)(3). In adopting the environmental regulations, the Board's predecessor specifically determined that "there should be an environmental review of proposals to discontinue rail service (except for discontinuances under modified certificates ... and discontinuance of trackage rights where the affected line will continue to be operated.)" *Implementation of Environmental Laws*, 7 ICC 2d 807, 822 (1991) (footnotes omitted).³

² A search of the Board's on-line docket of filings indicates that no environmental (or historic) materials were filed.

³ Neither of the exceptions set forth in section 1105.6(b)(3) apply in this case.

Under 49 CFR 1105.7, UP was required to consult with various affected parties (including ODOT and potentially Oklahoma City and BNSF), to prepare an environmental report, and to file and serve the environmental report at least 20 days before its notice of exemption was filed. Additionally, under 49 CFR 1105.8, UP was required to do likewise with respect to a historic report. UP's environmental report would need to address, among other issues, the safety of BNSF's potential trackage rights operations, and impact of eliminating this line as an interchange alternative or back-up. *See* UP Notice of Exemption at 3-4. Further, the historic report would need to address effects on the historic Oklahoma City bridge.

UP claims that it was not required to prepare an environmental or historic report because the discontinuance would not affect rail or truck traffic, and because the discontinuance would not result in significant changes in carrier operations. Notwithstanding the footnote in the Board's notice served March 16, 2006, however, UP's reliance on the exceptions set forth in 49 CFR 1105.6(c)(2) is misplaced. Section (c)(2) lists specific types of actions when it is appropriate to look at changes in carrier operations – significantly neither abandonments nor discontinuances are listed. None of the other actions listed in Section (c) applies to the proposed discontinuance in this proceeding. Indeed, if Section 1105.6(c) is read to apply in this proceeding, then environmental reports would not be required in any out-of-service exemption proceedings because in each case there has not been any local service for more than two years. The regulations at 49 CFR 1105.7(b) clearly provide otherwise.⁴

⁴ UP clearly believes otherwise as well. In two year out of service abandonments, UP routinely prepares a Combined Environmental and Historic Report. *See for, example*, STB Docket No. AB-33 (Sub-No. 223X) (filed February 27, 2006); STB Docket No. AB-33 (Sub-No. 222X) (filed February 23, 2006).

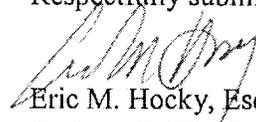
Petition for Stay

The Board's regulations at 49 CFR 1152.50(d)(4), as well as the notice it served on March 16, 2006, make clear that the Board has the power to issue a stay in situations when an informed decision on environmental and historic issues cannot be made prior to the date the exemption is scheduled to become effective. In this case, where no environmental or historic consultation has been done by UP and no report has been filed, the Board will not be able to make such an informed decision. Accordingly, the Board should stay the exemption pending UP's compliance with the Board's environmental and historic regulations.⁵

Conclusion

For the foregoing reasons, Oklahoma Department of Transportation requests that the Board stay the discontinuance exemption until Union Pacific Railroad Company complies with the Board's environmental and historic regulations.

Respectfully submitted,



Eric M. Hocky, Esq.
Gollatz, Griffin & Ewing, P.C.
Four Penn Center, Suite 200
1600 John F. Kennedy Blvd.
Philadelphia, PA 19103
(215) 563-9400

Dated: April 5, 2006

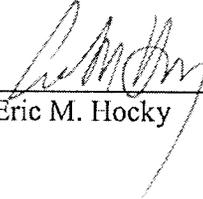
⁵ Alternatively, the Board could revoke the exemption for the failure to comply with the Board's regulations. See ODOT's Petition to Revoke or Reopen being filed simultaneously with this document.

Certificate of Service

I hereby certify that on the 5th day of April , 2006, a copy of the foregoing Petition of Oklahoma Department of Transportation for Stay and Environmental Comments was served electronically on:

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