

STB FINANCE DOCKET NO. 33611

UNION PACIFIC RAILROAD COMPANY -- PETITION FOR
DECLARATORY ORDER --REHABILITATION OF MISSOURI-
KANSAS-TEXAS RAILROAD BETWEEN JUDE AND
OGDEN JUNCTION, TX

Decided August 19, 1998

The Board finds that rehabilitation of abandoned rail line running parallel to existing main line does not require Board approval, as the project will improve service to existing shippers but will not penetrate new markets.

BY THE BOARD:

In a decision in this proceeding served on June 5, 1998, and published at 63 Fed. Reg. 30,810 (1998), the Board requested comments on a petition filed by the Union Pacific Railroad Company (UP) asking the Board to declare that it lacks jurisdiction under 49 U.S.C. 10901 over UP's rehabilitation and reactivation of 16.7 miles of track near New Braunfels, TX that it had previously abandoned.¹

In the petition, UP states that, because of significant congestion and inadequate capacity on its Austin Subdivision north of San Antonio, it has been unable to haul all of the cement and aggregates being offered to meet a surge in demand by the Texas construction industry. To accommodate this traffic, UP has begun rehabilitating the former MKT line between UP milepost 219.5 at Jude, TX, and UP milepost 236.2 at Ogden Junction, TX, that would restore a needed second line and eliminate the only single-track section on the 56 miles between San Marcos and San Antonio. UP contends that this project does not

¹ The Interstate Commerce Commission (ICC) had granted UP abandonment authority for this former Missouri-Kansas-Texas Railroad (MKT) line in the UP-MKT merger, *Union Pacific Corp. Et al. - Cont. - MO-KS-TX Co. Et al.*, 4 I.C.C.2d 409 (1988). See, *Missouri-Kansas-Texas Railroad Company-Abandonment Exemption-In Comal County, TX*, Docket No. AB-102 (Sub-No. 18X).

fall within the Board's licensing jurisdiction under 49 U.S.C. 10901 as an extension or additional railroad line, because the reactivated line will not invade or penetrate new territory. Rather, by adding what is in effect a second mainline (or "double track") that is roughly parallel to the existing mainline, the project will simply add capacity and enhance the efficiency of UP's current operations, improvements that, the carrier claims, do not require the Board's authorization.

After reviewing UP's petition, subsequent comments, and the carrier's reply, we agree. We find that we do not have section 10901 jurisdiction over this project, and that UP may proceed with the rehabilitation and reactivation of the line in question without Board approval.

COMMENTS

New Braunfels. The City of New Braunfels filed a response opposing UP's petition. New Braunfels does not question that there is congestion on the Austin Subdivision, or that UP needs to make improvements to alleviate service problems. The City argues, however, that UP's service problems do not create exceptions to the Act, and that the carrier's rehabilitation and reactivation of the former MKT line requires Board approval under 49 U.S.C. 10901, following full review under the National Environmental Policy Act (NEPA).

New Braunfels submits that what is involved here is not a double-tracking project, and it argues that one of the cases chiefly relied upon by UP in support of that position -- *City of Stafford, Texas v. Southern Pacific Transportation Co.*, Finance Docket No. 32395 (ICC served November 8, 1994) (*Stafford*), *aff'd sub nom. City of Stafford v. ICC*, 59 F. 3d 535 (5th Cir. 1995) -- is distinguishable. The City points out that *Stafford* involved a second main line track within the same 100-foot wide right-of-way containing the existing track, while the MKT line is separated from the current track at some points by as much as 1.75 miles, and that *Stafford* does not stand for the proposition that "a railroad may build an additional line of track miles distant from its existing track without Section 10901 approval."² New Braunfels also asserts that, in *Stafford*, the ICC reasoned that it lacked jurisdiction over construction of a double track because it had no jurisdiction over an abandonment of one line of double track, and, as

² The City submits that, in *Stafford* (at 6 and n.9), the ICC opined that the construction of lines outside the existing right-of-way required ICC approval, citing *Duluth, S. Shore & Atl. R.R. Co. v. Chicago, Milw. St. P. & Pac. R.R. Co.*, 307 I.C.C. 311 (1959), *rev'd*, 214 F. Supp. 244 (E.D. Wis. 1963), *rev'd per curiam*, 380 U.S. 448 (1964), and *New Orleans v. Spencer*, 366 F.2d 160 (5th Cir. 1966), *cert. denied*, 386 U.S. 942 (1967) (*New Orleans*).

³ S.T.B.

a result, argues that, because the ICC authorized abandonment of the MKT line, its reactivation necessarily requires approval under section 10901.

The City further contends that entry into a new service area is not the only criterion for determining whether a construction project comes within section 10901, claiming that, in *Texas & Pacific v. Gulf, Colorado & Santa Fe Ry.*, 270 U.S. 266 (1926) (*Texas & Pacific*), the Supreme Court found that penetrating new territory was one, but not necessarily the only, ground for determining if a matter required the ICC's prior approval under this section.³

Finally, New Braunfels states that, in the years since the line's abandonment, additional residential neighborhoods (and two homes by Habitat For Humanity) have been built adjacent to the line, parks and playgrounds have been built and improved, parts of the right-of-way have been used as a parking lot, and that at least one structure has been built on the right-of-way. The City asserts that many of these changes would not have taken place in the absence of the line's abandonment.

Other comments. We also received comments from 37 parties, mostly from citizens of New Braunfels, but also from the National Association of Reversionary Property Owners (NARPO) and State Senator Jon Lindsay. Most commenters oppose reactivation of the line, largely on safety and environmental grounds. Some commenters assert that operating freight service in residential areas is bad public policy, particularly where children live in houses immediately adjacent to the line; others voice concern of an increased risk of derailments and chemical spills, particularly as they concern the City's water

³ In further support of this argument, New Braunfels cites to language in *Detroit/Wayne County Port Authority v. ICC*, 59 F.3d 1314, 1316 (D.C. Cir. 1995) (*Wayne County*), *aff'g*, *City of Detroit v. Canadian National Ry.*, 9 I.C.C.2d 1208 (1993) (*City of Detroit*), where the court stated:

According to petitioner, the [ICC] read *Texas & Pacific* to hold that *only* construction that invades new territory requires Commission approval under section 10901(a) * * *. This, of course, was not the holding of *Texas & Pacific*, and had the [ICC]'s decision been based on such a reading, we would have no choice but to remand.

It also cites *Nicholson v. I.C.C.*, 711 F.2d 364, 368 (D.C. Cir. 1983) (*Nicholson*), *aff'g* *Nicholson v. Missouri Pacific Railroad Company*, 366 I.C.C. 69 (1982) (*Nicholson v. MP*), where the court stated:

[T]rack segments which are intended to be used to carry through trains between points of shipment and delivery, particularly those segments which extend a railroad's service into new territory, must be approved by the Commission pursuant to section 10901(a)."

New Braunfels argues that the court's use of the word "particularly" shows that entering "new territory" is not an absolute requirement for the Board to take jurisdiction under section 10901.

supply, pointing out that the main water supply is only two miles from the Guadalupe Bridge, which has been idle for 10 years and may have deteriorated. Also, the tracks are only blocks from New Braunfels' only hospital and, with many nearby crossings and UP planning to run 20 to 30 trains a day, other commenters state that access to the facility could be dangerously compromised. Finally, and of particular concern, is the matter of grade crossings, with one commenter claiming that, while there will be 41 road crossings, only 10 of them will have crossing arms.

NARPO states that it has two members who own property abutting the line. It argues that, since the line has been abandoned and certain track portions removed or covered over with asphalt, UP, if it wants to reactivate the line, must seek Board authority. Other commenters discuss, however, whether the MKT line has been abandoned or is merely "inactive." Harold E. Hughes argues that people planning to build houses next to railroad tracks should exercise "due diligence" to determine the line's status. Certain property owners, by contrast, stated that they purchased property close to the track only after being assured that the line was abandoned; one party claims that it was told by officials at the State Railroad Commission that the line "had been abandoned and would not be reactivated."

On the other hand, Donald L. Hildebrand commented in favor of the line's reactivation, arguing that it would be good for New Braunfels, and that the reasons given for opposition were frivolous and without merit. State Senator Lindsay also supports the reactivation, arguing that shortage of concrete is a serious problem in the growth areas of Harris County, hurting the construction industry. Reactivation, he submits, will allow for improved movement of gravel trains. Lastly, one commenter, Roland W. Emeshoff, while not appearing to oppose the line's reactivation, requested us to advise UP of "the list of standards and specifications" for its track, and he attached a letter to the mayor of New Braunfels requesting that the City insist that UP comply with all applicable federal, state, and local standards and specifications in that regard.

Union Pacific. In reply, UP, citing the ICC's review of section 10901's legislative history in *City of Detroit*, 9 I.C.C.2d at 1214-15, asserts that Congress conferred authority on the ICC to review line extensions and additions to restrict the construction of wasteful or unnecessary lines. As such, UP argues that improvements by carriers to an existing system do not require Board action, noting that the D.C. Circuit, in affirming *City of Detroit*, distinguished between additions and extensions, on the one hand, and relocations and improvements, on the other, and upheld the proposition that Congress did not want improvements to existing systems regulated. *Wayne County*, 59 F.3d at 1314, 1316-17.

Citing *City of Detroit* again, 9 I.C.C.2d at 1221, UP also disputes the City's argument that the Board's jurisdiction under section 10901 is triggered whenever a new rail line is not within an existing right of way, noting that line relocations -- which are almost always outside of existing rights-of-way -- do not require section 10901 approval. UP also rejects the City's argument that, because it obtained the ICC's authorization to abandon the MKT line, it needs Board approval for its reactivation. UP submits that it is not clear that it needed the ICC's authority to abandon the line (no issue concerning the ICC's jurisdiction over the trackage was ever raised during the UP/MKT merger proceeding), but that, in any event, nothing in section 10901 requires the kind of statutory "symmetry" that the City suggests.

Finally, UP submits that it is rehabilitating and reactivating the former MKT line because the "segment is a severe bottleneck -- perhaps the most severe -- on the UP system." Stating that New Braunfels points to no countervailing national transportation interest that should thwart this project, the carrier argues that the Board's jurisdiction is not properly invoked simply to ensure the City full NEPA review. UP states that existing federal, and state and local regulations and resources provide a sufficient framework to address the City's concerns, and that, as it does with other cities facing similar issues, it is currently working with the City to address environmental and safety matters, and that progress is being made. Merely because a project will have environmental effects, UP argues, does not bring it within the Board's jurisdiction.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10901(a), a person may "construct an extension to any of its railroad lines * * * [or] construct an additional railroad line * * * only if the Board issues a certificate authorizing such activity * * *." "Extension" and "additional railroad line" are not defined in the statute. As interpreted by the Supreme Court in *Texas & Pacific*, however, the construction of an extension to a rail line, or an additional rail line, is one that enables a carrier to penetrate or invade a new market.⁴ As the ICC later discussed, this interpretation of the

⁴ In *Texas & Pacific*, 270 U.S. at 278, the Supreme Court stated:

But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier * * * may be inimical to the national interest * * *.

(continued...)

statute is consistent with the Congress' purpose in enacting the Transportation Act of 1920: to encourage railroads to maintain and improve existing services, thereby strengthening their common carrier abilities, before spending capital constructing a new line or extending an existing one to serve new customers. *City of Detroit*, 9 I.C.C.2d at 1216.

Using the *Texas & Pacific* test, we find that UP's rehabilitation and reactivation of the former MKT line does not come within the Board's section 10901 jurisdiction. The line does not penetrate or invade a new market, but simply augments the capacity of existing main line operations by eliminating the single track bottleneck between Jude and Ogden Junction. The line will not reach into new territory or serve new shippers; it will simply improve service to UP's existing shippers.

That the MKT line may be outside the right-of-way of the existing mainline is not, contrary to New Braunfels' argument, determinative of the Board's jurisdiction here.⁵ While the situation here differs factually from *Stafford*, which concerned construction of a second track within the main line's existing 100-foot right-of-way, and *City of Detroit/Wayne County*, where a second mile-long tunnel was built 90 feet parallel to the old tunnel that it would replace, jurisdiction in both cases was examined in the same way -- using the *Texas & Pacific* test to determine whether the involved project enabled the rail carrier to enter a new market. Determinations of the Board's section 10901 jurisdiction under *Texas & Pacific* simply do not concern either the distance between two lines or whether they are within the same right of way.⁶

⁴(...continued)

If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad * * *.

See also, *Nicholson v. MP*, 366 I.C.C. at 74 n.8; *Stafford*, at 2, and *Missouri Pacific Railroad Company and Southern Pacific Transportation Company—Construction and Operation Exemption—Avondale, LA*, STB Finance Docket No. 33123 (STB served July 11, 1997), at 2.

⁵ The MKT line runs roughly parallel to UP's existing main line in the New Braunfels area. From Jude to New Braunfels, the MKT line lies approximately north of the UP line. After the lines cross in New Braunfels, the MKT line switches to the southern side of the UP line. Although not in the same right-of-way, in one place the two lines are only 100 feet apart. UP, V.S. Handley, at 4. In another area, the lines are 1.75 miles apart. In one 7-mile stretch between Comal and Landas Park, the lines are about 0.5 to 0.8 miles apart.

⁶ *Duluth and New Orleans*, referred to by the ICC in *Stafford*, do not, contrary to the City's argument, suggest that construction of lines outside a right-of-way needs section 10901 approval. Neither of those cases found jurisdiction on the ground that a rail line was outside a right-of-way. Moreover, in *Duluth*, the ICC applied *Texas & Pacific* and determined that, in contrast to the situation here, it had jurisdiction because the construction of the connecting and interchange tracks (continued...)

We are also unpersuaded by the City's argument that entry into a new service area is not the only criterion for invoking section 10901. The D.C. Circuit's language in *Wayne County* cited by New Braunfels for that proposition (note 4), when read in context, simply means that not only construction projects, but also improvements such as relocations, come within section 10901 if they invade new territory.⁷ Moreover, the D.C. Circuit's statement in *Nicholson* that approval under section 10901 is required "particularly" when a railroad invades new territory likewise does not suggest that proposition. In *City of Detroit*, the ICC had noted, and rejected, language in *Missouri Pac. R. Co. Trustee Construction*, 282 I.C.C. 388 (1952) (*Missouri Pacific*), that there were five separate tests for determining section 10901 jurisdiction. In *Wayne County*—issued after *Nicholson*—the D.C. Circuit approved the ICC's position rejecting "any language in *Missouri Pacific* that is inconsistent with the proposition that a relocation or an improvement to an existing line that does not extend into new territory is not an extension or addition under section 10901(a)." 59 F.3d at 1317.

We also find no basis for New Braunfels' argument that, because the ICC authorized UP to abandon the MKT line, UP requires Board authority for its reactivation. There is no jurisdictional connection between the two activities. Once abandonment of a rail line is consummated, as here, the Board loses jurisdiction over the line, and as the Supreme Court observed in *Hayfield N. R.R. v. Chicago & N.W. Transp. Co.*, 467 U.S. 622, 633-34 (1984), the abandoned line becomes no different than any other real estate, both in terms of its use and a State's jurisdictional oversight.⁸ Accordingly, whether we have jurisdiction over a subsequent transaction involving the line is necessarily based on the

⁶(...continued)

enabled the rail carriers "to compete for traffic in territories not previously served by them and which were theretofore adequately served by other carriers." 307 I.C.C. at 315. In *Stafford*, the ICC characterized *New Orleans* as "not directly relevant to the instant proceeding," because, in part, the court did not "explain the basis of its statements concerning our jurisdiction." At 6 (footnote omitted).

⁷ The D.C. Circuit stated at 59 F.3d at 1317 (citation omitted):

[T]he Commission recognized that under *Texas & Pacific*, even an improvement like the relocation in this case would qualify as an "extension" or "addition" if it invaded new territory. The Commission therefore looked to *Texas & Pacific* not, as petitioner contends, for the proposition that only construction which invades new territory requires section 10901(a) approval, but rather for the proposition that *Texas & Pacific* did not require the Commission to treat the tunnel relocation as an extension because the new tunnel did not invade new territory.

⁸ See also, *Missouri Pac. R.R.—Abandonment Exemption—Marion County*, Docket No. AB-3 (Sub-No. 77X) (ICC served July 6, 1989).

nature of the activity independent of the prior abandonment. Here, as discussed above, UP's reactivation of the previously abandoned MKT line only adds capacity to its existing operations, and therefore it is not a construction of an extension or additional rail line that requires our approval under section 10901.

Finally, we are mindful of the safety and environmental concerns that have been raised, including concerns for children living in houses next to the line, road crossings without crossing arms, and derailments threatening the water supply. These are serious matters which, if the Board had jurisdiction, we would analyze and weigh in determining how to proceed. NEPA requires federal agencies "to the fullest extent possible" to consider the environmental consequences "in every recommendation or report on major federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). The Council on Environmental Quality has defined "major federal actions" to include projects regulated or approved by federal agencies. 40 CFR 1508.18. Thus, with section 10901 jurisdiction, the Board would undertake an appropriate environmental review under NEPA and impose appropriate conditions on its approval of a rail line addition or extension to mitigate potentially significant environmental harm discovered during the course of its environmental review. If the dangers to public safety or the environment could not be adequately mitigated, the Board would have the authority to deny approval under section 10901.

The extent of, or intensity of debate over, a project's environmental and safety issues, however, does not, by itself, confer jurisdiction on the Board. Cf. *Nicholson*, 711 F.2d at 366. Because we do not have jurisdiction over UP's project, NEPA does not apply.⁹ Moreover, as we explained in a declaratory order decision in the *Stampede Pass* cases, the provisions of 49 U.S.C. 10501(b) preempt state and local regulation to the maximum extent permitted by the Constitution.¹⁰ This would include, for example, state and local permitting or pre-clearance requirements, including environmental requirements, which by their very nature interfere with interstate commerce because they impede the carrier's right to conduct its operations. The preemption, however, is not absolute. State and local regulation that does not interfere with the

⁹ See, 49 CFR 1105.3 ("A finding that a service or transaction is not within the STB's jurisdiction does not require an environmental analysis under [NEPA] * * *").

¹⁰ *King County, WA--Pet. for Declar. Order--Stampede Pass Line*, 1 S.T.B. 731 (1996), clarified, *Auburn & Kent, WA--Pet. for Decl. Order--Burlington N. R.R.--Stampede Pass Line*, STB Finance Docket No. 33200 (STB served July 2, 1997), *pets. for review pending sub nom. City of Auburn v. STB*, Nos. 96-71051 and 97-70920 (9th Cir. submitted after oral argument June 3, 1998).

accomplishment of federal objectives is not preempted,¹¹ and localities retain certain police powers. Moreover, state and local agencies play a significant role under many federal environmental statutes.

In any event, UP has undertaken to work with the affected community to look for mutually beneficial ways to mitigate potential environmental and other local concerns. UP's reply (at 3) states:

UP has a strong incentive to work with the communities it serves, because it hopes to live with them for a long time * * *. UP will work with New Braunfels and its people, and has already made progress in that direction. The existing network of state, federal and local regulations and resources provides a sufficient framework for addressing changes in rail operations * * *.

This jurisdictional determination will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The Board declares that it does not have jurisdiction over UP's rehabilitation and reactivation of the MKT line.
2. In view of the need for increased rail capacity in central Texas, this decision is effective on August 21, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.

¹¹ *Juniata Valley R.R.--Pet. for Decl. Order--Lewiston C. R.R.*, STB Finance Docket No. 33420 (STB served June 17, 1998).