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December 31, 2002



Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

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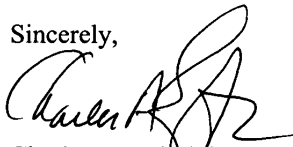
Re: Finance Docket No. 34292; *Santa Clara Valley Transportation Authority*
--*Acquisition Exemption* -- *Certain Assets of Union Pacific Railroad Company*

Dear Sir:

I am enclosing an original and ten (10) copies of each of the Motion of Santa Clara Valley Transportation Authority to Dismiss and Vacate the Notice of Exemption and the Verified Statement of Peter M. Cipolla in the above referenced proceeding. I am enclosing an extra copy of these documents that I would ask that you date stamp and return to our messenger. Please note that a copy of this document is provided on the 3.5-inch diskette, which is also enclosed.

Thank you for your attention to this matter.

Sincerely,


Charles A. Spitulnik

Enclosures

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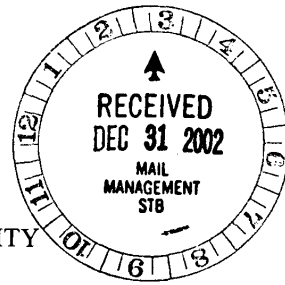
JAN 02 2003

Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34292

SANTA CLARA VALLEY TRANSPORTATION AUTHORITY
--ACQUISITION EXEMPTION --
CERTAIN ASSETS OF UNION PACIFIC RAILROAD COMPANY



**MOTION OF
SANTA CLARA VALLEY TRANSPORTATION AUTHORITY
TO DISMISS AND VACATE THE NOTICE OF EXEMPTION**

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Attorneys for Santa Clara Valley
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Dated: December 31, 2002

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**MOTION OF
SANTA CLARA VALLEY TRANSPORTATION AUTHORITY
TO DISMISS AND VACATE THE NOTICE OF EXEMPTION**

The Santa Clara Valley Transportation Authority ("VTA") hereby moves this Board for an order dismissing and vacating the Notice of Exemption filed in this proceeding on December 4, 2002. VTA respectfully submits that the rights and obligations it has acquired in the transaction that is the subject of this proceeding do not constitute the acquisition of a common carrier obligation that would trigger this Board's jurisdiction over either the transaction or over VTA. As a result, the Notice of Exemption ("NOE") that VTA filed with respect to the transaction should be dismissed and vacated.

I. STATEMENT OF FACTS

VTA, a non-carrier¹, will acquire approximately 14.88 miles of railroad right-of-way and related improvements known as the "WP Milpitas Line" located in Alameda and Santa Clara Counties, California from the Union Pacific Railroad Company ("UPRR"). VTA is a public

¹ VTA has previously acquired a line of railroad from UPRR. VTA filed a Notice of Exemption with respect to that transaction along with a Motion to Dismiss, which the Board granted because VTA "will not hold itself out as a common carrier of freight" and because the "transaction ... [would] not impair UP's ability to fulfill its common carrier obligation." STB Finance Docket No. 34094, *Santa Clara V.T.A. - Acquisition Exemption - Union Pacific R. Co., slip op* (Service Date November 16, 2001) at 3. VTA is using the same procedure, that is, filing a Notice of Exemption coupled with this Motion to Dismiss and Vacate, with respect to this transaction.

agency created under Cal. Pub. Util. Code §100000, *et seq.* UPRR is a Delaware corporation and Class I rail carrier.

Pursuant to a Purchase and Sale Agreement entered into by and between VTA and UPRR on December 11, 2002, VTA will acquire UPRR's right, title and interest in approximately 14.88 miles of the WP Milpitas Branch and certain related improvements between a point north of Paseo Padre Parkway² in Fremont, CA, at approximately UPRR milepost 2.61 (former Western Pacific Railroad San Jose Branch MP 33.14) and William Street in San Jose, CA at approximately UPRR milepost 17.49 (former WP San Jose Branch MP 48.02) ("the Line"), subject to the reservation by UPRR of an exclusive easement for the provision of freight railroad service. A copy of the Purchase and Sale Agreement is attached to the Verified Statement of Peter M. Cipolla ("VS Cipolla") as Exhibit 1. The Line is located in Alameda and Santa Clara Counties, California. VTA is acquiring the Line from UPRR for corridor preservation purposes and currently plans to construct a public transportation system.

UPRR provides freight transportation service over the Line. UPRR has retained an easement that is exclusive for purposes of providing freight rail service on the Line, and will continue to provide that service after the subject transaction is consummated until such time as it secures authorization from this Board to abandon (or discontinue) that service. For so long as UPRR provides freight service on the Line, it will have full responsibility for every aspect of that service. It will operate the trains, will maintain the line and will dispatch the operations. VS Cipolla, para. 8 at 3. According to section 9.1 of a Trackage Rights Agreement- WP Milpitas Line (the "TR Agreement"), a copy of which is attached to VS Cipolla at Exhibit 2, UPRR has

² In the Notice of Exemption filed by VTA in this proceeding on December 4, 2002 and published by the STB on December 26, 2002, VTA incorrectly identified this street as "Pasco Padre Parkway". VTA is filing an errata sheet today that corrects this error.

concluded that it would be able to at some point either abandon, discontinue or relocate its freight operations to an adjacent line (the former SP Warm Springs Subdivision) and seek authority to abandon or discontinue its freight service on all or portions of the Line. Once that authorization is secured, VTA will construct a public transportation system on the right-of-way that is the subject of this transaction. VTA will not obtain the right or obligation to conduct freight rail service on any portion of the Line, and will not at any time hold itself out as a freight common carrier. VS Cipolla, para. 8 at 3.

The process for UPRR to either relocate, abandon or discontinue its service that currently operates along the Line will involve a series of steps that are spelled out in the TR Agreement and an Engineering and Construction Contract-WP Milpitas Line ("E&C Contract") (a copy of which is attached to VS Cipolla at Exhibit 3). The parties have agreed that the construction project and the relocation of UPRR's freight rail operations will occur over a period of time in phases linked to the rail segments that are defined in Exhibit A to the E&C Contract. The construction will involve a series of "Freight Projects" which are collectively defined in Article I as "the project to construct a new alignment for UP's freight rail line and all related Facilities on and in the general vicinity of the Property and the UP Property, to ensure that the Functionality of UP's Freight Rail Service is maintained at its current level, as shown and described in Exhibit B to this Contract" E&C Contract at 3. VTA will give UPRR notice at least one year and in some instances as much as two years (depending on the specific line segment) prior to the date it will begin the construction process (the "Notice Period"). TR Agreement section 9.1.1 at 17. During the Notice Period, UPRR will make alternative transportation arrangements with the shippers on the affected line segment. These can include service via a new connection from a nearby UPRR freight line or transload arrangements or other options, at UPRR's and the

shipper's discretion. The E&C Contract specifies that in the design, as in the request for modifications to that design:

The parties will give due consideration to (i) the needs and requests of UP's freight rail customers (and to any party desiring freight service), (ii) any change in the circumstances of such customers that has an impact on their freight service needs; and (iii) any conditions imposed by the STB, which consideration may include without limitation, relocating certain connections, leads and spurs; exploring comparable alternative freight solutions such as indirect access to rail service through transloading; and exploring comparable business relocation opportunities; where such solutions could be beneficial to the Project and are acceptable to both UP and its freight customer.

E&C Contract, §2.2(b) at 8. Once UPRR and its customer are satisfied with the freight service arrangements, the construction plans will be finalized and UPRR will (as may be necessary) initiate and prosecute any necessary proceedings at the STB before VTA commences any construction of the public transportation system.

II. ARGUMENT: VTA HAS ACQUIRED NONE OF THE INDICIA OF "COMMON CARRIER STATUS" AND ITS NOTICE OF EXEMPTION SHOULD BE DISMISSED AND VACATED.

The Notice of Exemption should be dismissed and vacated because this is not a transaction that should come under the Board's jurisdictional umbrella. Following the transaction, UPRR will continue to have the exclusive right and ability to conduct and control freight operations on the Milpitas Line and will continue to provide those services until such time as the STB issues an order permitting abandonment or discontinuance of those services. The Notice Period will trigger the implementation by UPRR of alternative plans for providing rail transportation services to shippers on the line. VTA will not be able to intrude on UPRR's ability to fulfill its obligations to shippers on the Line. There is no transfer of rights and obligations from UPRR to VTA that would place this transaction within the jurisdiction of the STB.

This Board, like the ICC before it, has continued to rule that it need not assert jurisdiction over a transaction involving a line of railroad when the buyer has no intention or ability to assume operation and is not acquiring assets or rights that would “disenable . . . [the seller] from meeting its common carrier obligation.” *State of Maine, DOT – Acquisition and Operation Exemption - - Maine Central R. Co.*, 8 I.C.C. 2d 835 (1991). Citing *State of Maine*, this Board has recently reiterated that “[o]ur authorization is not required, however, when only the physical assets will be conveyed and the common carrier rights and obligations that attach to the line will not be transferred.” F. D. No. 34170, *Utah Transit Authority – Acquisition Exemption – Certain Assets of Union Pacific R. Co., slip op.*, Service Date May 22, 2002 (“*UTA Acquisition*”).

The Board should conclude that this transaction, like *UTA Acquisition*, does not involve the transfer of common carrier rights and obligations. Following this transaction, UPRR will continue to hold itself out as the carrier, and will conduct and manage every aspect of the provision of freight service on this line. UPRR has already concluded, according to the Trackage Rights Agreement that it:

... would be able to abandon, discontinue or relocate its Freight Rail Service provided along the Freight Trackage, subject to the approval of any such abandonment or discontinuance by the STB, and VTA’s performance of the Freight Project Work, which is necessary to allow UP to maintain the Functionality of UP’s Freight Rail Service and to satisfy its obligations as a freight common carrier.

Exh. 2 to VS Cipolla, § 9.1.1 at 17.³

³ According to the Trackage Rights Agreement, “Freight Rail Service” means “the common carrier freight rail operations on the Freight Trackage and Property, including without limitation operations in furtherance of transporting freight commodities of all types and descriptions in trains, personnel training and the use of equipment for such operations.” “Freight Project” means “the project to construct a new alignment for UP’s freight rail line and all related Facilities, on and in the general vicinity of the Property and the UP Property” TR Agreement, Exh. 2 to VS Cipolla at 2-3.

The structure of this transaction is materially different from the transactions that the I.C.C. reviewed in *Southern Pacific Trans. Co. - Abandonment Exemption - Los Angeles Co.*, CA, 8 ICC 2d 495 (1992) ("*SP Abandonment I*"), *reconsideration denied*, 9 I.C.C. 2d 385 (1993) ("*SP Abandonment II*"). In that transaction, the (former) Los Angeles County Transportation Commission ("LACTC") had acquired various property and interests in property from the former Southern Pacific Transportation Company ("SP"). LACTC acquired the right and obligation to maintain portions of the subject properties and ultimately to decide to dispatch portions of the lines on which it was acquiring an ownership interest. *SP Abandonment I* at 508. LACTC also acquired the right to notify SP, without consultation and without SP having the right to object, that the time had come to exit the business of providing rail service along various of the lines acquired. The parties agreed specifically that SP's cessation of service following receipt of notice from LACTC was subject to required regulatory approvals. The ICC found that "the rights retained by SP under the agreements effecting the transfers are too limited to permit it to carry out the freight service obligation it purports to have." *SP Abandonment II* at 387, quoting *SP Abandonment I* at 507-508.

Since that time, the STB has reviewed transactions in which the public agency acquiring a line has acquired some of the rights LACTC received but were not enough to cause the STB to conclude that the freight railroad's common carrier obligation was transferred. In *UTA Acquisition*, for example, UTA acquired the right-of-way and UPRR retained the freight easement. Although UTA acquired the right to make changes or additions to the lines, as well as the right ultimately to control dispatching, this Board concluded that "this will not materially interfere with UP's ability to upgrade its trackage or its overall ability to provide freight rail

service to current or future customers.” *UTA Acquisition* at 4. The Board confirmed that “the transaction will not interfere with UP’s fulfillment of its common carrier obligations.”

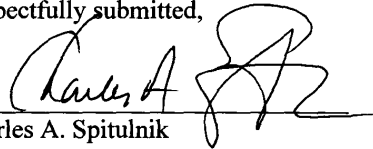
The Board should reach the same conclusion about this transaction that it reached in *UTA Acquisition*. There is nothing here to trigger jurisdiction because VTA will be acquiring no control over UPRR’s operation on the Line. UPRR itself has already concluded that it can “abandon, discontinue or relocate its Freight Service”, and VTA’s sole role here is to advise UPRR of when the construction of the public transportation system will begin so that UPRR can take whatever steps are required to implement that decision. UPRR will then have an extended period of time within which to construct alternative trackage, or to make other arrangements with shippers to ensure that the shippers needs for rail transportation services continue to be met. VTA will not at any time become the dispatcher of UPRR’s operations over the line and it will not maintain a line on which UPRR is providing Freight Service.

Moreover, UPRR has already made the decision that operations on this line are suitable for change, but will continue to provide those services exactly as it does today until the STB issues any required order that would permit a change in those operations. If all that is happening is relocation of the service to a new connection from a nearby UP line, then no regulatory approvals will be required. *See Detroit/Wayne County Port Authority v. I.C.C.*, 59 F.3d 1314 (D.C. Cir.1995). Otherwise, UP will initiate and prosecute any requests for abandonment or discontinuance and will take all steps that are required to ensure that rail service remains a viable option for those shippers that continue to seek it. Until its right and obligation to provide freight service is extinguished by the STB, UP will remain fully in control of every aspect of its freight operations.

VTA will be advising UPRR of the time the construction will begin and, in accordance with terms and conditions agreed upon with UP in the Construction Agreement, will be arranging for construction of transportation alternatives for shippers on the Milpitas Line. UP, not VTA will be making the ultimate decision as to the timing for submission of any required request for abandonment or discontinuance of its service. Unlike LACTC in *SP Abandonment*, VTA will have no ability to make a unilateral determination that UP must seek authority to abandon its service obligations. Rather, UP has already concluded that "it would be able to abandon, discontinue or relocate its Freight Rail Service provided along the Freight Trackage, subject to approval of the STB of any such abandonment or discontinuance by the STB", TR Agreement section 9.1.1 at 17, and VTA's notification will advise UPRR that the time has come to implement its prior decision.

This is a transaction over which the STB need not assert jurisdiction. VTA has not acquired sufficient rights with respect to the line to justify a conclusion that it has acquired any common carrier obligation, either residual or primary. Accordingly, VTA's Motion to Dismiss and Vacate the Notice of Exemption should be granted.

Respectfully submitted,



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Dated: December 31, 2002