

SERVICE DATE – FEBRUARY 13, 2024

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36741

UNION PACIFIC RAILROAD COMPANY—OPERATION EXEMPTION—
IN TOOELE COUNTY, UTAH

Digest:¹ This decision grants Union Pacific Railroad Company the authority to reinstitute common carrier service over 1.04 miles of rail line in Tooele County, Utah, and denies BNSF Railway Company’s motion to institute a proceeding and set a procedural schedule.

Decided: February 13, 2024

On November 21, 2023, Union Pacific Railroad Company (UP) filed a petition under 49 U.S.C. 10502(a) for exemption from the prior approval requirements of 49 U.S.C. 10901 to reinstitute common carrier service over an approximately 1.04-mile portion of rail line known as the Warner Branch, between milepost 0.0 connecting to the Shafter Subdivision and milepost 1.04, in Tooele County, Utah (the Line). On December 11, 2023, BNSF Railway Company (BNSF) moved for the Board to instead institute a proceeding under 49 U.S.C. 10502(b) and set a procedural schedule for consideration of UP’s petition. As discussed below, the Board will grant UP’s petition and deny BNSF’s motion.

BACKGROUND

According to UP, the Warner Branch was formerly owned and operated by its predecessor, Western Pacific Railroad Company (WP). (UP Pet. 2.) In 1983, WP sought and received authority to abandon the Warner Branch in Western Pacific Railroad—Abandonment Exemption—in Tooele County, Utah, FD 30208 (ICC served Aug. 9, 1983). (UP Pet. 2.) UP says that it is seeking to reinstitute common carrier service over the Line as part of a transaction with Savage Tooele Railroad Company (STR), in which UP agreed to sell STR the right-of-way and track assets between milepost 1.04 and milepost 6.94 of the Warner Branch so STR could construct approximately 11 miles of new rail line connecting to the Warner Branch to serve shippers located at Lakeview Business Park and connect to the national rail network.²

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

² STR’s petition to construct the new line is currently before the Board in Savage Tooele Railroad—Construction & Operation Exemption—Line of Railroad in Tooele County, Utah, Docket No. FD 36616. STR had originally indicated that either UP would retain ownership of the Line for use as ancillary track or STR would acquire the Line and reinstate common carrier

(UP Pet. 2-3). UP further states that it did not want to sell the Line to STR because it has been using it as ancillary track to support operations on the Shafter Subdivision. (*Id.* at 3.)

In its December 11 motion, BNSF states that, as a condition of the Board's 1996 approval of the merger between UP and the Southern Pacific Rail Corporation (SP),³ it was granted trackage rights to operate over the Shafter Subdivision and the right to interchange with any new short line railroad connecting to the Shafter Subdivision. (BNSF Mot. 1.) BNSF argues that it appears UP structured its transaction with STR in such a way as to establish a physical barrier between the Shafter Subdivision and STR so that BNSF cannot interchange with STR, as BNSF asserts it is entitled to do under the UP/SP merger conditions and the Restated and Amended Settlement Agreement (RASA) between UP and BNSF, which the Board approved in the context of its review of the merger transaction. (*Id.* at 1-2.)

UP and STR separately replied to BNSF's motion on January 10, 2024. UP asks the Board to deny BNSF's motion, asserting that it has not violated BNSF's rights and that BNSF can demand arbitration under the RASA's arbitration provision if BNSF believes its rights were violated by UP. (UP Reply 4-5.) STR does not take a position on the merits of BNSF's motion but asks the Board to deny the motion because considering BNSF's claim and the relief it seeks in the context of this exemption proceeding would significantly prolong the proceeding and delay the rail construction project, thereby delaying STR's ability to meet the needs of rail shippers locating in Lakeview Business Park. (STR Reply 4.)

DISCUSSION AND CONCLUSIONS

BNSF's Motion. BNSF asks the Board to institute a proceeding under 49 U.S.C. 10502(b) and set a procedural schedule for consideration of UP's petition. BNSF maintains that UP structured its transaction with STR and acted with respect to the Line so that BNSF cannot interchange with STR, thus violating its rights under the RASA. (BNSF Mot. 1-2.) According to BNSF, "UP's action is consistent with other recent attempts by UP to frustrate the competition-preserving conditions imposed by the Board in connection with its approval of the UP/SP merger." (*Id.* at 2.)

UP's effort to seek common carrier operating authority over the Line is separate and distinct from BNSF's claimed right to access STR and its future shippers via the Line under the terms of the RASA. See Union Pac. R.R.—Operation Exemption—in Bexar & Wilson Cntys.,

service over it. STR Pet. 4-5, June 30, 2022, Savage Tooele R.R., FD 36616. After the Board questioned how STR's proposed line would connect (and remain connected) to the national rail network should UP continue to retain the Line as ancillary track under 49 U.S.C. 10906, and requested supplemental information, see Savage Tooele R.R.—Construction & Operation Exemption—Line of R.R. in Tooele Cnty., Utah, FD 36616, slip op. at 2 (STB served Aug. 24, 2022), STR confirmed that UP decided to retain ownership of the Line and petition to reinstate common carrier operating authority over this segment, STR Verified Suppl. at 1, Sept. 20, 2022, Savage Tooele R.R., FD 36616.

³ See Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., 1 S.T.B. 233, 419 (1996).

Tex., FD 35776, slip op. at 3-4 (STB served Dec. 24, 2013). BNSF itself has stated that it “believes that, regardless of the ownership or regulatory status of the [Line], BNSF should have the right to interchange with STR once the new short[] line begins operating, consistent with STR’s stated intent and UP’s obligations under RASA Section 8(k) and the UP/SP merger conditions.” (BNSF Mot. 3.) Granting UP the authority to reinstitute common carrier service over the Line does not preclude BNSF from seeking, through either arbitration or a new, separate Board proceeding, a determination that BNSF is entitled to access STR via the Line. Moreover, granting UP common carrier operating authority over the Line will help avoid delay to STR’s project and ensure that its business park shippers are connected to the national rail network. The Board notes that, in any future proceeding, whether before an arbitrator or the Board, this decision shall not be construed as permitting UP to defeat any rights that BNSF may have had to interchange with STR or serve shippers at Lakeview Business Park had the exemption not become effective.

BNSF’s motion to institute a proceeding and set a procedural schedule will therefore be denied.

UP’s Petition for Exemption. Under 49 U.S.C. 10901, a rail carrier may not reinstitute operations over abandoned rail line without the prior approval of the Board. However, under 49 U.S.C. 10502(a), the Board shall, to the maximum extent consistent with 49 U.S.C. subtitle IV, part A, exempt a transaction or service from regulation upon finding that: (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101 (RTP); and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not needed to protect shippers from the abuse of market power.

Detailed scrutiny of the proposed transaction through an application for review and approval under 49 U.S.C. 10901 is not necessary to carry out the RTP. Reinstitution of service on the Line would facilitate rail transportation to tenants of the Lakeview Business Park and thus promote the RTP by minimizing the need for federal regulatory control (49 U.S.C. 10101(2)), ensuring the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public (49 U.S.C. 10101(4)), reducing regulatory entry and exit barriers (49 U.S.C. 10101(7)), and providing for the expeditious handling and resolution of proceedings (49 U.S.C. 10101(15)). Other aspects of the RTP would not be adversely affected.

Regulation of this transaction is not needed to protect shippers from the abuse of market power. Rather, reinstitution of service is a step toward providing the shippers at Lakeview Business Park with a rail transportation option that otherwise would not exist. See Savage Tooele R.R.—Constr. & Operation Exemption—Line of R.R. in Tooele Cnty., Utah, FD 36616, slip op. at 2 (STB served Aug. 24, 2022) (“[I]t is not clear how STR’s proposed line will connect (and remain connected) to the national rail network” should UP “retain the right-of-way between milepost 0.0 and milepost 1.04 to use as ancillary track . . .”). And, as noted above, this decision does not affect BNSF’s rights under RASA Section 8(k) and the UP/SP merger conditions. Moreover, the transaction is limited in scope since the Line is only 1.04 miles long and reinstitution of common carrier service will merely connect STR’s proposed line to the interstate rail network.

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. However, labor protective conditions may not be imposed on transactions under 49 U.S.C. 10901. See 49 U.S.C. 10901(c).

UP states that the proposed action will not result in changes to existing rail carrier operations or existing operations on the Line that would exceed the applicable thresholds of 49 CFR 1105.7(e)(4) or (5). Therefore, under 49 CFR 1105.6(c), this transaction is categorically excluded from environmental review. Similarly, under 49 CFR 1105.8(b)(1), no historic report is required because the subject transaction is for reinstituted rail service, UP has indicated no plans to alter railroad properties 50 years old or older, and any abandonment of service would be subject to Board jurisdiction.

It is ordered:

1. BNSF's motion to institute a proceeding and set a procedural schedule is denied.
2. Under 49 U.S.C. 10502, the Board exempts UP's reinstitution of service over the Line from the prior approval requirements of 49 U.S.C. 10901.
3. Notice of the exemption will be published in the Federal Register.
4. The exemption will be effective on March 14, 2024.
5. Petitions to stay must be filed by February 23, 2024. Petitions for reconsideration and petitions to reopen must be filed by March 4, 2024.
6. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.