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SERVICE DATE - AUGUST 28, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34079

SAN JACINTO RAIL LIMITED CONSTRUCTION EXEMPTION AND
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
OPERATION EXEMPTION—BUILD-OUT TO THE BAYPORT LOOP NEAR
HOUSTON, HARRIS COUNTY, TX

Decided: August 19, 2002

By petition filed on August 30, 2001, San Jacinto Rail Limited (San Jacinto) and The Burlington Northern and Santa Fe Railway Company (BNSF) (collectively, petitioners) seek an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901 for the construction by San Jacinto and the operation by BNSF of a 12.8-mile line of railroad serving the Bayport Industrial District (Bayport Loop) in southeast Houston, Harris County, TX, near Galveston Bay. The line would connect the Bayport Loop with the former Galveston, Henderson and Houston Railroad (GH&H) line now owned by Union Pacific Railroad Company (UP) near the southeast corner of Ellington Field. Petitioners request that, consistent with our usual practice in rail construction cases, we conditionally grant the exemption, subject to our completion of the ongoing environmental review and the issuance of a further decision addressing the environmental issues and establishing an effective date for the exemption, if warranted, subject to any necessary conditions.¹

¹ In October 2001, the Board's Section of Environmental Analysis (SEA) issued a notice of intent to prepare a full Environmental Impact Statement (EIS) in this case. A draft scope of study was issued for public review and comment in November 2001. Following scoping meetings held in January 2002, a Final Scope of Study for the EIS was issued in July 2002. A Draft Environmental Impact Statement (Draft EIS) now is being prepared. After it is issued for public review and comment (for a minimum of 45 days), SEA will issue a Final Environmental Impact Statement addressing the public's comments. We will then consider the potential environmental impacts associated with the proposal and make our final determination as to whether the exemption will become effective, and whether construction can begin.

On August 30, 2001, the Bayport Producers petitioned the Board for leave to intervene in the proceeding.² On October 9, 2001, UP filed comments, to which petitioners replied on October 29, 2001. By decision served November 28, 2001, the Board instituted a proceeding under 49 U.S.C. 10502(b) to consider the petition and responsive pleadings. On April 18, 2002, the United Transportation Union (UTU) filed comments opposing construction of the proposed line, and on June 13, 2002, petitioners filed a reply.³

As discussed below, we tentatively conclude, subject to completion of the ongoing environmental review, that the proposed exemption meets the statutory standards of 49 U.S.C. 10502. Following our practice in rail construction cases, this is a preliminary decision addressing transportation-related issues. We will not make a final determination, the exemption will not be effective, and construction cannot begin, until after we have considered the potential environmental impacts associated with this proposal. We will make the exemption authority effective at that time, if appropriate, subject to any necessary mitigation conditions.

BACKGROUND

San Jacinto, a Delaware limited partnership, is comprised of one general partner, Bay Rail, LLC, a subsidiary of BNSF, and several limited partners, i.e., BNSF, Basell Impact Holding

² The Bayport Producers consist of producers/shippers ATOFINA Petrochemicals, Inc. (ATOFINA), Basell USA Inc., Equistar Chemicals, LP, and Lyondell Chemical Company. All of these companies previously filed statements in support of the petition, which were attached thereto. The intervention request is reasonable and will be granted.

³ Statements in opposition to the proposal were filed by The Galveston Bay Conservation and Preservation Association (Galveston Bay) and the Greater East End Coalition For Community Concerns. These groups generally raise concerns related to the environment, traffic, and safety—concerns that will be fully addressed in the ongoing environmental review process in this proceeding. These groups also raise infrastructure concerns which will be resolved in our response to UP's arguments.

A letter in support of the proposal was filed by John O'Leary of ATOFINA Chemicals, Inc., a sister corporation of ATOFINA that is building a new facility adjacent to ATOFINA in the Bayport Loop. This letter stresses the importance of competitive rail service to its business in the Bayport Loop as well as to the chemical industry in general.

In addition, letters in support of the proposal were filed by the American Chemistry Council, David Boswell of Velsicol Chemical Corporation, and Mary E. Nave of Old World Industries, Inc. These letters stress the importance of competitive rail service to shippers in the chemical industry.

Company, Bay Junction, Inc., Equistar Bayport, LLC, and Lyondell Bayport, LLC.⁴ The Bayport Loop contains the chemicals and plastics production facilities of many petrochemical companies that rely heavily on rail transportation to obtain raw materials, move their products to market, and store cargo to reduce the need for silos. These producers state that they require efficient and reliable rail service at competitive rates. According to petitioners, UP, the only rail carrier now serving the Bayport Loop producers, has not always been able to meet their transportation needs.

Petitioners plan to construct and operate the proposed line to provide additional rail service to this area. San Jacinto plans to acquire all necessary land for the line and to either construct the line or have it constructed on its behalf.⁵ BNSF (or its designated operator), pursuant to a contract with San Jacinto, intends to operate the line as a common carrier. BNSF would initially provide service to the four core producers, but it plans to offer service to all shippers located in the Bayport Loop and adjoining areas upon request.⁶

BNSF intends to reach the proposed line from the storage yard of CMC Railroad, Inc. in Dayton, TX, approximately 30 miles northeast of Houston. From the Dayton yard, BNSF would operate trains in a southwesterly direction via a combination of trackage rights over UP lines and over a joint BNSF/UP track segment to Tower 85. At Tower 85, BNSF trains would turn south onto UP's GH&H line to the proposed build-out. BNSF states that it intends to seek authority to operate over UP's GH&H line pursuant to trackage rights stemming from a condition, imposed on UP when the Board approved its merger with Southern Pacific Transportation Company (SP), giving BNSF a right to travel over the UP line to reach a build-in/build-out point.⁷

⁴ With the exception of BNSF, the limited partners are wholly owned subsidiaries of the four members of the Bayport Producers.

⁵ According to petitioners, no residences or recreational lands will be necessary for construction, and the line will be located next to existing track, utilities, and pipelines where possible.

⁶ According to petitioners, BNSF anticipates running one 36-to-66-car train each way per day on the line, for a total of 13,000 to 23,000 loaded rail cars per year. Petitioners state that this volume of traffic could be accommodated on the GH&H line. Most cargo on the line would consist of non-hazardous plastic pellets moved in covered hopper cars. The remainder would be chemicals moved in tank cars, of which 1,500 to 7,000 cars per year would contain hazardous materials or other miscellaneous commodities. The majority of the cars involved would be private cars owned or leased by the producers.

⁷ This route is a change from the route described in BNSF's original petition and was brought
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The proposed line would extend from the GH&H at the Graham Siding, near the Ellington Field, a commercial airport. It would be about 12.8 miles long, initially running about 6 miles through mostly undeveloped, industrially or municipally owned properties before entering the Bayport Loop. Inside the Bayport Loop, the line would proceed for another 7 miles, crossing the lines of UP, Bayport Rail Terminal, Inc. (BRT), and several public and private access roads.⁸ The line would terminate near the ATOFINA facilities, just east of Highway 146.

Each of the Bayport Producers has submitted a statement in support of the proposal explaining the importance of the new line to their business' success. In addition, BNSF states that the new line would increase the availability of efficient, reliable, and competitive rail service to area shippers, increase rail capacity and infrastructure in the Houston area, increase shippers' access to BNSF's single-line service, provide an alternate route during service disruptions,⁹ extend BNSF's access to petrochemical and plastics facilities on the Gulf Coast, and replace the pre-existing competition between UP and SP.

⁷(...continued)

to the Board's attention in a letter dated August 6, 2002, addressed to our SEA. In its original petition, BNSF proposed to reach the GH&H by running its trains through the New South Yard south of Houston and over the Glidden Subdivision, which connects to the GH&H at Tower 30. In response to community concerns about potential congestion impacts near New South Yard, BNSF proposes this alternative to avoid New South Yard altogether. BNSF states that this change does not affect the proposed route location for the new line construction.

⁸ No carrier may refuse permission for a constructing carrier to cross its property, so long as the construction and operation of the crossing do not unduly interfere with the operation of the crossed line and the crossing carrier compensates the owner of the crossed line. 49 U.S.C. 10901(d)(1). Any carrier engaged in a crossing dispute may request that we set the terms for crossing when the carriers are unable to agree. 49 U.S.C. 10901(d)(2).

Petitioners indicate that they have secured permission from BRT to cross its track and that they intend to promptly engage in talks with UP. Should the latter be unsuccessful, petitioners state that they will seek authority to cross UP's track pursuant to section 10901(d). UP, in its comments, pledges to cooperate with BNSF in reaching a crossing agreement. UP Comments, p. 17.

⁹ Petitioners claim that, in 1997 and 1998, shippers experienced a disruption of UP's rail service as UP's merger with SP was being implemented, resulting in significant delays, substantial economic damage, and customer dissatisfaction.

DISCUSSION AND CONCLUSIONS

Transportation Aspects of the Petition. Generally, the construction and operation of common carrier railroad lines requires prior Board approval under 49 U.S.C. 10901. However, under 49 U.S.C. 10502, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

UTU opposes the petition. It argues that BNSF's delay in declaring who would operate the line creates the possibility that BNSF would hire a non-union carrier using underpaid and inexperienced workers. UTU maintains that this possibility conflicts with the rail transportation policy (RTP), which "encourages fair wages and safe and suitable working conditions in the rail industry." 49 U.S.C. 10101(11). Furthermore, according to UTU, BNSF should be obligated to operate the line itself under the terms of the UP/SP merger agreement and should not be able to designate another operator in its stead.

We find UTU's concerns to be premature. Any operator that BNSF might designate to perform service in the future would have to file with the Board for authority to operate. That proceeding would provide UTU with ample opportunity to raise its objections.¹⁰

In its comments, UP states that it does not oppose petitioners' plans here and does not intend to attempt to delay the proposed line. However, it expresses concerns about losing traffic to the proposed new BNSF alternative and criticizes the proposed build-out on grounds that BNSF's Houston facilities are allegedly inadequate to handle its existing traffic. UP states that, by rerouting rail traffic to and from the Bayport Loop, and by attracting other shippers to the Bayport area, the build-out would add rail traffic to facilities that already need expansion, and that this increased pressure on the infrastructure would increase delays and the risk of service failures.¹¹

¹⁰ UTU also argues that, because this transaction is really part of the UP/SP merger subject to the provisions of the predecessor to section 11323, the labor conditions set forth in New York Dock Ry.-Control-Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), should apply here. We disagree. The instant petition is an independent, properly filed request for an exemption from the provisions of section 10901 for which, by statute, no labor protection may be imposed.

¹¹ UP also expresses concern for the safety of railroad yard employees and motorists, and a fear of automobile and railcar congestion at locations along the proposed route where rail traffic would increase. Similarly, Galveston Bay has asked us to find that the RTP does not permit the proposed
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We find no support on the record for UP's fears. All traffic in the area currently moves over UP. Should BNSF not make sufficient infrastructure improvements to enable it to offer shippers a superior service, traffic would stay on UP.

UP's argument that the proposed construction would lure into Bayport new industry that would overwhelm the rail network is not persuasive. That argument assumes that firms in the petrochemical industry would make irrational investments of millions of dollars simply because BNSF plans to build this line. But any industrialist contemplating building a facility in this area would carefully study the entire transportation system before undertaking such a major investment. UP's claim that this line constitutes a lure for the unwary ignores the reality of how this sort of investment decision is made.

The proposal fulfills a condition imposed on the UP/SP merger to preserve pre-merger competition between UP and SP. As such, the effect of the proposed build-out on UP's traffic is simply a consequence of BNSF's proper exercise of its trackage rights acquired under the UP/SP merger agreement. In short, BNSF's new line would result in an additional service option for Bayport Loop shippers and require BNSF and UP to compete for their traffic. These goals are fully consistent with the public interest and the RTP.¹²

Based on the information provided, we conclude that detailed scrutiny of the proposed construction and operation under 49 U.S.C. 10901 is not necessary to carry out the RTP. The requested exemption would promote the RTP by providing an alternative rail service option to shippers in the Bayport Loop and by increasing competition [49 U.S.C. 10101(1) and (4)]. Exempting the proposed construction and operation would reduce the need for Federal regulatory control over the rail transportation system [49 U.S.C. 10101(2)], ensure the development of a sound transportation system with effective competition among carriers [49 U.S.C. 10101(4)], foster sound economic conditions [49 U.S.C. 10101(5)], and reduce regulatory barriers to entry [49 U.S.C. 10101(7)]. Unless we determine otherwise following the environmental analysis, other aspects of the RTP would not be adversely affected.

¹¹(...continued)

construction, citing concerns that Galveston Bay has raised in the ongoing environmental review process. These concerns, however, will be addressed in the EIS and in our final decision, where we will consider the environmental issues following completion of the environmental review process.

¹² Under 49 U.S.C. 10901(c), we must authorize a rail line construction project "unless the Board finds that such activities are inconsistent with the public convenience and necessity." This permissive licensing policy establishes a clear presumption in favor of rail construction proposals and conforms to the broader congressional policies to promote "effective competition among rail carriers" and to "reduce regulatory barriers to entry into . . . the industry." 49 U.S.C. 10101(4), (7).

Regulation of the proposed construction and operation is not necessary to protect shippers from an abuse of market power. Rather, the proposed transaction would dilute any existing market power in the Bayport Loop area by providing another transportation option. Thus, the proposal would enable shippers to realize the benefits of increased competition, and at the same time, it would fulfill a condition imposed on the UP/SP merger to preserve pre-merger competition between UP and SP. In light of our finding that regulation is not necessary to protect shippers from an abuse of market power, we need not determine whether the transaction is limited in scope.

Completion of the Construction Proceeding. As noted above, petitioners have requested that we pursue our usual approach of issuing a preliminary decision addressing the transportation aspects of the proposed construction prior to completion of our environmental review, which we are doing here. But we cannot, of course, authorize the construction until we have completed our environmental review.¹³ Therefore, this exemption will not be effective, and no construction can begin, until our environmental review process is concluded.

Following the conclusion of the environmental review process,¹⁴ we will issue a further decision assessing the potential environmental impacts of the proposal and making the exemption effective at that time, if appropriate, subject to mitigation conditions, if necessary. See Missouri Mining, Inc. v. ICC, 33 F.3d 980 (8th Cir. 1994). This decision does not in any way prejudge our ultimate decision, and it will not diminish our capacity to address environmental issues in reaching a final decision. Illinois Commerce Com'n v. ICC, 848 F.2d 1146, 1259 (D.C. Cir. 1988), cert. denied, 488 U.S. 1004 (1989). Construction may not begin until our final decision in this proceeding has been issued and has become effective.

As conditioned, this action will not significantly affect either the quality of the human environment or the conservation of energy resources.

¹³ Our November 28, 2001 decision instituting this proceeding contemplated that the proceeding would be completed by August 28, 2002. However, it will take considerably longer to complete a full examination of the potentially significant environmental issues that have surfaced, warranting preparation of a full EIS, rather than a more limited Environmental Assessment.

¹⁴ As previously indicated, a number of organizations and individuals have raised safety and environmental concerns about this proposal. Those concerns will be fully considered and addressed in the environmental review of this proceeding.

It is ordered:

1. The Bayport Producers' request to intervene in this proceeding is granted.
2. Under 49 U.S.C. 10502, we conditionally exempt San Jacinto's construction and BNSF's operation of the above-described line from the prior approval requirements of 49 U.S.C. 10901, subject to our further consideration of the anticipated environmental impacts of the proposal.
3. On completion of the environmental review, we will issue a further decision addressing those matters and establishing an effective date for the exemption, if appropriate, subject to any necessary conditions, thereby allowing construction to begin at that time.
4. Notice will be published in the Federal Register on August 28, 2002.
5. Petitions to reopen must be filed by September 17, 2002.
6. This decision is effective 30 days from the date of service.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams
Secretary