

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Public Record

TEXAS RAILWAY EXCHANGE LLC – Construction and Operation Exemption – Galveston County, TX	)))))	FD 36186
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**PETITIONER’S REPLY IN OPPOSITION TO UNION PACIFIC
RAILROAD COMPANY’S MOTION FOR EXTENSION OF TIME**

Petitioner Texas Railway Exchange LLC (“TREX”) hereby replies in opposition to the Motion for Extension of Time (“Motion”) filed by Union Pacific Railroad Company (“UP”) in this docket on December 5, 2018. UP’s novel, open-ended, and belated extension request for additional time until TREX responds to UP discovery – and its incorporated request that the Board’s refrain from issuing a provisional certificate of public convenience and necessity (“PC&N”) – is simply a delay tactic that is improper and in contravention of the Board’s rules designed to expedite exemption proceedings. The Motion therefore should be denied. Nonetheless, TREX is willing to agree to a standard date extension of up to seven days to allow UP a reasonable time to file a reply on the substance of TREX’s exemption petition.

**I.
BACKGROUND**

TREX filed its Petition for an Exemption under 49 U.S.C. § 10502 from the Requirements of 49 U.S.C. § 10901 (“Petition”) on November 21, 2018. TREX seeks to construct and operate a new one-half mile common carrier rail line to provide new direct, competitive rail service in Galveston, Texas. TREX’s Petition follows many prior decisions of

the Board and its predecessor exempting similar pro-competitive rail construction projects from the prior approval requirements of 49 U.S.C. § 10901. Petition at 8-9.

TREX's Petition is one of the most detailed and thorough construction and operation petitions of its kind, even though the proposed construction is relatively short and uncomplicated. The Petition includes complete descriptions of routings, track construction, and the installation of crossings and turnouts, as well as detailed, engineering drawings of the four alternative routings. The Petition also contains substantial factual need and justification information as well as comprehensive legal argument demonstrating that the proposed construction clearly meets the § 10502 criteria. TREX fully justified its request for expedited review and the granting of a provisional PC&N certificate subject to final approval upon completion of the environmental review.

TREX did not file a complaint, and UP is not automatically made a party to the exemption proceeding. However, because the construction entails a crossing of UP's local track, TREX sent a courtesy copy of the Petition to UP's Chief Legal Officer by overnight mail, in the interests of full disclosure. Shortly thereafter, TREX wrote to UP's Chief Legal Officer a letter on November 27, 2018, asking UP to enter into discussions in the hopes of reaching agreement on terms for operations and crossing compensation. Rather than simply respond to TREX's letter, earlier this week, UP sent to TREX substantial discovery requests, consisting of 37 interrogatories and 25 requests for production of documents. Those 62 requests cover expansive areas, including project need, rail service and operations, expected revenues, expected customer rates, site inspection information, real estate ownership, and environmental review, and include many areas in which the Board has routinely denied discovery in construction exemption proceedings.

Upon receiving UP's discovery requests, TREX counsel asked UP counsel on December 5, 2018 if UP intended to seek party status or formally intervene in the proceeding, and, if so, at what time. It also asked UP counsel to advise when UP intended to respond to TREX's November 27, 2018 letter inquiring about UP's willingness to discuss rail line operation and crossing issues associated with the Petition. UP responded later that day by filing its open-ended extension request and informing TREX that it was "carefully evaluating" the request that the parties engage in discussions and "will substantively respond to your inquiry with all deliberate speed."

II. ARGUMENT

UP's novel Motion, seeking an open-ended extension of the Board's reply deadline pending TREX's response to broad discovery – coupled with its request seeking to block the issuance of a provisional PC&N certificate – are unwarranted and contravene the Board's well-established rules governing the orderly processing of exemption proceedings, and should be denied. No such extension request has ever been granted in prior exemption proceedings, and UP does not even try to provide legal support for its request. In reality, UP's Motion is simply a thinly veiled attempt to seek an unending extension to delay consideration of a complete application while UP engages in a discovery fishing expedition whose only purpose is to substantially delay administrative review and aid UP's attempts to block the proposed pro-competitive rail line. If granted, UP's request would set a dangerous precedent allowing any interested person with an interest in an exemption proceeding – construction, abandonment, merger, class exemptions, or otherwise – to simply propound voluminous

discovery requests in order to subvert the orderly review and processing of such cases. The Board should not countenance UP's approach.

A. UP Provides No Valid Justification for its Extension Request

UP's sole stated basis for its extension request is that TREX filed its Petition near a holiday, leaving UP with "just twelve business days" to file its reply under the Board's governing rules. Mot. at 3.¹ However, the Board's rules require replies within 20 *calendar* days, not 20 *business* days. 49 C.F.R. §§ 1104.7; 1104.13(a). Additionally, UP's extension request is belated and contravenes the requirement that "[any] request for an extension must be filed not less than 10 days before the due date." *Id.* § 1104.7(b). UP provides no explanation or basis for its failure to timely file its extension request, nor does it seek leave to do so.

Also, UP has had sufficient time to fully evaluate and respond to TREX's Petition, but instead apparently elected to spend its time crafting 62 detailed discovery requests. However, the Board's rules in exemption proceedings do not authorize delays in reply filings to allow interested persons to first propound discovery, as explained below. Additionally, while the Board often grants reasonable extensions of a *specific* duration, (e.g., a week), and TREX is willing to consent to such a request under the circumstances, UP failed to consult with TREX on any such extension request. Instead, UP elected to file with the Board a novel request for an extension of indefinite duration that is unwarranted.

Nevertheless, TREX consents to a standard extension of up to seven days to allow UP a reasonable time to file a substantive reply, and which should fully dispense with UP's concern that it has "just twelve business days" to file its reply.

¹ UP is incorrect. The reply deadline of December 11, 2018 is 13 business days after the filing of the Petition on November 21, 2018.

B. UP's Request for a Delay in the Submission of Comments to Allow Open-Ended Pre-Reply Discovery is Unwarranted

UP seeks to indefinitely delay for its reply “until 20 days after TREX completes its responses to [UP’s] discovery requests.” Mot. at 2. However, UP’s request is unsupported. This is not a complaint proceeding where UP is the defendant, and UP has not intervened or sought leave to do so, and has not even responded to TREX’s request asking UP when it might seek to intervene or obtain party status. 49 C.F.R. § 1112.4 (specifying the standards for requesting intervention in proceedings set for modified procedure). Under the Board’s rules, only parties may seek discovery. *Id.* § 1114.21.

In addition, the Board’s rules do not authorize even parties to exemption proceedings to extend due dates in the manner UP seeks. To the contrary, “[e]xemption proceedings are informal, and public comments are generally not sought during consideration of exemption petition proposals.” *Id.* § 1121.4(a). Further, “in determining whether the [exemption] criteria are met, the Commission considers proposals contained in exemption petitions on their merits without seeking public comment.” *Rail Exemption Procedures*, EP 400 (Sub-No.3), 8 I.C.C.2d 114, 116 (1991). While the Board will consider timely filed comments in an exemption proceeding, there is no compelling need for such comments here, given the thoroughness of TREX’s Petition, which more than adequately addresses all of the Board’s exemption criteria. There is no reason for deviation from the Board’s rules requiring that “the Commission will determine on the basis of the initial filing whether the criteria of [§ 10502] are met. [And,] [i]f we find that they are met, we will issue the exemption and publish a notice of the exemption in the Federal Register.” *Id.* at 116-17.

Some irony attaches to UP's tactics here as the Board and the railroad industry, including UP, have long sought to avoid the unwieldy and protracted delays of the type UP seeks here. Such tactics undermine the Congressional directives at 49 U.S.C. § 10502(b), that the STB determine within 90 days after petition for exemption is filed whether to initiate a proceeding. *Expedited Procedures for Processing Rail Rate Reasonableness, Exemption & Revocation Proceedings*, 1 S.T.B. 754, 772 (1996) ("The 90-day deadline for deciding whether to initiate a proceeding requires that we impose strict standards for developing a record.")

Additionally, 49 C.F.R. § 1114.21(a) does not authorize discovery in an informal proceeding, although TREX recognizes that the Board has allowed some limited discovery in exemption proceedings in appropriate circumstances,² but *without* delaying comment due dates. TREX intends to respond in good faith to UP's discovery requests, formally or informally, and provide UP with relevant, responsive information. However, UP's expansive requests propounded on TREX are far from limited, or within the proper scope of the Board's discovery rules, and are clearly designed for improper, manipulative purposes. In fact, UP's Motion fails to raise any factual disputes or possible omissions with respect to TREX's Petition. Further, well over half of UP's requests improperly go to issues of rail

² Cf. *Chi. & N. W. Transp. Co – Constr. & Operation Exemption – City of Superior, Douglas Cnty., WI*, FD 32433 (ICC served May 11, 1994), 1994 WL 178841 at *6 n.7 (noting that petitioner UP (CNW) "refuse[d]" to answer limited interrogatory requests served on it by another party in the construction exemption proceeding).

service, public need, environmental review, or crossing matters – discovery matters that are inappropriate or premature³ in rail construction exemption proceedings.⁴

UP makes no attempt to show why any of its specific requests are necessary for it to be able to meaningfully comment on the Petition as required under the Board’s rules, especially as UP itself should already have most of the relevant information on local operations and service, and on many of the other matters on which it seeks discovery. UP also makes no attempt to show how the sought discovery information is relevant, and might be able to affect the outcome of the proceeding.⁵ UP is simply trying to improperly use the discovery procedures as a bootstrap to extract the delay that Board’s rules are designed to prevent. UP should not be allowed to use broadly propounded discovery as a means of controlling the exemption process and obviate from the Board’s well-established rules for the orderly submission of comments and review of the Petition.

³ As noted above, UP has not responded to TREX’s request that UP discuss with it crossing issues, and as noted in TREX’s Petition (at 17), if UP is unwilling to do so, TREX will need to file a formal § 10901(d) crossing petition with the Board.

⁴ *E.g., Ill. Cent. R.R. – Constr. & Operation Exemption – In E. Baton Rouge Parish, LA*, FD 33877 (STB served May 25, 2001), at 3 (“[petitioner] need not demonstrate insufficient service capacity, service failures, a shortage of storage capacity, or multiple industries' support for its proposal. [Party’s] requests for information pertaining to public need are irrelevant to our review under the statute.”); *Dakota, Minn. & E. R.R. Constr. into the Powder River Basin*, FD 33407 (STB served Feb. 2, 2000), at 1 (environmental matters are addressed as part of the Board’s environmental review, and such requests are not authorized under the National Environmental Policy Act or the Board’s rules).

⁵ In the unlikely event that the Board determines that the impacts of the proposed exemption cannot be ascertained from the Petition, or significant adverse impacts might occur if the proposed exemption were granted, then it has the authority to direct that additional information be provided. 49 C.F.R. § 1121.4(c)(1).

C. UP's Request for Delay in Issuing a PC&N Certificate is Unwarranted and Premature

While UP's Motion does not specifically oppose TREX's request that the Board conditionally grant TREX's Petition within 90 days as it has requested in its Petition, it "ask[s] the Board to refrain from issuing a certificate of public convenience and necessity until TREX finalizes the route for its proposed track and shows it is entitled to cross affected tracks." Mot. at 2. In particular, UP asserts that any such certificate should be delayed "until all questions about the proposed track's routing are resolved" and the Board approves a possible future crossing petition under 49 U.S.C. § 10901(d). Mot. at 5. However, UP again provides no support for its request to block the issuance of a PC&N Certificate, and its objections, at best, are clearly premature.

While UP expresses concerns about possible routings, TREX's Petition includes detailed engineering drawings of four alternative routings, and UP has not expressed any concerns about the completeness of any of them. Also, UP is not entitled to hold up the exemption process until the environmental review examining the routings is complete. Additionally, as noted above, TREX has not yet determined whether it needs to seek §10901(d) authority. If TREX does need to seek crossing authority, and if UP opposes TREX's statutory right to cross its property, UP may request that the Board set the terms for crossing if TREX and UP are unable to agree. 49 U.S.C. § 10901(d)(2).

As TREX stated in its Petition, the Board will revoke a grant of exemption in part and issue a certificate under 49 U.S.C. § 10901 where necessary "to remove any possible room for doubt that the statutory requirements for the implementation of 49 U.S.C. 10901(d) are met." *Midwest Generation, LLC – Exemption from 49 U.S.C. 10901 – for Constr. in Will*

Cnty., IL, No. 34060 (Sub-No. 1) (STB served Oct. 4. 2002) at 5. To eliminate any uncertainty as for the possible need for a certificate, and to help facilitate construction, TREX has requested that the Board summarily issue a public convenience and necessity certificate as part of its exemption petition decision. UP does not address this reasonable need for a certificate or the underlying authority of the Board to grant such a certificate in its Motion. In any event, UP's objections to the issuance of a PC&N certificate are a red herring and a further delay tactic, and the Board need not decide this issue at this time in ruling on UP's extension request.

III. CONCLUSION

As explained above, UP has failed to provide adequate justification for extension request, and the Board should deny UP's request. Nonetheless, TREX does not oppose up to a seven-day extension to allow UP to present any substantive concerns that it may have at this time. Additionally, UP has failed to justify its opposition to the Board issuing a certificate of public convenience and necessity when granting TREX's requested exemption, and therefore, this request should be denied – although the Board need not decide this issue at this time in deciding UP's extension request.

Respectfully submitted,

TEXAS RAILWAY EXCHANGE LLC

/s/ Peter A. Pfohl
Peter A. Pfohl
Robert D. Rosenberg
Katherine F. Waring
SLOVER & LOFTUS LLP
1224 Seventeenth St., N.W.
Washington, D.C. 20036
(202) 347-7170

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Its Attorneys

CERTIFICATE OF SERVICE

I hereby certify that I have this 7th day of December 2018 caused to be served copies of this Reply by courier and by email to outside counsel of Union Pacific Railroad Company, as follows:

Michael L. Rosenthal
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, D.C. 20001
(202) 662-6000

/s/ Katherine F. Waring

Katherine F. Waring

An Attorney for Texas Railway Exchange LLC