

SERVICE DATE - DECEMBER 3, 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: December 2, 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.<sup>1</sup>

On August 28, 2002, pursuant to petitioners' request, we served a decision (August decision) in which we tentatively concluded, subject to completion of the ongoing environmental review,<sup>2</sup> that the

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<sup>1</sup> On August 30, 2001, the Bayport Producers, consisting of producers/shippers ATOFINA Petrochemicals, Inc., Basell USA Inc., Equistar Chemicals, LP, and Lyondell Chemical Company, petitioned the Board for leave to intervene in the proceeding. That request has been granted in a prior decision in this matter. 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.

<sup>2</sup> 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) will be issued shortly. After it is issued for public review and comment (for a  
(continued...)

proposed exemption meets the statutory standards of 49 U.S.C. 10502. This was a preliminary decision addressing transportation-related issues. In that decision, we stated that we would not make a final determination as to whether to grant the exemption, thereby allowing the line to be built, until after we consider the potential environmental impacts of the proposal.

Also in the August decision, we noted that petitioners had sent a letter to SEA on August 6, 2002, proposing a change in the routing by which BNSF would move over the GH&H and other existing lines. Specifically, in lieu of routing Bayport traffic into and out of New South Yard south of Houston and over the Glidden subdivision, petitioners proposed routing that traffic to Dayton Yard along the GH&H and the East Belt, a UP-owned rail line, the applicable portion of which runs north and south through both residential and industrial parts of eastern Houston.<sup>3</sup> Petitioners asserted that the change pertained only to a shift in proposed operations within the East End area of Houston and did not affect the proposed new line itself.

On September 17, 2002, in response to this letter, the Galveston Bay Conservation and Preservation Association (Galveston Bay)<sup>4</sup> filed various motions and related requests for relief. On October 8, 2002, petitioners filed a reply. On October 11, 2002, Galveston Bay filed a motion to compel to obtain certain environmental materials supplied to Board staff by petitioners in this case. For the reasons discussed below, we will deny Galveston Bay's motions.

#### POSITIONS OF THE PARTIES

In its September pleading, Galveston Bay argues that the letter from petitioners to SEA functioned as a revision to the original petition. It further argues that this revision is improperly included in the record because it was not filed with the Board's Secretary or served on the parties, thereby denying the public notice and an opportunity to comment. Galveston Bay also contends that the

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<sup>2</sup>(...continued)

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 new line may be built.

<sup>3</sup> BNSF's operation over this route would be subject to its acquisition of any necessary trackage rights or trackage rights modifications.

<sup>4</sup> On January 11, 2002, Galveston Bay filed a statement opposing the proposed construction. The statement generally raised concerns relating to the environment, traffic, and safety—concerns that will be fully addressed in the ongoing environmental review process in this proceeding. It also raised infrastructure arguments that were resolved in the August decision.

communication of the letter to the Board is an improper ex parte communication between petitioners and Board staff. Galveston Bay asks us to strike petitioners' letter from the record and to impose sanctions on petitioners and certain Board employees for ex parte communications and on petitioners for failure to serve other parties. Galveston Bay also asks us to reopen the environmental scoping process to allow for public comment on the proposed change.

In its October pleading, Galveston Bay argues that, under the regulations of the Council on Environmental Quality (CEQ) at 40 CFR 1506.6(f), it is entitled to review and comment on materials supplied by petitioners in the environmental review process, some of which were submitted before and after the official comment period on the draft scope. Galveston Bay asks that we immediately place all such evidence, data, and correspondence in the record and provide Galveston Bay with an inventory of all such information along with an estimate of the costs of reproducing the material.

In response, petitioners argue that the letter describing the change did not revise the original petition, but merely proposed a voluntary mitigation measure addressing potential congestion impacts near New South Yard. They also argue that the letter did not constitute an ex parte communication because it related to the environmental review, not the transportation merits of the exemption proceeding. In addition, they assert that, because the letter is an environmental comment, it need not have been filed with the Board or served on other parties. Therefore, petitioners claim, there is no basis for disregarding the letter or imposing sanctions. Petitioners add that Galveston Bay also provides no basis on which to reopen the scoping process because the proposed change in the routing is not a substantial change or a significant new circumstance,<sup>5</sup> and, in any event, Galveston Bay will have an opportunity to comment on the change when the Draft EIS is issued.

## DISCUSSION AND CONCLUSIONS

Our review of the record leads us to conclude that neither petitioners nor any Board employees have engaged in any inappropriate communications or other misconduct with regard to petitioners' letter. Under the National Environmental Policy Act, the environmental review process is necessarily informal and all-inclusive and depends on cooperative consultations with the applicant as well as other agencies and other interested parties with expertise, so that all possible environmental information, issues, and points of view will come before the agency. See *City of Auburn v. United States*, 154 F.3d 1025, 1033 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999) (opportunity for public participation

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<sup>5</sup> Under CEQ regulations at 40 CFR 1501.7(c), an agency shall revise its scoping determinations "if substantial changes are made later in the proposed action, or if significant new circumstances or information arise which bear on the proposal or its impacts."

provides necessary checks and balances).<sup>6</sup> The letter itself is not an ex parte communication because it does not relate to the merits of the proposed construction but is environmental correspondence that merely proposes, in response to community concerns about potential congestion impacts near New South Yard, an alternate routing by which BNSF trains would move over the GH&H and other existing lines. This type of voluntary mitigation measure is not only contemplated but encouraged by our environmental procedures. In addition, because the communication was part of the environmental review process, petitioners' letter was properly sent directly to SEA rather than to the Board's Secretary. SEA acted properly in accepting the letter, placing it in the public files in the Board's public reading room,<sup>7</sup> and in bringing it to our attention so that it could be mentioned in the August decision. Finally, because the letter is environmental correspondence, petitioners were not required to serve it on other parties. See 49 CFR 1105.10(e). Consequently, there was no improper communication here or notice deficiency.

We also find no basis to reopen the exemption proceeding. The letter does not seek to revise the construction proposal itself. Nor do the contents of the letter have any bearing whatsoever on the transportation-related issues already addressed in this proceeding. The letter concerns environmental matters, and that phase of the case has not yet been completed. Galveston Bay and other interested parties will have an opportunity to comment on the routing change after issuance of the Draft EIS. As SEA explained in an October 30, 2002 letter to Galveston Bay's attorney, the CEQ environmental regulations at 40 CFR 1501.7(c) do not require that we reopen the environmental scoping process for a change of this nature.<sup>8</sup> Accordingly, we will not do so.

Finally, the environmental materials supplied to Board staff by petitioners are already in the public docket for this proceeding and, therefore, are publicly available in the Board's reading room,

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<sup>6</sup> Indeed, the CEQ regulations implementing NEPA specifically anticipate the continuing involvement and participation of the applicant throughout the process, so long as the agency independently evaluates the information submitted and is responsible for its accuracy. See, e.g., 40 CFR 1506.5(a)-(c). Our environmental rules also provide that the railroad may "participate in the preparation of environmental documents." 49 CFR 1105.4(j).

<sup>7</sup> Thus, the letter was made available to all interested parties, and it became part of the administrative record in this case.

<sup>8</sup> The change in routing does not affect the proposed rail construction itself and, therefore, does not represent a substantial change in the proposed action. Nor is this routing modification a significant enough new circumstance or piece of information to warrant revisiting the scope of the environmental review at this point. Finally, reopening the scoping process is unnecessary here because the proposed routing change will be included in the Draft EIS, which will be available for public review and comment.

either in paper copy or on microfiche. Moreover, all of this correspondence will be included as an addendum to the Draft EIS, so Galveston Bay and all other interested parties will have adequate opportunity to review and comment on the information after the Draft EIS is issued.

For these reasons, Galveston Bay's various motions are groundless and will be denied.

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

It is ordered:

1. Galveston Bay's motion to strike is denied.
2. Galveston Bay's motion to impose sanctions is denied.
3. Galveston Bay's motion to reopen the exemption proceeding is denied.
4. Galveston Bay's motion to reopen the environmental scoping process is denied.
5. Galveston Bay's motion to compel is denied.
6. This decision is effective on the date of service.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Nober.

Vernon A. Williams  
Secretary