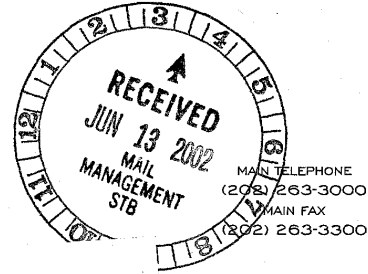


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June 13, 2002

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street NW
Washington, DC 20423

205617

ENTERED
Office of the Secretary

JUN 14 2002

Part of
Public Record

Re: Finance Docket No. 34079, San Jacinto Rail Limited –
Authority to Construct – And The Burlington Northern and
Santa Fe Railway Company – Authority to Operate – Petition
for an Exemption From 49 U.S.C. § 10901 – Build-Out To
The Bayport Loop Near Houston, Harris County, Texas

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are the original and ten (10) copies of the San Jacinto Rail Limited and The Burlington Northern and Santa Fe Railway Company's Reply to United Transportation Union's Comments.

I would appreciate it if you would date-stamp the enclosed extra copy of this submission and return it to the messenger for our files. Thank you for your assistance.

Sincerely,

Erika Z. Jones/als

Erika Z. Jones

Enclosures

cc: Parties of Record

Brussels Charlotte Chicago Cologne Frankfurt Houston London Los Angeles Manchester New York Palo Alto Paris Washington, D.C.
Independent Mexico City Correspondent: Jauregui, Navarrete, Nader y Rojas, S.C.

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BEFORE THE
SURFACE TRANSPORTATION BOARD



Finance Docket No. 34079

San Jacinto Rail Limited -- Authority To Construct -- And
The Burlington Northern and Santa Fe Railway Company --
Authority To Operate -- Petition For An Exemption From 49 U.S.C. § 10901 --
Build-Out To The Bayport Loop Near Houston, Harris County, Texas

SAN JACINTO RAIL LIMITED AND THE BURLINGTON NORTHERN
AND SANTA FE RAILWAY COMPANY'S REPLY TO
UNITED TRANSPORTATION UNION'S COMMENTS

ENTERED
Office of the Secretary

JUN 14 2002

Part of
Public Record

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June 13, 2002

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 34079

**San Jacinto Rail Limited -- Authority To Construct -- And
The Burlington Northern and Santa Fe Railway Company --
Authority To Operate -- Petition For An Exemption From 49 U.S.C. § 10901 --
Build-Out To The Bayport Loop Near Houston, Harris County, Texas**

**SAN JACINTO RAIL LIMITED AND THE BURLINGTON NORTHERN
AND SANTA FE RAILWAY COMPANY'S REPLY TO
UNITED TRANSPORTATION UNION'S COMMENTS**

San Jacinto Rail Limited ("San Jacinto") and The Burlington Northern and Santa Fe Railway Company ("BNSF") (collectively, "Petitioners") submit this Reply to United Transportation Union's ("UTU") Comments filed on April 18, 2002, in this proceeding.¹

In its Comments, UTU opposes the granting of the Petition for Exemption for the construction and operation of the proposed new line to the Bayport Loop. In support of its opposition, UTU relies in large part on the Comments filed by Union Pacific Railroad Company ("UP") on October 9, 2001, in which UP expressed its view that the Petitioners' traffic projections for the new line were too low and that, due to the lack of adequate rail infrastructure, the traffic on the new line would cause congestion and safety problems. UTU also raises a

¹ Petitioners note that their Petition for Exemption was filed on August 30, 2001, and that UTU did not file its Comments until some seven and one-half months later, well after the 20-day period provided for in 49 C.F.R. 1104.13(a). Petitioners do not, however, object to the late filing of UTU's Comments. Petitioners' Reply to the UTU Comments was not filed until now in light of on-going discussions between UTU and BNSF with respect to UTU's concerns, but it now appears that the parties will be unable to successfully resolve those concerns, and the Petitioners are therefore proceeding to reply to UTU's Comments.

question in its Comments as to what carrier will operate the proposed new line. Finally, UTU seeks the imposition of New York Dock² labor protective conditions on the transaction.

As set forth below, UTU's Comments do not provide any basis upon which to deny the Petition for Exemption.

1. First, Petitioners' fully responded to UP's Comments in their October 29, 2001 Reply in which they established that UP's criticism of the Petitioners' traffic projections was unfounded. In fact, UP significantly overstated the traffic that is presently moving to and from the Bayport Loop shippers which could be accessed by the new line.³ Petitioners also addressed UP's congestion and safety claims.

Further, to the extent UTU has concerns about the safety of operations on the new line, those concerns will be fully addressed and considered in the EIS process being conducted by the Section of Environmental Analysis ("SEA"). See Draft Scope of Study for the Environmental Impact Statement, 66 Fed. Reg. 59046, 59048 (Nov. 26, 2001). The preparation of a full EIS for this project will enable SEA and the Board to assure themselves that the construction of and operations on the line will be conducted in a safe and efficient manner consistent with the public interest.

2. UTU's concern about the new line being operated by a non-union shortline railroad is premature since no alternative operator has been proposed to date. In the event BNSF determines to contract the line operations to another carrier, UTU would have an opportunity to raise any concerns it may have with such an arrangement in the proceeding held pursuant to 49

² New York Dock Ry. - Control - Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979) ("New York Dock").

³ UP acknowledged its overstatement of the relevant Bayport Loop traffic in a November 15, 2001 letter from its counsel, J. Michael Hemmer, to the Board.

U.S.C. 10901(a), 49 U.S.C. 10902 or other applicable statutory provision to authorize such operations. Further, this is not the proper forum to decide whether the use of a hypothetical third party violates any contractual rights of UTU.⁴

3. UTU's request that New York Dock labor protective conditions be imposed on the transaction because, in UTU's view, the proposed new line is a part of the UP/SP merger transaction is unjustified. The Petition for Exemption is an independent proceeding under 49 U.S.C. 10901 for which by statute no labor protective conditions may be imposed.⁵ See 49 U.S.C. § 10901(c). In addition, in Missouri Pacific Railroad Company et al. – Construction and Operation Exemption – Avondale, LA, STB Finance Docket No. 33123 (served July 11, 1997), the Board addressed a similar UTU argument seeking New York Dock protective conditions in the context of a connector track construction resulting as a consequence of the UP/SP merger:

UTU contends that the proposed crossovers are part of the UP/SP Control and therefore the protective conditions in New York Dock should be imposed. Applicants' proposed crossovers at Avondale apparently are intended to integrate the applicants' systems. Thus, it appears that any employees affected by changes in operations following construction will be covered by employee conditions imposed upon our approval of the merger and trackage rights to the extent that they are affected by changes in operations resulting from implementing the merger or trackage rights authority.

⁴ In the event circumstances develop so that UTU has a claim that certain work should fall to employees it represents, the appropriate forum for resolving those claims would be the arbitration processes of Section 3 of the Railway Labor Act, 45 U.S.C. 153 First and Second.

⁵ This is consistent with other build-outs pursuant to the build-in/build-out condition. See The Burlington Northern and Santa Fe Railway Company – Construction and Operation Exemption – Seadrift and Kamey, TX, STB Finance Docket No. 34003 (served June 19, 2001); Entergy Arkansas and Entergy Rail – Construction and Operation Exemption – White Bluff to Pine Bluff, AR, STB Finance Docket No. 33782 (served May 4, 2000). Moreover, to impose such a condition on Petitioners would not be consistent with a pre-merger build-out and would thus erode the pro-competitive alternative the build-in/build-out condition was intended to provide.

Slip. op. at 3 (footnote omitted). We submit that any employees adversely impacted by the grant of the trackage rights necessary to reach the build-in/build-out point should pursue Norfolk and Western⁶ labor protective conditions as set forth by the Board in Decision No. 44 approving the UP/SP merger to the extent such relief may be available. See 1 S.T.B. 233, 553 (1996).

Conclusion

For the reasons set forth above, UTU's request that the Petition for Exemption be denied should not be granted.

Respectfully submitted,

Erika Z. Jones/als

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June 13, 2002

⁶ Norfolk and Western Ry. Co. – Trackage Rights – BN, 354 I.C.C. 605, 610-615 (1978), as modified in Mendocino Coast Ry., Inc. – Lease and Operate, 360 I.C.C. 653, 664 (1980) (“Norfolk and Western”).

Certificate of Service

I hereby certify that a copy of the foregoing has been served on all Parties of Record and Non-Parties of Record as well as the following by hand delivery or first-class mail on this 13th day of June, 2002.

By First-Class Mail:

Mr. Jerry L. Martin
Director, Rail Division
Railroad Commission of Texas
PO Box 12967
Austin, TX 78711-2967

Mr. John W. Johnson, Chairman
Texas Department of Transportation
125 E. 11th Street
Austin, TX 78701-2483