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October 28, 2002



BY HAND DELIVERY

Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, 7th Floor
Washington, DC 20423

Re: STB Finance Docket No. 34252; Union Pacific Railroad Company – Operation Exemption – In Yolo County, California

Dear Mr. Williams:

Enclosed for filing in the above-referenced proceeding are an original and 10 copies of the Petition to Reject/Petition to Stay of Yolo Shortline Railroad Company. Also enclosed is a check in the amount of \$150 to cover the filing fee.

Please acknowledge receipt of this filing by date-stamping the enclosed acknowledgment copy and returning it to our messenger.

Sincerely,

FEE RECEIVED

OCT 28 2002

Rose-Michele Weinryb

Enclosures

SURFACE
TRANSPORTATION BOARD

FILED

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34252

Union Pacific Railroad Company
--Operation Exemption--
In Yolo County, California



PETITION TO REJECT
PETITION TO STAY

206504
206503

EXPEDITED HANDLING REQUESTED

YOLO SHORTLINE RAILROAD
COMPANY

By its attorneys,

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Dated: October 28, 2002

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SURFACE
TRANSPORTATION BOARD

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



Finance Docket No. 34252

**Union Pacific Railroad Company
--Operation Exemption--
In Yolo County, California**

**PETITION TO REJECT
PETITION TO STAY**

On October 21, 2002, Union Pacific Railroad Company (“UP”) filed with the Surface Transportation Board (the “Board”) a document styled “Verified Notice of Exemption Pursuant to 49 C.F.R. Part 1150, Subpart D” (the “Notice”). In the Notice, UP seeks to change the legal status of its operations on approximately 6.3 miles of track owned by the Sacramento-Yolo Port District (“Port”) and leased to Yolo Shortline Railroad Company (“YSLR”), from exempt industrial track operations to regulated common carrier service. UP’s stated intention in filing the Notice is “to prevent. . . YSLR from unilaterally terminating any of UP’s existing service.” Notice at 5.

The Board should summarily reject the Notice on the grounds that (1) it does not describe a transaction that falls within the scope of 49 U.S.C. § 10901, (2) it does not describe a transaction that falls within the scope of the class exemptions set forth in 49 C.F.R. Part 1150, Subpart D, and (3) UP’s purpose in making the filing – “to change the legal status of . . . [operations on exempt industrial trackage] to regulated common carrier service”¹ despite the fact that “[n]o changes in operations are anticipated”² – is not a proper matter for handling under the class exemption procedures invoked by UP. The Notice is an abuse by UP of the Board’s

¹ Notice at 2.

² Id.

regulatory procedures in an effort to avoid the termination of an industrial track contract pursuant to its terms. YSLR urges that the Board reject the Notice and thereby prevent UP from using the class exemption regulations for this improper purpose.

In the alternative, the effective date of UP's exemption should be stayed, pursuant to 49 C.F.R. § 1150.35(f), pending the Board's establishing a procedural schedule in this proceeding. As set forth below, this Petition to Stay the exemption satisfies each of the four standards used by the Board in determining the merits of a stay petition.

I. Background.

On October 10, 2001, the Port and YSLR entered into a Railroad Lease and Operating Agreement (the "Lease Agreement"). Pursuant to the Lease Agreement, the Port granted YSLR, among other rights, a lease and license to possess and operate certain Port-owned track situated "outside the fence" of the Port facility ("Leased Track"). The Port retained possession of its tracks that access shippers "inside the fence". ("Port Facility"). See map attached as Exhibit A.

Pursuant to the Lease Agreement, the Port also assigned to YSLR all of its rights and obligations under certain contracts related to the Leased Track, including a February 12, 1951, Agreement, as amended, between the Port and Southern Pacific Railroad (now UP) (the "1951 Agreement") and a September 1, 1966 agreement between Southern Pacific Company, Sacramento Northern Railway and the Port ("1966 Agreement"). Both agreements are named in the Notice, and neither agreement has heretofore been regarded by UP as requiring Board approval. The 1951 Agreement provides that either party may terminate the agreement upon one years' notice. On November 16, 2001, YSLR provided UP with notice of its termination of the 1951 Agreement, which, under the terms of the agreement, will be effective on November 16,

2002.³ Upon termination of the 1951 Agreement, UP will no longer have the contractual right to perform rail operations on the Leased Track. Under the 1966 Agreement, UP will retain the right to use a portion of the Leased Track to bridge its operations between its West Sacramento yard and the UP-owned track referred to alternately as the Port Center Track or the Drill Track.

In its Notice, UP characterizes its 50 plus years of operations on the Leased Track as exempt operations on industrial track. Accordingly, it operated without regulatory authority, pursuant to a contract that defined the deal between UP and its landlord. Neither UP operations over the track governed by the 1951 Agreement nor YSLR's exercise of its contractual right to terminate those operations are subject to Board approval.

UP does not even pretend that there will be a change in its rail operations that would warrant reclassifying its use of the Leased Track as regulated operations. UP admits that "[n]o changes in operations are anticipated as a result of this transaction." Notice at 2. In fact, there is no "transaction." UP's sole reason for seeking Board regulation of its operations is to impede YSLR's exercise of its rights under the 1951 Agreement by putting YSLR in a position of having to commence an adverse discontinuance proceeding in order to terminate the contract in accordance with its terms. That conduct should not be sanctioned by the Board.

II. The Verified Notice of Exemption is Defective on Its Face and Should be Summarily Rejected.

A. THE NOTICE DOES NOT DESCRIBE A TRANSACTION SUBJECT TO 49 U.S.C. § 10901

UP filed the Notice pursuant to 49 C.F.R. § 1150, Subpart D, which sets forth the class exemption procedures for exempt transactions under 49 U.S.C. § 10901. Section 10901(a) provides the Board with jurisdiction over the following types of transactions:

³ YSLR also exercised its right to terminate a 1950 agreement between the Port and Sacramento Northern Railway by giving the 20-day notice required by that agreement. That agreement also covered the Leased Track, but its termination did not change UP's right to operate, as the 1951 Agreement remained in effect. UP apparently accedes to the termination of the 1950 agreement.

A person may –

- (1) construct an extension to any of its railroad lines;
 - (2) construct an additional railroad line;
 - (3) provide transportation over, or by means of, an extended or additional railroad line; or
 - (4) in the case of a person other than a rail carrier, acquire a railroad line or acquire or operate an extended or additional railroad line,
- only if the Board issues a certificate authorizing such activity. . . .

The Notice does not describe the construction of a railroad line, the provision of transportation over an extended or additional railroad line or the acquisition or operation of a railroad line by a noncarrier. Instead, the Notice plainly states that the operations at issue have been in place for more than a half century: “UP and its predecessors have operated over subject Port trackage covered by this transaction since the early 1950’s....” Notice at 4. Equally plainly, UP explains that, “[c]urrently, UP operates over this track as exempt industrial track under 49 U.S.C. § 10906.” *Id.* Finally, the Notice states without qualification that, “UP does not anticipate any change in current operations as a result of this transaction.” *Id.* at 7 (emphasis added). The Notice, therefore, describes nothing more than the maintenance of the status quo in terms of UP’s operation and ownership of railroad lines. Not only does the Notice fail to describe a transaction that falls within the scope of 49 U.S.C. § 10901, it fails to describe a transaction at all.

B. THE NOTICE DOES NOT DESCRIBE A TRANSACTION SUBJECT TO 49 C.F.R. PART 1150, SUBPART D

The class exemption regulations in 49 C.F.R. Part 1150, Subpart D, apply to three, specific types of transactions: Sections 1150.32 through 1150.34 apply to “transactions that involve creation of Class III carriers;” Section 1150.35 applies to “transactions that involve creation of Class I or Class II carriers;” and Section 1150.36 applies to “Exempt construction of

connecting track.” No other types of arrangements – including other types of transactions described by 49 U.S.C. § 10901 – can be conducted under the class exemption of Subpart D.⁴

The Notice does not describe the creation of a railroad or the construction of a rail line. Instead, the Notice seeks a change of legal status of UP’s operations over the Port track in the context of the maintenance of operational status quo. Subpart D does not address this type of situation, nor could it in light of the statutory language of 49 U.S.C.

§ 10901. The Board should reject UP’s effort to characterize its attempt to change the legal status of its operations over Port track as a “transaction” covered by the Board’s class exemption regulations.

The misuse of a class exemption procedure is particularly alarming because class exemptions, by their nature, typically become effective prior to any review by the Board. It is even more alarming when such misuse is done at the hand of a rail carrier such as UP. UP is an established, class I railroad with sophisticated counsel and abundant experience with complex regulatory filings with the Board. The filing by UP of a defective notice of exemption should not be tolerated or excused by the Board.

C. THE BOARD HAS PREVIOUSLY RULED THAT A CHANGE OF LEGAL STATUS OF A RAIL LINE OR OPERATIONS THEREON CANNOT BE CONDUCTED UNDER THE CLASS EXEMPTION PROCEDURES OF SUBPART D

The Board has previously considered whether the class exemption procedures in Subpart D may be used to change the legal status of a railroad line. In Jefferson Terminal Railroad Company – Acquisition and Operation Exemption – Crown Enterprises, Inc., Finance Docket 33950, 2001 STB LEXIS 267, served March 19, 2001 (“Jefferson Terminal”), a purchaser of

⁴ Despite the fact that Section 1150.31(a) provides that, except as indicated therein, “this exemption applies to all acquisitions and operations under section 10901...,” the Board’s regulations do not set out procedures or requirements for any types of transactions other than the three specific classes of transactions described in the regulations. Because the notices of exemption under Subpart D are self-effecting, these procedures cannot be available for transactions for which no class has been established and no procedures have been written.

certain track filed a notice of exemption with respect to that track in an effort to preempt a condemnation action by a municipality. The Board revoked the exemption:

The class exemption procedures were adopted to serve shipper and community interests by facilitating continued rail service, on lines that the selling carrier could no longer operate profitably, by new, smaller carriers seeking to provide service more efficiently. [Citation omitted.] The procedures were not intended to apply to cases in which a noncarrier seeks to convert what could be non-rail property into a rail line.

(Emphasis added) See Jefferson Terminal at *9.

Moreover, the Board noted that the facts presented in Jefferson Terminal suggested that the filing of the notice of exemption by the owner of the track “was merely a device to acquire or retain property for non-rail purposes using federal preemption as a shield.” *Id.* At *11. The Board refused to allow the owner to utilize the Subpart D class exemption process, “to insulate the property from the condemnation proceedings,”⁵ or to support a “claim that the property is a rail line beyond the reach of state or local condemnation authority.”⁶ The Board concluded:

We will not permit our processes to be misused in that manner. See The Land Conservancy of Seattle & King County – Acquisition and Operation Exemption – The Burlington Northern & Santa Fe Ry Co., STB Finance Docket No. 33388 [sic] (STB served Sept. 26, 1997) (Board will revoke an exemption “to protect the integrity of our processes”).

See id.

The pertinent facts of the instant proceeding are similar to those in Jefferson Terminal. UP has filed a Notice for the avowed purpose of “prevent[ing] YSLR from forcing a discontinuance of UP’s operations over the subject trackage.” See Notice at 7. There is no transaction described in the Notice; instead, the Notice is simply an effort by UP to invoke Board jurisdiction as a means of avoiding the termination of an industrial track agreement according to

⁵ Id.

⁶ Id.

its terms. The Board should be no more tolerant of misuse of its regulations in this case than it was in Jefferson Terminal.

Similarly, in Riverview Trenton Railroad Company – Acquisition and Operation Exemption – Crown Enterprises, Inc.; Riverview Trenton Railroad Company – Petition for an Exemption from 49 U.S.C. 10901 to Acquire and Operate a Rail Line in Wayne County, MI, STB Finance Docket Nos. 33980 and 34040, 2002 STB LEXIS 108 (served February 15, 2002) (“Riverview Trenton”), the Board ruled that the transaction at issue was outside the scope of the class exemption procedure under section 10901, in part because it “would convert private carrier operations into for-hire common carrier service.” See Riverview Trenton, at * 16. As in Jefferson Terminal, the effectiveness of the class exemption interfered with a local condemnation action, engendering opposition. The Board, mindful of the loss of local condemnation rights and the related opposition, concluded that the proceeding presented issues necessitating “additional scrutiny and the development of a more complete record.” *Id.* The Board revoked the exemption.⁷

The Notice raises similar issues of loss of local rights. In this case, YSLR would lose its right to terminate a contract under state law, and a state loses the right to enforce a contract in accordance with its terms. The Board should not permit the deliberate use of its authority to evade local law. As in Riverview Trenton, UP should not be allowed to use the class exemption as a means of depriving YSLR of important rights under state law.

D. THE VERIFIED NOTICE OF EXEMPTION SATISFIES THE STANDARD FOR REJECTION.

The Board’s predecessor, the Interstate Commerce Commission (the “Commission”) has ruled that a class exemption filing may be rejected in circumstances such as these. In Sagamore

⁷ In Jefferson Terminal and Riverview Trenton, no opposing party appears to have filed a petition to reject the subject exemption prior to its effective date.

National Corporation – Acquisition and Operation Exemption – Lines of Indiana Hi-Rail

Corporation, Finance Docket 32523, 1994 ICC LEXIS 153, at * 10, August 19, 1994, the

Commission squarely addressed this issue:

If a significant question arises upon the filing of a notice of exemption as to whether the involved transaction meets the requirements of the class exemption, the Commission may reject the filing. We are not obligated to allow the exemption to take effect and then revoke it under section 10505(d). In West Side Rail Line Development Foundation Inc. – Exemption – Purchase of a Portion of the West 30th Street Secondary Track In New York, NY, Finance Docket No. 30795, (ICC served Apr. 10, 1986) (West Side), we granted a petition to reject a notice not because of any false or misleading statement in the document itself but rather because filing the notice constituted a representation that the transaction met the requirements of the class exemption. When the transaction fails to meet the standards of the class exemption, it may be rejected. [citation omitted].

The Notice, by its terms, fails to describe a transaction that meets the requirements of the class exemption. It does not even describe a change in operations. Accordingly, the Board should reject the Notice.

III. The Four Criteria for Issuance of a Stay are Satisfied.

In the event the Board does not reject the Notice outright, it should stay the effective date pursuant to 49 C.F.R. § 1150.35(f). The Board considers the following four standards in determining whether to grant a petition to stay a transaction:

- (1) that there is a strong likelihood that the movant will prevail on the merits;
- (2) that the movant will suffer irreparable harm in the absence of a stay;
- (3) that other interested parties will not be substantially harmed; and
- (4) that the public interest supports the granting of the stay.

See Baukmatic Railroad Corporation – Acquisition and Operation Exemption –

Bulkmatic Transport Company; Bulkmatic Railroad Corporation – Operation Exemption –

Bulkmatic Transport Company, STB Finance Docket Nos. 34145 and 34179, 2002 STB LEXIS 145, at * 2-3, served March 5, 2002. This Stay Petition satisfies each of these four standards.

A. THERE IS A STRONG LIKELIHOOD THAT YSLR WILL PREVAIL IN ITS PETITION TO REJECT THE UP'S VERIFIED NOTICE OF EXEMPTION.

The first standard the Board considers in determining the merits of a stay petition is the likelihood that the Board will grant petitioner the relief it ultimately seeks (in this case, YSLR's Petition to Reject). The following facts strongly support the Board's granting of YSLR's Petition to Reject.

1. UP's Verified Notice of Exemption is Defective on its Face.

As discussed above, the class exemption procedure invoked by UP in its Notice is not available for the subject transaction. For this reason alone, the Board should summarily reject UP's exemption filing in this proceeding.

2. Recent Decisions by the Board Ruled That Use of The Class Exemption Procedures of Subpart D Is Inappropriate to Change the Legal Status of A Rail Line.

As discussed above, the Board has recently twice considered and rejected the use of the class exemption procedures in Subpart D to change the legal status of a railroad line. See Jefferson Terminal and Riverview Trenton. Fully cognizant of this precedent (in a related pleading in Finance Docket No. 34114, UP actually cites to Riverview Trenton, which in turn cites to Jefferson Terminal), UP nevertheless filed its Notice under the Subpart D class exemption to change the legal status of its operations. Because UP's use of class exemption procedure to change the legal status of the subject track is inappropriate, the Notice should be rejected.

3. UP Failed to Provide the Appropriate Notice to Employees.

The Notice fails to provide the requisite notice to affected shippers and employees. First, the Board's regulations require that UP post an employee notice "at the workplace of the

employees on the affected line(s)....” See 49 C.F.R. § 1150.32(e). Despite the fact that YSLR both leases and operates over the Leased Track subject to the Notice, UP failed to post its employee notice at the workplace of YSLR employees.⁸

B. YSLR WILL SUFFER IRREPARABLE HARM WITHOUT A STAY.

YSLR will suffer irreparable harm if the Board does not grant the stay and the exemption becomes effective. Today, YSLR has the right to terminate the 1951 Agreement in accordance with its terms. Almost one year ago, it gave notice to UP of its intention to terminate the agreement under the one-year notice requirement. If the exemption becomes effective, UP intends to argue that its operations under the 1951 Agreement can be terminated only if Board authority is obtained to adversely discontinue those operations. In addition to delaying by several months YSLR’s ability to terminate UP’s operations on the Leased Track, YSLR would be forced to engage in an unnecessary, protracted regulatory proceeding that would divert its scarce resources away from its operations. This result would not only irreparably harm YSLR, but its shippers as well.

Moreover, if YSLR is forced to commence an adverse discontinuance proceeding, YSLR will need to satisfy a much more stringent standard -- that “the present and future public convenience and necessity require or permit the proposed discontinuance”⁹ – before it could terminate UP operations under the 1951 Agreement. If the exemption is permitted to become effective, UP would have used the Board to deny YSLR the benefit of its bargain and to gain rights that exceed those it obtained in the contract. From a broader perspective, there is a public

⁸ With respect to the service of the Notice of Intent on certain interested parties, pursuant to 49 C.F.R. § 1150.35(c), YSLR points out that neither it nor the Port was served a copy of this notice. Although not an express regulatory requirement, UP knew YSLR and the Port were interested parties and chose not to provide them with the Notice of Intent. In addition, five of the seven industries listed on UP’s service list for its Notice of Intent are located on the UP’s Drill Track rather than the Leased Track; accordingly, these industries will not be affected by the termination of the 1951 Agreement.

⁹ See Tacoma Eastern Railway Company – Adverse Discontinuance of Operations Application—A Line of City of Tacoma, In Pierce, Thurston and Lewis Counties, WA, STB Docket No. AB-548, 1998 STB LEXIS 790, at *16, served Oct. 16, 1998.

harm that arises from a misuse of federal authority to interfere with state law contractual rights, as well as a public interest in the proper use of federal regulatory procedures.

Compounding the offense is that, by using an exemption procedure that becomes effective after the passage of 21 days, YSLR would be stripped of a contractual right without any review by the Board of the merits of UP's request to change the legal status of its operation on the Leased Track. UP's decision to seek regulatory authority by class exemption, rather than a proceeding in which the appropriate classification of its operations could be thoroughly considered, denies the Board (as well as YSLR) the opportunity to review and comment on the relevant issues. UP's use of the Board's class exemption procedures as a sword to cut off YSLR's exercise of its contractual rights irreparably harm YSLR.

C. INTERESTED PARTIES WILL NOT BE SUBSTANTIALLY HARMED BY GRANTING THE STAY.

By granting the stay, UP and FRC will be in no worse a position than they were prior to UP's filing of the Verified Notice of Exemption. UP will continue to operate (and cease operations) in accordance with the terms and conditions of the 1951 Agreement into which the parties voluntarily entered. FRC has two industry leads – one off the Leased Track and one off the Drill Track. FRC will continue to be served by UP off the UP track for the foreseeable future and off the Leased Track for the duration of time permitted by the terms of the 1951 Agreement. Rather than substantially harming any party, staying the transaction simply preserves the status quo.

D. THE PUBLIC INTEREST SUPPORTS THE GRANTING OF THE STAY

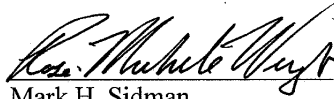
The public interest supports the Board's grant of YSLR's Petition to Stay the subject transaction. The public interest is served anytime the Board protects the integrity of its regulatory processes. Parties must feel free to enter into voluntary contracts without worry that the federal government will inappropriately interfere with the enforcement of a contract's terms.

UP now seeks to use the Board's authority to strip a party of an important contractual right by means of a defective regulatory filing. Furthermore, if the exemption is not stayed, UP will have been permitted to commandeer a rail line over which it has no right to operate after November 16, 2002. The public interest requires that the Board not allow its authority to be abused in such a fashion.

IV. Conclusion.

For the foregoing reasons YSLR respectfully requests that the Board summarily reject the Notice. In the alternative, YSLR requests that the Board grant YSLR's Petition to Stay the Verified Notice of Exemption, pending the Board's full consideration of the pleadings in this proceeding.

Respectfully submitted,



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Jo A. DeRoche
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1300 19th Street, NW
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Washington, DC 20036
(202) 628-2000

Attorneys for:

YOLO SHORTLINE RAILROAD COMPANY

Dated: October 28, 2002

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of October, 2002, a copy of the foregoing Petition to Reject/Petition to Stay in STB Finance Docket No. 34252 (the "Petition") was served overnight by Federal Express, postage prepaid, upon:

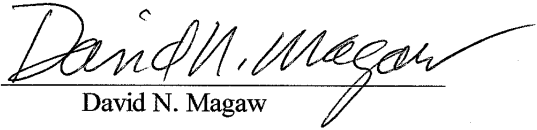
Robert T. Opal
General Commerce Counsel
Union Pacific Railroad Company
1416 Dodge Street, Room 830
Omaha, Nebraska 68179
Facsimile Number: 402-271-5610

Service was also made by faxing the Petition to Mr. Opal at the above-referenced number.


Rose-Michele Weinryb

VERIFICATION

I, David N. Magaw, am the general manager of the Yolo Shortline Railroad Company. I have read the foregoing petition to reject or stay and do hereby certify under penalty of perjury that the facts contained in the petition are true and correct to the best of my knowledge, information and belief.


David N. Magaw

Dated: October 28, 2002