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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-369 (Sub-No. 3X)

BUFFALO & PITTSBURGH RAILROAD, INC.--ABANDONMENT EXEMPTION--
IN ERIE AND CATTARAUGUS COUNTIES, NY

Decided: September 17, 1998

By petition filed on June 1, 1998, Buffalo & Pittsburgh Railroad, Inc. (B&P) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 9 U.S.C. 10903 to abandon two contiguous segments of rail line: (1) from milepost 2.0, at or near Buffalo, NY, to milepost 45.0, at or near Ashford Junction, a distance of 43.0 miles; and (2) from milepost 93.8, at or near Ashford Junction, to milepost 103.0, at or near Salamanca, NY, a distance of 9.2 miles, in Erie and Cattaraugus Counties, NY. Pursuant to 49 U.S.C. 10502(b), the Board published a notice in the Federal Register (63 FR 33762) on June 19, 1998, instituting this proceeding.

Protests in opposition to the proposed abandonment have been filed by three shippers located on the line to be abandoned. They are Electro Abrasives Corporation (Electro Abrasives); Thruway Builders of Orchard Park, Inc. (Thruway); and Gramco, Inc. (Gramco). Buffalo Crushed Stone, Inc. (BCS),[1] a shipper located on an adjoining line and who ships over the line to be abandoned, also protests the petition. Finally, the United States Department of Energy and the New York State Energy Research and Development Authority, (DOE/NYSERDA or objectors) also protest. The United Transportation Union seeks the imposition of labor protective conditions. Colden Country Rails to Trails has requested a public use condition as well as a request for interim trail use. As explained below, we will deny the petition for exemption.

PRELIMINARY MATTER

On July 31, 1998, B&P filed a motion for leave to file a rebuttal statement in this matter, accompanied by the statement. B&P asserts that its supplemental pleading will not delay the proceeding and argues that, in the interest of having as complete a record as possible, we should accept its rebuttal.

BCS, on August 20, 1998, and DOE/NYSERDA, on August 28, 1998, filed replies in opposition to the motion and, alternatively, responses to the rebuttal statement. They claim,

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[1] BCS also submitted a verified statement from its Executive Vice President, Joseph L. Laraiso. By decision served July 20, 1998, a request for a protective order filed by BCS was granted.

generally, that B&P has given no valid reason why we should permit the filing of an otherwise impermissible reply to a reply. BCS claims that acceptance of B&P's filing would create a procedural unfairness for it, while DOE/NYSERDA states that the supplemental pleading merely reiterates previous arguments and attempts to explain why it failed to submit sufficient financial data in the first place.

We will grant B&P's motion for leave to file a rebuttal statement in this case and accept its tendered reply for filing. We will also accept the supplemental pleadings in response tendered by both BCS and DOE/NYSERDA. Although our regulations (49 CFR 1104.13(c)) do not permit replies to replies, we may do so in a particular instance if it is warranted. See, e.g., Tulare Valley Railroad Co.--Abandonment and Disc. Ex.--In Tulare and Kern Counties, CA, STB Docket No. AB-397 (Sub-No. 5X) (STB served Feb. 21, 1997). Because the ICC Termination Act requires that we issue decisions in abandonment cases within 110 days after the filing of an application or a petition, we have sought to limit supplemental pleadings in these cases. See Central Railroad Company of Indiana--Abandonment Exemption--In Dearborn, Decatur, Franklin, Ripley, and Shelby Counties, IN, STB Docket No. AB-459 (Sub-No. 2X) (STB served May 4, 1998). Here, however, the supplemental pleadings are necessary to clarify certain matters, especially the interest of BCS, and more fully explain the factual situation, and were filed in time for us to adequately consider them. More importantly, in light of our disposition of this matter, the objecting parties--whose interests in this regard our regulations seek to protect--will not be harmed in any way by our consideration of these pleadings. B&P's reply and the responses thereto do not unduly broaden the issues.

BACKGROUND

B&P currently owns approximately 83 miles of rail lines in New York. The 51.2-mile line segments at issue here connect with a line owned by the Rochester & Southern Railroad (R&S), an affiliate of B&P, at Ashford Junction, NY. R&S has contemporaneously filed a petition seeking to abandon this connecting line. See Rochester & Southern Railroad, Inc--Abandonment Exemption--in Cattaraugus County, NY, STB Docket No. AB-354 (Sub-No. 2X). We are issuing a decision in that proceeding simultaneously with this one, denying that petition.

In 1997, B&P consummated a trackage rights agreement with Conrail which enabled B&P to shift its overhead traffic from the line segments at issue here to a parallel Conrail line. See Buffalo & Pittsburgh Railroad, Inc.--Trackage Rights--Consolidated Rail Corp., STB Finance Docket No. 33514 (STB served Dec. 4, 1997). B&P states that it has not moved any overhead traffic on these line segments since then.

POSITIONS OF THE PARTIES

B&P states that it has decided to abandon these contiguous line segments because traffic from them does not justify the cost of operating and maintaining them. B&P contends that the four

shippers currently located on the line segments have averaged only about 140 carloads of freight per year over the last five years, producing revenues ranging from approximately $44,000 to $60,000 annually. B&P asserts that each of these shippers also receives service by truck, and that all of the freight handled for these shippers could be accommodated by motor carrier, or a combination of rail service to and from Buffalo or other convenient locations on Conrail's lines in the region together with a local motor carrier move.

B&P states that it has chosen to defer major capital expenditures on the line segments, with the exception of those that are essential to keep the segments operating, because of the lack of on-line traffic. Nevertheless, B&P claims it has spent approximately $400,000 annually on maintenance in recent years. B&P also claims that the property taxes allocated to these line segments for 1998 are estimated to be approximately $250,000. B&P states that, although abandonment will not eliminate these taxes, it should significantly reduce them because the State of New York taxes railroad property under a different (presumably higher) formula than other property.

B&P notes that it has had discussions with the Department of Environment and Planning of the County of Erie and the Cattaraugus County Industrial Development Agency, which are interested in purchasing portions of the line segments. These two agencies have requested that B&P delay filing this petition to permit further discussions. B&P states, however, that it does not want to be forced to continue to incur the costs of maintaining the line segments. Accordingly, B&P has filed this petition while reporting that it is continuing discussions with interested parties regarding rail service alternatives.

Finally, B&P alleges that exemption of the abandonment of these two line segments satisfies the criteria of 49 U.S.C. 10502 in that detailed scrutiny of the abandonment is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101. Also, the proposed exemption, B&P claims, is of limited scope and will not subject shippers to an abuse of market power.

DOE/NYSERDA argues that this line is important to the long-term success of the West Valley Demonstration Project (WVDP), a nuclear waste demonstration project managed by DOE and located on a spur line that connects to the Buffalo to Ashford line. DOE/NYSERDA indicates that they are currently considering alternatives for long-term management or closure of the WVDP facilities, but are relying upon the availability of rail transportation to ship radioactive materials off-site in the future. DOE /NYSERDA claims that, if WVDP utilizes rail to ship all of its waste off-site, it could generate between 21,000 and 36,000 rail car shipments over the next twenty-six years. DOE/NYSERDA claims they have spent over $10 million in obtaining special train casks in anticipation of these future shipments. They maintain that B&P has offered no evidence concerning the availability of alternative transportation service for this traffic.

DOE/NYSERDA also asserts that B&P has grossly understated the revenues attributable to the line segments because B&P's figures do not include revenue from overhead traffic. Further, they claim that B&P's estimates regarding the costs of operating these line are indefensible, especially

because those figures ignore government subsidies that B&P receives to offset its maintenance costs. B&P allegedly received a $4 million grant from the State of New York in 1993 to improve its track, including a segment of its line between Ashford Junction and Salamanca. Objectors also question B&P's claim that it has already spent $75,000 on maintenance in 1998; they note that B&P has rerouted all overhead traffic and has discontinued virtually all local shipments in anticipation of its exemption petition. DOE/NYSERDA suggests, however, that the $75,000 could conceivably have been spent on insurance or on other ongoing expenses that B&P will incur regardless of abandonment.

DOE/NYSERDA also claims that an environmental impact statement must be prepared due to the potential adverse impacts from the nuclear waste disposal. They claim that, because the requisite environmental considerations (such as a Memorandum of Agreement pursuant to the National Historic Preservation Act of 1966, 16 U.S.C. 470) cannot be accomplished within the statutorily mandated 110 days for completion of an abandonment exemption, the petition must be denied.

Electro Abrasives claims that the loss of the rail service will force it to use truck transportation for its main raw material at double its current cost, or over $67,000 a year, in a very competitive industry. This shipper also states that its factory is designed solely for railcar delivery of raw materials and that unloading truck deliveries would cost an additional $25,000 per year.

Thruway states it has been in the building supply business for over 30 years and has relied heavily upon B&P to deliver its supplies for resale at a cost which permits it to be competitive. Thruway claims that the proposed abandonment will result in financial hardship and will preclude it from competing with the national chains of builder suppliers.

Gramco, which operates a feed mill in Springville, NY, employs approximately twenty-six persons, including seven at its Springville plant. Gramco opposes the abandonment, stating that railroad access to its Springville plant is important both for its business and the business of its customers. Gramco states that nearly all of the raw materials it uses are transported by rail and that this has been economical and cost effective in the past. Gramco indicates, however, that this has not been the case over the past several years. This shipper says that service has declined while prices have increased since 1995, when B&P first contemplated abandoning this rail line. Finally, Gramco claims that B&P recently advised it that the cost to transport a rail car from Buffalo to Springville (approximately 28 miles) would be increased from $318 per car to approximately ten times that amount.

BCS is a producer of processed gravel products in Franklinville, NY, where it originates traffic on B&P's affiliate R&S. BCS states that, without rail service by B&P over the Ashford Junction/Salamanca line segment proposed for abandonment here, BCS cannot bring a competitively priced product to its markets in Erie, Dubois, and Johnsburg, PA. BCS argues that the use of alternate modes of transportation (namely trucking) is cost-prohibitive, stating that it would cost $4.50 per ton to truck gravel mined at Franklinville to its Pennsylvania centers. BCS

states that B&P has failed to provide sufficient information regarding the impacts of the proposed abandonment on BCS, the sole overhead shipper on the Ashford-Salamanca line segment.

BCS also maintains that this abandonment proposal must be bifurcated, separating the 43-mile Buffalo to Ashford line from the 9.2-mile Ashford to Salamanca line. BCS claims this latter segment is financially viable, with traffic generated by BCS alone accounting for some $163,000 in revenues over the Ashford to Salamanca segment in 1997. This figure, BCS asserts, is over three times the average annual freight revenues received by B&P from on-line traffic. BCS projects a 25% increase in sales which would result in 131 more carloads of overhead traffic in 1998. Finally, BCS notes that B&P has inextricably intertwined its abandonment proposal with that of its affiliate R&S, and that this whole situation can only be properly resolved through the abandonment application process rather than through an exemption.

On rebuttal, B&P argues that the opposing parties' arguments are insufficient to warrant the filing of a full abandonment application. These parties, B&P maintains, have failed to demonstrate how the rail transportation policy of 49 U.S.C. 10101 would be served by denying its petition for exemption. It is clear, B&P contends, that its revenues from traffic on or over these line segments is marginal compared to its costs of operating them, and that B&P should not be required to submit detailed financial information to establish this. The increased costs of using alternative transportation modes, B&P concludes, is not a sufficient reason to deny its petition where the opposing parties have failed to show that it will not be burdened by continued operations. Finally, B&P argues that it should not be required to maintain these line segments for speculative future shipments such as those suggested by DOE/NYSERDA. B&P states, in response to DOE/NYSERDA's assertions that B&P has been subsidized by state funds, that B&P has not accepted any of the proceeds of the $4 million New York State grant.

In reply, BCS emphasizes that there is no viable alternative to rail service for its traffic to western Pennsylvania and that BCS's overhead traffic would be lost to B&P if abandonment occurs. BCS reiterates that, absent presentation of bifurcated data on the operating results of the Ashford to Salamanca line, there is insufficient information to assess whether waiver of the Board's normal abandonment procedures is consistent with the rail transportation policy.

DOE/NYSERDA maintains that it is far from clear that the revenues generated here are minimal compared to the costs of operating the line, and that the exemption petition must therefore be denied. It contends that B&P has not adequately explained why it has failed to utilize the $4 million grant which would clearly reduce the railroad's operating costs significantly. DOE/NYSERDA challenges B&P's assertion that it will save on taxes from abandoning the line. DOE/NYSERDA also argues that B&P's decision to reroute overhead traffic makes it impossible to ascertain the true burden of continued operations here.

DISCUSSION AND CONCLUSIONS

B&P has elected to forgo presenting any data on the cost of conducting rail operations over the lines to be abandoned. Instead, B&P argues that its costs of maintaining the line and paying taxes on it exceed the revenues it receives and expects to receive from the shippers that use the line. Also, despite BCS's request that B&P bifurcate its cost and revenue data between the 9.2-mile Ashford to Salamanca line, which BCS uses, and the 43-mile Buffalo to Ashford Junction Line, B&P declined to do so, arguing instead that revenue from the BCS traffic should not be considered at all.

B&P claims that the BCS traffic should be excluded because B&P is attempting to negotiate an interchange at Machias with Conrail using B&P's trackage rights over that carrier, thereby obviating the need for BCS to ship over the Ashford Junction to East Salamanca line. But B&P has not concluded that agreement. Thus, BCS has no option but to ship over the 9.2-mile segment of B&P's line. For that reason, B&P's revenue for this traffic is properly attributable to that B&P line segment. Moreover, because BCS obviously provides most of the revenues for the lines at issue here, while the cost of earning that revenue is limited to the 9.2-mile line segment, BCS has justified its request that B&P be required to segment its evidentiary submission between the 9.2-mile segment and the 43-mile segment. See CSX Transportation, Inc.--Abandonment--In Barbour, Randolph, Pocohontas, and Webster Counties, WV, Docket No. AB-55 (Sub-No. 500) (ICC served Aug. 10, 1995), rev'd in part on other grounds, 96 F.3d 1528 (D.C. Cir. 1996); Union Pacific Railroad--Abandonment and Discontinuance of Operations--In Canyon and Ada Counties, ID (Stoddard Branch), Docket No. AB-33 (Sub-No. 79) (ICC served June 11, 1995). We cannot authorize the abandonment of the 9.2-mile segment because the petition contains no information on the costs attributable to that line, and BCS has justified treating that segment as a separate part of this petition.

Nor do we have any basis upon which to grant the sought exemption as to the 43-mile segment. B&P relies exclusively on its argument that maintenance costs and taxes exceed the revenues from the traffic on that segment. Protestants have challenged both arguments. Protestants note that B&P has been given a $4 million grant from the State of New York. They maintain that B&P is authorized to use those funds to cover maintenance expense. B&P's reply that it elected not to expend the money is not a sufficient response to the question of how this subsidy should be treated, especially where, as here, a state agency is protesting the proposed abandonment. We would like to know why B&P chose not to expend the $4 million granted to it. If B&P had money available to cover all of its maintenance expenses and simply chose not to spend it, we have some doubt that the existence of maintenance expenses, by itself, can be used to justify the abandonment of the line.

B&P also cites the taxes it is required to expend annually on the line. In response to protestants' arguments that B&P will have to pay taxes on the property whether it is abandoned or not, B&P asserts that New York law taxes rail property more heavily than other real estate. B&P says that it ". . . estimates that annual assessment of real property taxes allocated to the Line

Segments will be reduced by anywhere from 50 to 70% following abandonment." B&P rebuttal at 15. B&P does not support this assertion with a reference to relevant New York law or with a verified statement from a real estate appraiser or other witness. Because protestants have challenged B&P's tax argument, we cannot grant this petition, in whole or in part, based on an unsupported assertion.

In conclusion, the opposition pleadings here raise serious questions about the petition for exemption filed by B&P. Taking those questions into account, we cannot make the findings necessary to support this request for exemption. Accordingly, we will deny the petition for exemption without prejudice to B&P's filing a full abandonment application under 49 U.S.C. 10903 and the Board's regulations at 49 CFR part 1152. Our denial of B&P's exemption request moots labor protection issues and environmental issues, including Colden Country Rails to Trails' request for a public use condition as well as interim trail use.

As noted, the Rochester & Southern Railroad is seeking an exemption to abandon a 10.41-mile line of railroad that connects with the line segments at issue here at Ashford Junction. By decision issued today in that case, that petition is being denied. The fact that a grant of abandonment authority here would isolate that line from the national rail system affords an additional reason to deny this petition. We strongly suggest that any future requests for the abandonment of these lines and the Rochester & Southern line be coordinated.

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

It is ordered:

1. The petition for exemption is denied.

2. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary