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SERVICE DATE – SEPTEMBER 18, 2009

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35148

KING COUNTY, WA—ACQUISITION EXEMPTION—BNSF RAILWAY COMPANY

Decided: September 17, 2009

By petition filed on September 22, 2008, King County, a political subdivision of the State of Washington and a noncarrier, seeks an exemption under 49 U.S.C. 10502 from the requirements of 49 U.S.C. 10901 to acquire from BNSF Railway Company (BNSF) the “residual common carrier rights and obligations,” including BNSF’s right to reinstate rail service in the future, over approximately 25.45 miles of rail line in King County, WA. The rail line consists of the following three segments: (1) a 5.60-mile rail line between milepost 5.00, at Kennydale, and milepost 10.60, at Wilburton (South Railbanking Segment); (2) a 12.55-mile rail line between milepost 11.25, near Wilburton, and milepost 23.80 at Woodinville (North Railbanking Segment); and (3) a 7.30-mile rail line between milepost 0.0, at Woodinville, and approximately milepost 7.30 at Redmond (Redmond Spur). The Board had previously conditionally authorized these segments to be abandoned, subject to notices of interim trail use (NITUs), and environmental, historic, and other conditions.¹

In a decision served on December 19, 2008, the Board instituted this proceeding under 49 U.S.C. 10502(b) to consider King County’s request. For the reasons discussed below, the petition for exemption from 49 U.S.C. 10901 will be granted.

BACKGROUND

This petition is part of a series of proposed multiparty transactions intended to entirely divest BNSF of its interest in the North and South Railbanking Segments and the Redmond Spur. In a notice in one of the abandonment proceedings,² served and published in the Federal Register

¹ These segments were the subject of the following proceedings: BNSF Railway Company—Abandonment Exemption—in King County, WA, STB Docket No. AB-6 (Sub-No. 463X); BNSF Railway Company—Abandonment Exemption—in King County, WA, STB Docket No. AB-6 (Sub-No. 464X); and BNSF Railway Company—Abandonment Exemption—in King County, WA, STB Docket No. AB-6 (Sub-No. 465X).

² BNSF Railway Company—Abandonment Exemption—in King County, WA, STB Docket No. AB-6 (Sub-No. 465X) (North Railbanking Segment Abandonment).

on August 29, 2008 (73 FR 51047), the Board requested additional information regarding the arrangements and intentions of BNSF and other interested persons for potential future rail service on the North Railbanking Segment. In response, BNSF, King County, and the Port of Seattle (Port) filed a joint pleading stating that the parties have agreed to a series of proposed transactions that are intended for: BNSF to enter into an interim trail use agreement with King County, the Port to acquire the real property and physical assets of the rail segments, and BNSF to transfer its remaining rights to reactivate rail service on these segments to King County.³ As mentioned above, the three rail segments have since been conditionally authorized to be abandoned, subject to NITUs under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act).

King County's petition indicates that BNSF intends to transfer its interest in the rights-of-way (ROW), track, fixtures, and other physical assets of the rail segments to the Port. According to King County, the Port plans to grant a public, multipurpose easement to permit King County to fulfill its Trails Act responsibilities. The petition includes a copy of the proposed easement and the parties' proposed Trail Use Agreement. (Petition, Exhibits C and D.) If granted, this petition would complete the series of proposed transactions by providing for King County to acquire BNSF's remaining rights and obligations over the rail segments.

On April 8, 2009, the Board received a late-filed reply in opposition to the petition (protest) from All Aboard Washington (AAW), a non-profit citizens' organization. AAW contends that the Port and King County have no plans to reactivate freight rail service over the segments and that therefore, granting King County BNSF's remaining rights and obligations would conflict with the interests of a trail sponsor. On April 28, 2009, King County filed a reply to AAW's protest, requesting that the Board reject it as untimely. On June 18, 2009, AAW filed a petition for leave to file (1) its earlier protest and (2) a tendered reply to King County's reply (June 18 filing).

PRELIMINARY MATTER

We will accept AAW's late-filed protest. While AAW initially did not request leave to file its protest late, the June 18 filing corrected this deficiency by seeking permission from the Board. AAW's protest provides a more complete record, clarifies the arguments, will not prejudice any party, and does not unduly prolong the proceeding. Although our rules prohibit a "reply to a reply," 49 CFR 1104.13(c), we will consider King County's reply to AAW's protest as well as AAW's June 18 filing responding to King County. It is within the Board's discretion to permit late-filed or otherwise impermissible filings, and it is appropriate to do so here.

³ A copy of the joint response of BNSF, the Port, and King County in the North Railbanking Segment Abandonment was submitted with the petition in this proceeding.

DISCUSSION AND CONCLUSIONS

The Trails Act preserves established railroad ROWs for future reactivation of rail service by prohibiting abandonment where a trail sponsor offers to assume managerial, tax, and legal liability for the right-of-way for use in the interim as a trail. See 16 U.S.C. 1247(d); Citizens Against Rails-To-Trails v. STB, 267 F.3d 1144, 1149-50 (D.C. Cir. 2001) (Citizens Against Rails-To-Trails). The statute expressly provides that, because such interim use is subject to restoration or reconstruction for railroad purposes, “such interim use shall not be treated, for [any] purposes . . . as an abandonment . . .” 16 U.S.C. 1247(d). Instead, the right-of-way is “railbanked,” which means that the abandoning railroad, here BNSF, is relieved of the current obligation to provide service over the line but that the railroad – or any other approved rail service provider – may reassert control to restore service on the line in the future. See Birt v. STB, 90 F.3d 580, 583 (D.C. Cir. 1996); R.J. Corman Railroad Company/Pennsylvania Lines Inc.—Construction and Operation Exemption—In Clearfield County, PA, STB Finance Docket No. 35116 (STB served July 27, 2009) (R.J. Corman); Iowa Power—Const. Exempt.—Council Bluffs, IA, 8 I.C.C.2d 858, 866-67 (1990) (Iowa Power); 49 CFR 1152.29(c)(2), (d)(2); Georgia Great Southern Division—Abandon. & Discontin. of Service, 6 S.T.B. 902, 906 (2003) (Georgia Great Southern). In short, a railbanked line is not abandoned, but remains part of the national rail system, albeit temporarily unused for railroad operations. An interim trail use arrangement is subject to being cut off at any time by the reinstatement of rail service.⁴ If and when a railroad wishes to restore rail service on all or part of the property, it has the right to do so, and the trail sponsor must step aside. Georgia Great Southern; 16 U.S.C. 1247(d).

It is also well settled that the Board’s role in rail banking/interim trail use is essentially ministerial. That is, the Board only looks to see if the trail sponsor meets the statutory and regulatory requirements to be a trail sponsor, that the railroad agrees to trail use, and that nothing occurs that would preclude a railroad’s right to reassert control over the ROW at some future time to revive rail service. See Georgia Great Southern, 6 S.T.B. at 907; Idaho Northern et al.—Abandonment & Discon. Exemption, 3 S.T.B. 50, 59 (1998); Iowa Southern Railroad Company—Exemption—Abandonment, 5 I.C.C.2d 496 (1989), aff’d Goos v. ICC, 911 F.2d 1283 (8th Cir. 1990); Citizens Against Rails-to-Trails.

The threshold issue in this case is whether it is permissible under the Trails Act for a trail sponsor to acquire from a railroad the right to reactivate rail service over a railbanked line even if there is no evidence that the trail sponsor intends to exercise that right. AAW asserts that King County’s petition is inconsistent with the Trails Act because neither King County nor the Port have plans (or are likely) to restart rail service. But as previously noted, the right to reactivate a railbanked line is not an exclusive right. See, e.g., Iowa Power. While the parties’ agreement would transfer to King County BNSF’s opportunity to provide rail service, it would not preclude

⁴ The right to reinstate rail service cannot be extinguished as long as the NITU remains in effect.

any other service provider from seeking Board authorization to restore active rail service on all or parts of the railbanked segments in the future if King County does not exercise its right to reinstate rail service. See 16 U.S.C. 1247(d); Georgia Great Southern. Accordingly, regardless of the parties' intentions, a bona fide petitioner, under appropriate circumstances, may request the NITU to be vacated to permit reactivation of the line for continued rail service. E.g., R.J. Corman; Georgia Great Southern.⁵ Thus, the parties' plans have not been shown to be inconsistent with the railbanking purpose of the Trails Act.

The Board, therefore, will consider King County's petition for exemption under 49 U.S.C. 10502(a) from regulation under 49 U.S.C. 10901 to acquire BNSF's rights and obligations, including the right to reinstate rail service on the three rail segments in the future. Under section 10502, the Board must exempt a person, class of persons, transaction, or service from regulation when it finds that: (1) continued regulation is not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny of this transaction under 49 U.S.C. 10901 is not necessary to carry out the RTP. By minimizing the administrative expense of a formal application, an exemption will expedite regulatory decisions and reduce regulatory barriers to entry into and exit from the industry [49 U.S.C. 10101(2) and (7)]. An exemption will also ensure the development and continuation of a sound rail transportation system with effective competition with other modes of transportation, to meet the needs of the public [49 U.S.C. 10101(4)]. Other aspects of the RTP will not be adversely affected.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. The rail lines involved have already been conditionally authorized for abandonment and we have found that there are no current prospects for future rail traffic. Given our market power finding, we need not determine whether the proposed acquisition is limited in scope.

⁵ In its June 18 filing, AAW cites to City of Coeur D'Alene—Acquisition and Operation Exemption—Union Pacific Railroad Company, STB Finance Docket No. 34980 (STB served March 30, 2007) (City of Coeur D'Alene), a case where the Board denied a notice of exemption as an inappropriate means of transferring the abandoning railroads' right to reactivate service on a rail banked line. Here, King County filed the appropriate petition. Further, in City of Coeur D'Alene, there was no indication that the abandoning railroad was "unwilling or unable to reassert control to restore service on the line in the future." Id. In this case, King County and BNSF have both made clear that BNSF does not wish to retain any rights related to the segments. See Petition at 3.

For the reasons discussed above, the Board will grant King County's petition for exemption from the requirements of 49 U.S.C. 10901.

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

It is ordered:

1. King County's petition for exemption from 49 U.S.C. 10901 is granted.
2. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Nottingham, and Commissioner Mulvey.

Anne K. Quinlan
Acting Secretary