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SERVICE DATE – DECEMBER 2, 2010

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35164

BNSF RAILWAY COMPANY—PETITION FOR DECLARATORY ORDER

Docket No. AB 6 (Sub-No. 430X)

BNSF RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN OKLAHOMA
COUNTY, OKLA.

Digest:¹ The Board denies a petition to reopen one of its decisions because it no longer has authority to consider the issues in the petition. The Board gave BNSF Railway Company (BNSF) permission to remove a section of track in Oklahoma City, Okla., from the national rail system, and BNSF did so before the petition was filed, thereby removing the track from the Board's authority. The Board concludes that even if it did have authority to consider the petition, it would have been denied because the petition lacked merit. Regarding the petitioner's allegations that BNSF is endangering residents near the Packingtown Lead, the Board notes that there is no evidence that BNSF is not in compliance with existing safety regulations and that BNSF recently refurbished the Packingtown Lead.

Decided: December 1, 2010

In a prior decision, the Board authorized BNSF Railway Company (BNSF) to abandon a short segment of rail line in Oklahoma City, Okla., to make way for an important highway relocation project. After the authorization became effective the following month, BNSF consummated the abandonment. More than 2 months later, Edwin Kessler (E. Kessler)² filed a petition to reopen, claiming that the ensuing transportation of hazardous materials over a nearby rail line constitutes new evidence and substantially changed circumstances that materially affect the Board's decision to permit the abandonment. We will deny the petition.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² This description will be used to differentiate petitioner from his brother, John Kessler (J. Kessler), who is also a party to this proceeding.

BACKGROUND

In 2005, to accommodate the planned relocation of an outdated and deteriorating stretch of Interstate 40 in downtown Oklahoma City, BNSF invoked the Board's expedited class exemption procedures under 49 C.F.R. pt. 1152 subpart F (for lines that have not had local traffic for at least 2 years) to abandon 2.95 miles of its Chickasha Subdivision between milepost 539.96 and milepost 542.91 (we refer to this portion as the Chickasha Line). BNSF indicated in its notice and accompanying environmental report required by 49 C.F.R. § 1105.7 that all overhead rail traffic (traffic that does not originate or terminate on the line) would be rerouted. As required by our regulations governing the contents of an environmental report, BNSF also addressed whether "hazardous materials are expected to be transported," 49 C.F.R. § 1105.7(e)(7)(ii), stating: "The proposed abandonment will not affect the transportation of hazardous materials. Indeed, the abandonment will not result in the transportation of hazardous materials."

BNSF provided public notice of the proposed abandonment, and the Board's Section of Environmental Analysis (SEA) issued for public comment an Environmental Assessment (EA) in which SEA recommended 5 environmental conditions related to salvage. A number of parties filed comments on the EA, raising concerns about the potential safety implications of diverting rail traffic to a nearby line to the south called the Packingtown Lead, which, the commenters stated, contains at-grade, as opposed to grade-separated, crossings³ on certain roadways. Reviewing the comments, SEA declined to recommend additional mitigation measures on grounds that the Oklahoma Corporation Commission (OCC) and the Federal Railroad Administration (FRA) have specific safety regulations in place for at-grade crossings that would mitigate the potential safety effects of diverting traffic to the Packingtown Lead. The Board adopted SEA's analysis and recommendations.

The notice of exemption authorizing abandonment of the Chickasha Line became effective in November 2005. BNSF, however, did not exercise its abandonment authority while the Board considered petitions to reopen, including one filed in February 2007 by E. Kessler, who presented the Board with evidence that, contrary to BNSF's certification in its notice of exemption, there had been local traffic on the eastern end of the Chickasha Line within the relevant 2-year time frame. In early 2008, while the Board was considering that filing, E. Kessler sought a cease and desist order after presenting the Board with evidence that BNSF had blocked the tracks at the west end of the Chickasha Line and had begun salvaging the line.

In June 2008, the Board determined that BNSF's use of the expedited notice-of-exemption procedures was inappropriate due to the presence of an undetermined amount of local traffic on the eastern end of the line within the pertinent 2-year period.⁴ The Board noted that BNSF could still seek abandonment authorization for the Chickasha Line through either a

³ A grade-separated crossing is an overpass or an underpass.

⁴ BNSF Ry.—Aban. Exemption—In Okla. County, Okla., AB 6 (Sub-No. 430X), et al. (STB served June 5, 2008).

petition for an individual exemption under 49 U.S.C. § 10502 or a formal abandonment application under 49 U.S.C. § 10903.

Instead, in July 2008, BNSF requested that the Board issue a declaratory order finding that what it characterized as projects to relocate 2 segments of the Chickasha Line—the eastern segment and the middle segment—did not require prior Board approval.⁵ At the time, ancillary spur trackage connected the eastern segment to the north-south Red Rock Subdivision. BNSF explained that it planned to relocate the eastern segment slightly to the south, where it would connect directly to the Red Rock Subdivision, and that it would “relocate” the middle segment by refurbishing the Packingtown Lead, which connects the Red Rock Subdivision to milepost 542.91 of the Chickasha Subdivision. BNSF stated that it had already rerouted all overhead traffic that had formerly moved over the Chickasha Line to the refurbished Packingtown Lead.

In October 2008, the Board instituted a declaratory order proceeding and, through a notice in the Federal Register, sought public comment on whether BNSF’s plans for the eastern and middle segments would involve merely track relocations (not requiring Board authorization) or whether they would eliminate service to shippers and/or extend BNSF’s operations into new territory, in which case Board authority would be required. The Board received a number of comments in response to the notice.

In a decision served on May 20, 2009 (Abandonment Decision), the Board granted in part BNSF’s request for a declaratory order. It concluded that the eastern segment project, which involved the construction of trackage on a new right-of-way, was simply a relocation of track that would not require prior Board authorization, but that the middle segment project, which involved refurbishing an existing line, would not be a relocation. The Board went on to find, however, that the evidence compiled in both the declaratory order proceeding and the prior 2005 abandonment proceeding offered ample support for authorizing the abandonment of the middle segment. Accordingly, pursuant to 49 U.S.C. § 10502, the Board, on its own motion, exempted BNSF from the prior approval requirements of 49 U.S.C. § 10903 to abandon that segment, subject to the 5 salvage-related environmental conditions previously imposed by the Board.⁶ The Board stated that petitions for stay would be due May 26, 2009, petitions to reopen would be due June 9, 2009, and absent a stay, its abandonment authorization would go into effect on June 9, 2009. No party filed a petition with the Board to stay the Abandonment Decision. By letter filed

⁵ The eastern segment lies between mileposts 539.96 and 540.15, and the middle segment lies between mileposts 540.15 and 541.69. BNSF stated that in the future it would seek Board authority to abandon the western segment (from milepost 541.69 to milepost 542.69), on which a former rail shipper, Boardman, Inc. (Boardman), was located.

⁶ In doing so, the Board found that neither former shipper Boardman nor existing overhead traffic would be adversely affected by removal of the middle segment. Also, on its own motion, the Board exempted the abandonment from the statutory offer-of-financial-assistance and public-use provisions (49 U.S.C. § 10904 and § 10905, respectively), so that the highway relocation project could proceed.

on June 18, 2009, BNSF notified the Board that it had consummated the abandonment of the middle segment on June 17, 2009.⁷

On August 25, 2009, more than 2 months after BNSF filed its notice of consummation, E. Kessler filed his petition to reopen and a separate addendum containing additional information, to which BNSF replied on September 14, 2009. In his petition to reopen, E. Kessler asserts that BNSF is now transporting hazardous materials on the Packingtown Lead, contrary to statements it had made in its environmental report filed in 2005, and that this transportation raises potentially serious safety concerns.

DISCUSSION AND CONCLUSIONS

After abandonment authority has been lawfully consummated, the Board generally loses authority to reopen the abandonment proceeding.⁸ However, if a timely administrative petition is outstanding, consummation does not divest the Board of authority to consider the pending issues in that petition and grant any necessary relief.⁹ Here, E. Kessler filed his petition after BNSF filed its consummation notice. Moreover, the Board, by decision served May 7, 2010, denied J. Kessler's timely filed petition to reopen. E. Kessler fails to explain why, under these circumstances, the Board retains authority to grant the relief he now seeks.

In any event, even if the Board still had authority to grant the petition to reopen, E. Kessler has not justified reopening. Under 49 U.S.C. § 722(c) and 49 C.F.R. § 1152.25(e)(4), a petition to reopen an abandonment decision must show that the prior action will be affected materially because of changed circumstances or new evidence, or that the prior action involves material error.

⁷ On June 8, 2009, J. Kessler timely filed a petition to reopen, which he claimed automatically stayed the Abandonment Decision, arguing that abandonment of the middle segment would deprive Boardman (on the western segment) of access to rail service. On June 29, 2010, Oklahomans for New Transportation Alternatives Coalition (ONTRAC) filed comments supporting J. Kessler's petition with an entirely different argument. In two decisions, the Board denied J. Kessler's petition, finding his arguments unpersuasive and ONTRAC's argument, presented to the Board after the June 17 consummation, too late and, in any event, without merit. BNSF Ry.—Pet. for Declaratory Order, FD 35164, et al. (STB served June 12, 2009) (rejecting J. Kessler's automatic-stay argument); BNSF Ry.—Pet. for Declaratory Order, FD 35164, et al. (STB served May 7, 2010) (rejecting J. Kessler's and ONTRAC's substantive arguments).

⁸ See Hayfield N. R.R. v. Chi. & N. W. Transp. Co., 467 U.S. 622, 633 (1984); S.R. Investors, Ltd.—Aban.—In Tuolumne County, Cal., AB 239-X, slip op. at 3 (ICC served Jan. 20, 1988).

⁹ S.R. Investors, Ltd.—In Tuolumne County, Cal., slip op. at 3.

E. Kessler argues that his evidence of hazardous materials being transported over the Packingtown Lead in August 2009 constitutes both new evidence and changed circumstances. According to petitioner, this evidence contradicts BNSF's statement in its 2005 environmental report and thus shows that the report was false and misleading.¹⁰ E. Kessler further argues that this evidence indicates that a "zone of danger" has been created, comprising a park visited by families and children and a residential complex for the elderly and disabled, both located near trains traveling through an at-grade crossing. Although E. Kessler states that "[i]t remains unknown what kinds and quantities of hazardous materials are being transported through the [Packingtown Lead],"¹¹ he speculates about the danger that a ruptured tank car containing chlorine could pose. E. Kessler asks the Board either to void the Abandonment Decision or, in the alternative, to condition BNSF's abandonment authorization on BNSF constructing grade-separated crossings and fences, installing a closed-circuit television monitoring system, and complying with a Board-imposed environmental reporting and monitoring condition. Finally, E. Kessler asks the Board to clarify the extent of OCC's local safety jurisdiction in this matter.

E. Kessler's petition does not present new evidence or substantially changed circumstances that would warrant reopening the underlying Abandonment Decision. We find nothing false or misleading about BNSF's statement in its 2005 environmental report that the proposed abandonment of the Chickasha Line would neither affect nor result in the transportation of hazardous materials. BNSF states that, at the time the environmental report was submitted, it was not handling any hazardous materials over the Chickasha Line. E. Kessler's evidence does not contradict that statement, but shows only that hazardous materials were being transported over the Packingtown Lead in August 2009. Because petitioner's evidence does not establish that hazardous materials traffic was, in fact, moving over the Chickasha Line in September 2005, and was then transferred to the Packingtown Lead after the abandonment of the Chickasha Line, there is no showing that BNSF's environmental report was false or misleading.

E. Kessler interprets the report as stating that no hazardous materials would ever be transported over the Packingtown Lead after abandonment of the Chickasha Line. This reads BNSF's statement too broadly. Where, as here, a railroad is not already carrying hazardous materials over the line it seeks to abandon, it would be unreasonable to require that carrier to address in its environmental report how or whether it would exercise its managerial discretion to route any hazardous materials traffic over other lines in the future. We therefore read BNSF's environmental report as saying that, because the Chickasha Line was carrying no hazardous materials in 2005, the proposed abandonment, by itself, would not cause or result in the

¹⁰ Petitioner also asserts that the environmental report itself was "invalid" because BNSF failed to provide notice to the Oklahoma Homeland Security Office, as required by Board rules. But the applicable regulation, 49 C.F.R. § 1105.7(b), requires only that a railroad notify, as pertinent here, the state clearinghouse, in this case OCC, which is responsible for distributing the report to appropriate state agencies. The record indicates that BNSF certified in its notice of exemption that it sent copies of the environmental report to OCC. BNSF, therefore, complied with the applicable regulation.

¹¹ Pet. at 5.

transportation of hazardous materials. Contrary to E. Kessler's argument, this was not an assurance that BNSF would never transport hazardous materials over the Packingtown Lead.

Moreover, any rerouting of traffic from the Chickasha Line to the Packingtown Lead resulted from BNSF's exercise of managerial discretion rather than from the Board's May 2009 Abandonment Decision. As explained in the background section of this decision, by early 2008, BNSF had blocked the Chickasha Line so that no rail traffic could move over it. Therefore, the transfer of traffic did not result from the Abandonment Decision. Accordingly, E. Kessler has not presented new evidence that would materially affect that decision.

Nor does petitioner's evidence demonstrate materially changed circumstances. The record here indicates that, as of August 2009, BNSF handled some hazardous materials—methanol and petroleum traffic¹²—over the Packingtown Lead. But that does not amount to a material change because, contrary to E. Kessler's claim, there is no evidence that this routing has created an unregulated “zone of danger” threatening the safety of area residents. Railroads have not only a right but a statutory common carrier obligation to transport hazardous materials “where the appropriate agencies have promulgated comprehensive safety regulations.”¹³ A number of federal agencies have, in fact, promulgated extensive regulations governing transportation of hazardous materials by rail.¹⁴ Here, BNSF explains that it is in compliance with all applicable safety regulations with respect to hazardous materials transportation. Although E. Kessler claims that the railroad is endangering area residents by moving such traffic over the Packingtown Lead, he has offered no evidence that BNSF is violating any applicable safety regulations.

E. Kessler has not shown that any alternate routing would, as a general matter, be safer. Before rerouting overhead traffic over the Packingtown Lead, BNSF completely rebuilt that line, replacing all of the rail and ties and constructing new crossings, gates, and flashers. Thus, it is likely that the Packingtown Lead is in better condition than was the Chickasha Line, which BNSF notes, also ran through a residential community and near a softball stadium. Moreover, as BNSF observes, although both routes have (or had) 3 grade-separated crossings, the Packingtown Lead has 4 fewer at-grade crossings than did the Chickasha Line. Thus, a different route would, at most, merely shift whatever risks exist from the transportation of these materials from one populated area to another.¹⁵

¹² Responding to E. Kessler's discussion of the dangers of a ruptured tank car carrying chlorine, BNSF notes that E. Kessler's evidence shows only tank cars on the Packingtown Lead carrying petroleum and methanol.

¹³ Union Pac. R.R.—Pet. for Declaratory Order, FD 35219, slip op. at 3-4 (STB served June 11, 2009).

¹⁴ These include the Department of Transportation, FRA, the Transportation Security Administration, and the Nuclear Regulatory Commission. Id. at 4-6.

¹⁵ See CSX Transp., Inc. v. Williams, 406 F.3d 667, 674 (D.C. Cir. 2005) (noting that the effect of a municipal ordinance banning rail shipments of hazardous materials in certain parts of the District of Columbia would be “simply to shift this risk . . . to other jurisdictions”).

There is also no basis on the record before us to now impose the additional environmental conditions sought by petitioner, given the existing safety regulations governing at-grade crossings on which the Board relied in 2005¹⁶ and existing regulations governing the transportation of hazardous materials. There is no evidence that BNSF has failed to comply with any applicable safety regulations on the Packingtown Lead. Nor does the record here support petitioner's claim that mitigation beyond that already imposed is needed to adequately protect area residents.

Finally, we will not address the OCC's jurisdiction over railroad safety issues in Oklahoma, as requested by petitioner. The FRA, not the Board, has primary jurisdiction over rail safety matters at the federal level.

For all of the foregoing reasons, we will deny E. Kessler's petition to reopen and reconsider.

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

It is ordered:

1. E. Kessler's petition to reopen and reconsider is denied.
2. This decision is effective on the date of service.

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

¹⁶ BNSF Ry.—Aban. Exemption—In Okla. City, Okla., AB 6 (Sub-No. 430X), slip op. at 2 (STB served Nov. 10, 2005).