30304 SERVICE DATE - SEPTEMBER 21, 1999
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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-6 (Sub-No. 382X)

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY--ABANDONMENT OF CHICAGO AREA TRACKAGE IN COOK COUNTY, IL

Decided: September 17, 1999

By petition filed on June 3, 1999, The Burlington Northern and Santa Fe Railway Company (BNSF) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon its switching and industrial lead track beginning north of Corwith Yard at station 24 + 43 and ending at station 149 + 87 near the east end of the Western Avenue Bridge, a total distance of 2.38 miles, within the city limits of Chicago, in Cook County, IL.[1] Notice of this exemption proceeding was published in the Federal Register at 64 FR 33544-45 on June 23, 1999. By decision served July 9, 1999, the time for filing replies to the petition was extended until July 23, 1999. A joint reply was timely filed by Crown Steel Sales, Inc. (Crown), International Cellulose, Inc. (Intercel), Kolcraft Enterprises, Inc. (Kolcraft), and Pure Asphalt Company (Pure) (collectively, protestants). A reply also was filed by the United Transportation Union - Illinois Legislative Board (UTU-IL). We will deny the petition for exemption.

PRELIMINARY MATTERS

On August 27, 1999, BNSF filed a motion for leave to file a reply and a reply to the joint reply. BNSF made these filings knowing that our procedures provide only for the filing of a petition and a reply thereto. 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) (Central Railroad). If BNSF had desired to assure itself of the right to rebut a filing in opposition to its abandonment request, BNSF could and should have filed a formal application. Moreover, replies are due within 20 days of the filing they seek to address. BNSF's filing is not only irregular but out of time as well, and the petitioner offers no explanation as to why it is late. Under our interpretation of the ICC Termination Act of 1995, we are required to decide an abandonment exemption petition within 110 days to allow for offers of financial assistance to be submitted by the 120th day. Here, the 110th day following the filing of the petition is September 21, 1999. In this case, were we to accept the proffered reply, the remaining time would

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[1] In its petition, BNSF stated that the line is "arguably" not subject to regulation by the Board pursuant to 49 U.S.C. 10906. But, the railroad added, to avoid any doubt over the status of the line and to avoid delays from possible litigation over the line's status, the carrier elected to file an abandonment petition for exemption. As noted below, BNSF belatedly filed a motion asking the Board to dismiss the case, citing 49 U.S.C. 10906. We will address the motion to dismiss below.

not be adequate to afford the joint protestants an opportunity for rebuttal. Rebuttal would be necessary because BNSF submits new material in its proffered reply, which in fairness the shippers must be allowed to address. We will reject BNSF's reply.

On August 27, 1999, BNSF also filed a motion to dismiss the proceeding, arguing that the line is a switching and industrial lead track not subject to regulation by the Board. BNSF should have made this motion concurrently with the filing of its petition for exemption. Because there is insufficient time to consider the motion to dismiss, allow protestants to reply, and meet the 110-day deadline, the motion to dismiss will be rejected.

Given our rejection of BNSF's filings above, we decline to consider two replies filed on September 3, 1999. One is a "joint reply in opposition to (1) motion for leave to file reply and (2) motion to dismiss" filed by the joint protestants. The other is the "reply to motion for leave to file reply to reply; and reply to motion to dismiss" filed by UTU-IL.

BACKGROUND

According to BNSF, the 2.38 miles of Chicago area trackage was formerly trackage of the Illinois Northern Railway (INR), a switching carrier owned by International Harvester (IH). IH sold its capital stock in the INR to a group of railroads, one of which was The Atchison, Topeka and Santa Fe Railway Company (ATSF). Later, ATSF (now BNSF) acquired all of the former INR interests in the Chicago area.

BNSF indicates that the trackage is currently used as an industrial lead to serve Intercel and Crown. Intercel is a paper distributor located at 28th Street and Troy Avenue in Chicago. It primarily ships paper to Mexico. If the line were abandoned, BNSF notes that several transportation alternatives would be available to Intercel: intermodal or trailer shipments; BNSF's team track at Western Avenue, approximately 4 miles from Intercel; other rail carriers in the Chicago area; a transloader located approximately 2 miles from Intercel's plant; and trucks, which are readily available in the Chicago area.

Crown is a distributor of steel products located at 31st Street and Homan Avenue in Chicago. Crown primarily receives steel beams from Arkansas. BNSF notes that these steel beams can be transloaded at Lamont, IL, or at the Western Avenue team track, approximately 4 miles from Crown, if a portable crane can be arranged. In addition to these rail alternatives, BNSF notes that alternative truck transportation is readily available in the Chicago area.

Kolcraft, a manufacturer and distributor of baby furniture, located at 31st Place and St. Louis Avenue, and Pure, a manufacturer of coatings, located at 31st Street and Spaulding Avenue, in Chicago, have used the involved rail service in the past and are potential future users.

Shippers replying in opposition to the petition assert that BNSF has failed to sustain its burden of proof and that the petition for exemption should be denied. Because all shipper protestants are located on the approximately 1.25-mile segment between the beginning of the proposed abandonment near Corwith Yard and Intercel's facility near 28th and Troy, however, they do not object to abandonment of the 1.13-mile portion at the end of the line.

TRAFFIC, REVENUE AND COSTS

BNSF submits that traffic for Crown and Intercel, respectively, consisted of 47 and 21 carloads in 1997, 66 and 50 carloads in 1998, and 17 and 10 carloads for the first quarter of 1999. The railroad claims that the present traffic volume can no longer support the costs of operating and maintaining the line. Because of a series of derailments and because of concerns expressed by employees about the line's safety, BNSF has the line under review for possible embargo. BNSF claims that a large number of grade crossings through busy Chicago streets are in need of substantial rehabilitation.

BNSF asserts that the total revenue attributable to the line was $206,156 for the base year, calendar year 1998. This revenue is based on 116 line haul cars that generated $184,306 in freight revenues, $21,250 in demurrage, and $600 in reciprocal switching. Because the line is not mileposted, BNSF says that data for on-branch maintenance of way, derailment expenses, and property taxes were not readily available through its systems reporting data. BNSF claims on-branch costs (excluding maintenance of way, derailment expenses, and property taxes) of $69,568.[2] BNSF submits off-branch costs as the 1997 URCS-based off-branch expenses attributable to the line of $183,085. Thus, BNSF claims total avoidable costs of $252,653 and an avoidable loss from operations in the base year of $46,497.

BNSF asserts that it would incur significant rehabilitation costs to upgrade the line to minimum safety standards. The railroad states that the line is classified as FRA excepted track, can only be operated at a maximum speed of 10 miles per hour, is constructed of light rail, and contains ties that are in poor condition. The line, according to BNSF, is frequently subject to vandalism, trespassing, and unlawful third party dumping of refuse. The railroad estimates that rehabilitation of the line to a safe operating condition and restoration of 16 public grade crossings would cost $534,000 (712 track feet @ $750/track foot). Due to public safety concerns and safety concerns for BNSF crews operating the line, BNSF asserts that, because the line sustains losses, there is no prospect for recovery of the substantial investment to rehabilitate the crossings alone, let alone the trackage.

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[2] This amount is the total of $18,212 for maintenance of way and structures, $9,994 for maintenance of equipment/locomotives, $38,554 for transportation, and $2,808 for freight car costs.

BNSF estimates the net salvage value of the track to be $29,100. The railroad says no valuation for the right-of-way was available at the time of filing this petition.

SHIPPER AND LABOR INTERESTS

Intercel disputes BNSF's representation of its traffic as 50 carloads in 1998 and 10 carloads in the first quarter of 1999. The shipper submits a list that identifies the date and car number for each carload received or shipped by Intercel in 1998 and for the first 5 months of 1999. The list shows a total of 66 carloads in 1998 and 19 carloads for the first 5 months of 1999. Because the shippers challenge BNSF's statements about the number of carloads in the base year, and because the railroad did not provide underlying data sufficient to permit us to evaluate the shippers' arguments, we are unable to accept BNSF's base year evidence as submitted or provide a reasonable restatement. BNSF also submits no forecast year data. The lack of forecast year data is unfortunate, in that the only basis for BNSF's petition is 1998 data, which cover little more than 10 months. As Intercel notes, BNSF placed the line out of service for 52 days in 1998, claiming that it could stop service without regulatory approval, thus adversely affecting Intercel's 1998 traffic volume. Intercel states that its traffic is likely to account for more than 70 carloads in the forecast year. Intercel claims that it would suffer a revenue loss of approximately $50,000 a year because rail shipments to Mexico generate between $10 to $20 more per ton than domestic rail or truck shipments. Intercel says that it would suffer a substantial capital loss if forced to relocate to another building that is rail-served.

Crown disputes BNSF's representation of its traffic as 66 carloads in 1998. Crown says that it received 75 carloads in 1998. Crown indicates that rail shipments from Arkansas constitute approximately 70 percent of Crown's business and that it would not be economically feasible to receive steel beams by truck from Arkansas. Crown says that it costs 91 cents per hundredweight by rail and $3.18 per hundredweight by truck. According to Crown, transloading that traffic from rail to truck would make that form of transportation uneconomic. A loss of 70 percent of its business would force a reduction of 50% in its work force, thus having a harmful effect on community development in the surrounding neighborhood that is already economically depressed. Crown disputes that the grade crossing at 31st Street needs substantial repairs, stating that it was resurfaced only about 2 or 3 years ago.

Kolcraft opposes abandonment of the line. Kolcraft says that it has used the line in the past and is a potential user of the line in the future. Kolcraft maintains that the rail line is a valuable asset to its business.

Pure opposes the abandonment of the line. Pure says that it has received rail shipments over the line in the past by means of a siding adjacent to its facility and that the line is a valuable asset to its business. Although Pure has not used the rail line in recent years because of unfavorable oil prices, this shipper indicates its intent to use the line again when prices return to normal levels.

UTU-IL disagrees with BNSF's assertion that the line is arguably not subject to regulation pursuant to 49 U.S.C. 10906. Because we are rejecting the railroad's motion to dismiss as late-filed, we will not rule on whether the line may be properly classified as excepted "spur, industrial, team, switching or side tracks." In any event, consideration of UTU-IL's interests in this matter are assured by BNSF's filing for an abandonment exemption. UTU-IL personnel that serve the line dispute BNSF's Exhibit P (23 pages of photographs taken along the line), which characterizes certain photographs as indicating unsafe conditions. UTU-IL has stated that it would resist any future effort by BNSF to embargo the line. Otherwise, UTU-IL requests that the petition be denied because BNSF revenue and cost data are incomplete, citing Gauley River Railroad, LLC--Abandonment and Discontinuance of Service--In Webster and Nicholas Counties, WV, STB Docket No. AB-559 (Sub-No. 1X) (STB served June 16, 1999) (Gauley River), and cases cited therein.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned or service discontinued without our prior approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy 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.

The exemption process is designed to minimize regulatory burdens. An exemption is appropriate when we have sufficient information to reach an informed decision. Typically, the types of abandonment and discontinuance transactions that are exempted are those where the shippers do not contest the abandonment or if they do contest it, revenue from their traffic is clearly marginal compared to the cost of operating the lines. See Boston and Maine Corporation--Abandonment Exemption--In Hartford and New Haven Counties, CT, STB Docket No. AB-32 (Sub-No. 75X) et al. (STB served Dec. 31, 1996), slip op. at 5 (Boston and Maine); Tulare Valley Railroad Company--Abandonment and Discontinuance Exemption--In Tulare and Kern Counties, CA, STB Docket No. AB-397 (Sub-No. 5X) (STB served Feb. 21, 1997), slip op. at 7-8; San Joaquin Valley Railroad Company--Abandonment Exemption--In Kings and Fresno Counties, CA, STB Docket No. AB-398 (Sub-No. 4X) (STB served May 23, 1997), slip op. at 5, aff'd (STB served Mar. 5, 1999); Central Railroad; and Gauley River. Where there is an inadequate record on which to grant an abandonment petition for exemption, the petition will be denied outright. See Boston and Maine, slip op. at 6.

In this proceeding, the evidence is not sufficient for us to make an informed decision on the merits of the proposed abandonment exemption. As in any abandonment case, whether authority is sought by application or petition, the railroad must demonstrate that the line in question is a burden on interstate commerce. Typically, in an attempt to make that showing, the carrier submits evidence to show that the costs incurred by the railroad for the line exceed the revenues attributable to it. Considering the fact that the shippers threatened litigation when the line was placed out of service temporarily, BNSF should have known that this abandonment proposal would be strenuously opposed and should have filed a formal application under section 10903 or at least extensive information, augmented by detailed workpapers, in support of a petition for exemption. Petitioner submitted very little evidence on which we can make a determination of the profitability of the line. BNSF's case-in-chief is fatally flawed because its evidence has been contravened by the protesting shippers and is not supported. Protestants Intercel and Crown challenge BNSF's carload numbers and the resulting revenues attributable to the base and forecast years. Furthermore, BNSF does not provide costs or revenue projections for the forecast year that would allow us to project future operating results for this line. Protestant Intercel says that its traffic would increase in the base year and forecast year due to the 52 days that the line was out of service, days not considered by BNSF. BNSF's assertion that it would cost $534,000 to rehabilitate the line to a safe operating condition and to restore 16 public grade crossings is unsupported. A letter from the Illinois Department of Transportation states that it would cost $170,000 to rehabilitate the first 1.25 miles of the line and that it would be willing to do so. Given this record, we are unable to determine whether the costs incurred by petitioner exceeds the revenue from the line.

The petitioner bears the burden of showing that the current situation imposes a burden that outweighs the harm that would befall shippers and other members of the public and the adverse impact on rural and community development if the line were abandoned. Upon review of the record before us, we conclude that BNSF has failed to establish that continued regulation of the proposed abandonment is not necessary to carry out the rail transportation policy and either that it is not necessary to protect shippers from the abuse of market power or that the transaction is limited in scope.

Denial of this petition is without prejudice to BNSF refiling an appropriate abandonment application or a petition for exemption that cures the defects found in the current proposal. In particular, any new filing should provide cost and revenue information for the 1.25-mile segment, as well as the full 2.38-mile line. The new filing must be under a new docket sub-number.

Our denial of BNSF's petition for exemption moots labor protection and environmental issues.

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

It is ordered:

1. The reply to protests and motion to dismiss filed by BNSF on August 27, 1999, are rejected.

2. BNSF's petition for exemption is denied.

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

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary