

33008
EB

SERVICE DATE - OCTOBER 4, 2002

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-597X

BUTTE-SILVER BOW COUNTY-ABANDONMENT EXEMPTION-
IN SILVER BOW COUNTY, MT

Decided: October 2, 2002

By petition filed on June 18, 2002,¹ Butte-Silver Bow County (BSB)² seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 governing rail line abandonments, and from 49 U.S.C. 10904 governing offers of financial assistance (OFA), to abandon approximately 11 miles of railroad known as the Missoula Gulch and Butte Hill (MGBH) line in and near Butte, in Silver Bow County, MT. The MGBH line extends from milepost 0.0 at Rocker, west of Butte, to milepost 4.40 at the Butte Hill Yard (Missoula Gulch segment), and also extends north and east from milepost 0.0 at the Butte Hill Yard to milepost 3.69 near the Badger Mine (Butte Hill segment).³ On June 25, 2002, BSB also filed a request for issuance of a notice of interim trail use (NITU) for the Missoula Gulch segment and a request for the imposition of a public use condition for the Butte Hill segment. We will grant the requested exemption from sections 10903-04, subject to environmental, public use, and trail use conditions. No employee protection will be imposed.

BACKGROUND

The MGBH line was most recently owned and operated by a non-profit corporation called the Butte/Anaconda Historic Park and Railroad Corporation (BAHPR). The BAHPR operated a tourist train over the portion of the MGBH between Rocker and the former Butte Hill Yard under a lease from the State of Montana from 1988 to 1991, at which time the BAHPR acquired the MGBH line. See

¹ The petition for exemption was initially submitted on May 17, 2002, but its official date of filing was delayed until June 18, 2002, upon receipt by the Board of certain required information not included with the initial petition.

² BSB is a consolidated city-county government authorized under Montana law.

³ Notice of the filing was served and published in the Federal Register on June 28, 2002 (67 FR 43698).

Butte/Anaconda Historic Park and Railroad Corporation–Acquisition Exemption–State of Montana, Department of Commerce, ICC Finance Docket No. 31982 (ICC served Feb. 11, 1992). In 1994, the Montana Secretary of State’s Office directed an involuntary dissolution of the BAHPR.⁴ The BAHPR, however, continued intermittently to operate a tourist train over the MGBH line through 1996, did not seek reinstatement, and never distributed its assets following dissolution. On October 29, 2001, the Montana district court in Silver Bow County ordered the BAHPR’s assets distributed to BSB.

On February 15, 2002, BSB filed a verified notice of exemption under 49 CFR 1150.31 to acquire the MGBH line, with the intention to subsequently seek this abandonment authority. On March 15, 2002, the Board provided public notice of the acquisition exemption. See Butte-Silver Bow County–Acquisition Exemption–Silver Bow County, MT, STB Finance Docket No. 34171 (STB served Mar. 15, 2002) (67 FR 11743). The notice explained that acquisition was being sought to facilitate abandonment and environmental cleanup of the line. The line is located within the boundaries of a Superfund site, and cleanup activities in and around Butte have been required by the U.S. Environmental Protection Agency (EPA) under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9601 et seq. (CERCLA, or Superfund).⁵

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.

Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy in this case. By minimizing the administrative expense of the abandonment application process,

⁴ The BAHPR had failed to comply with state filing requirements.

⁵ According to BSB, on January 12, 2000, EPA issued an order that requires cleanup work on and near Butte area railroad beds, including the MGBH line. BSB adds that portions of the MGBH bed and ballast contain concentrations of heavy metals in excess of EPA risk levels resulting primarily from the use of mine wastes during the bed’s construction. The cleanup plan, as overseen by EPA, in consultation with the State of Montana’s Department of Environmental Quality and supported by BSB, contemplates removal of all or a portion of the track structures and cleanup of the railroad bed on the existing portions of the MGBH line. The Board’s approval of abandonment is necessary before that work can begin.

an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. Other aspects of the rail transportation policy will not be affected adversely. Furthermore, regulation of the transaction is not necessary to protect shippers from an abuse of market power. No shippers have used the line for over 20 years, and there are no potential rail customers.⁶

As indicated, petitioner also seeks an exemption from the OFA provisions of 49 U.S.C. 10904. Under the unique facts of this case, where abandonment is being sought to facilitate an environmental cleanup and there are no existing or prospective shippers on the line, it is not foreseeable that an OFA to purchase or subsidize the line for continued rail service would be made here. Accordingly, BSB's request for an exemption from the OFA provisions will be granted.

Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. However, the record indicates that BSB has no railroad employees, and in any event petitioner's entire line is involved in this abandonment.⁷ Accordingly, no employee protection will be imposed here.

By letter, petitioner requested permission to submit a Preliminary Draft Environmental Assessment (PDEA) in lieu of the environmental and historic reports otherwise required.⁸ Our Section of Environmental Analysis (SEA) granted this request, and petitioner has submitted the PDEA as part of its petition for exemption. Petitioner has also notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed abandonment. See 49 CFR 1105.11. SEA has reviewed the PDEA, verified its data, and analyzed the probable effects of the proposed action on the quality of the human environment. SEA concluded that an Environmental Assessment (EA) was the appropriate form of environmental documentation for the case, given the extensive environmental analysis prepared by EPA, the Montana Department of Environmental Quality, and SEA's independent review of the PDEA. Accordingly,

⁶ Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

⁷ A railroad that is abandoning its entire system and going out of business generally is not required to provide labor protection. See Northampton and Bath R. Co.—Abandonment, 354 I.C.C. 784, 785-86 (1978); Wellsville, Addison & Galeton R. Corp.—Abandonment, 354 I.C.C. 744 (1978), cited with approval, Matter of Chicago, M., St. P. & Pac. R.R., 658 F.2d 1149, 1153 (7th Cir. 1981), cert. denied, 455 U.S. 1000 (1982).

⁸ The Board's environmental rules at 49 CFR 1105.4(g) permit applicants to prepare environmental reports in the form of PDEAs.

SEA used the PDEA as a starting point for the preparation of the EA. SEA served the EA on July 16, 2002, and requested that the public submit comments by August 15, 2002.

In the EA, in order to address the potential environmental impacts of the proposal, SEA recommended that the following environmental mitigation measures be imposed in any decision approving the abandonment exemption: (1) BSB shall comply with the Environmental Protection Agency Enforcement/Action Memorandum and Administrative Order for the Butte Priority Soils Time Critical Removal Action Plan; (2) BSB shall ensure that Best Management Practices are implemented to minimize fugitive dust emissions during construction transport activities; (3) BSB shall use Best Management Practices to control erosion, runoff, and surface instability during construction, including seeding, fiber mats, straw mulch, plastic liners, slope drains, and other erosion control devices; (4) BSB shall obtain all necessary Federal, state, and local permits if salvage activities require the alteration of wetlands, ponds, lakes or streams, or if these activities would cause soil or other materials to wash into these water resources; (5) BSB shall retain its interest in the line and maintain it unaltered until completion of the section 106 process of the National Historic Preservation Act; (6) BSB shall control areas where construction vehicles drive or park during salvage to reduce the potential spread of noxious weeds along the right-of-way; (7) BSB shall use weed-free seed for revegetation of the right-of-way; and (8) BSB shall mitigate potential short-term noise impacts through appropriate Best Management Practices and construction engineering controls.

No comments to the EA were filed. Accordingly, we will impose the conditions recommended by SEA and, based on SEA's recommendations (see EA at ES-3), we conclude that the proposed abandonment, if implemented as conditioned and with the cleanup plan proposed by EPA, will not significantly affect either the quality of the human environment or the conservation of energy resources.

BSB requests that we issue a NITU for the Missoula Gulch segment under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), so that it may use the right-of-way as a recreational trail. BSB has submitted a statement of willingness to assume financial responsibility for the management of, for any legal liability arising out of the transfer or use of, and for the payment of any and all taxes that may be levied or assessed against the right-of-way, as required at 49 CFR 1152.29. It has also acknowledged that the use of the right-of-way for trail purposes is subject to future reactivation for rail service. Because BSB's request complies with the requirements of 49 CFR 1152.29, a NITU will be issued.

SEA has indicated in the EA that the right-of-way may be suitable for other public use following abandonment. BSB has filed a request for a public use condition under 49 U.S.C. 10905 for the Butte Hill segment so that the right-of-way between Butte Hill or Kelley Mine Yard and a point near the Badger Mine may be used as one or more public roads. BSB states that the condition has public importance because the Butte Hill segment right-of-way provides access to upper portions of Butte that

currently have limited potential access routes. BSB has met the public use criteria prescribed at 49 CFR 1152.28(a)(2). Therefore, a 180-day public use condition will be imposed here, commencing with the effective date of this decision and notice.⁹

As conditioned, this decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903, and from the OFA provisions of 49 U.S.C. 10904, the abandonment of the above-described line.

2. The exemption of the abandonment of the line described above is subject to the conditions that BSB shall: (1) leave intact all of the right-of-way of the Butte Hill segment, including bridges, trestles, culverts and tunnels (but not track and track materials), for a period of 180 days from the effective date of this decision and notice, to enable any state or local government agency or other interested person to negotiate the acquisition of the Butte Hill segment of the line for public use; (2) as to the Missoula Gulch segment, comply with the terms and conditions for implementing the interim trail use/rail banking procedures set forth below; (3) comply with the EPA Enforcement/Action Memorandum and Administrative Order for the Butte Priority Soils Time Critical Removal Action Plan; (4) ensure that Best Management Practices are implemented to minimize fugitive dust emissions during construction transport activities; (5) use Best Management Practices to control erosion, runoff, and surface instability during construction, including seeding, fiber mats, straw mulch, plastic liners, slope drains, and other erosion control devices; (6) obtain all necessary Federal, state, and local permits if salvage activities require the alteration of wetlands, ponds, lakes, or streams, or if these activities would cause soil or other materials to wash into these water resources; (7) retain its interest in the line and maintain it unaltered until completion of the section 106 process of the National Historic Preservation Act; (8) control areas where construction vehicles drive or park during salvage to reduce the potential spread of noxious weeds along the right-of-way; (9) use weed-free seed for revegetation of the right-of-way; and (10) mitigate potential short-term noise impacts through appropriate Best Management Practices and construction engineering controls.

3. BSB must assume full responsibility for management of, for any legal liability arising out of the transfer or use of, and for the payment of any and all taxes that may be levied or assessed against, the Missoula Gulch segment right-of-way.

⁹ As with the NITU, BSB is both the railroad owner and the prospective future user of the right-of-way.

4. Interim trail use/rail banking is subject to the future restoration of rail service and to BSB's continuing to meet the financial obligation for the Missoula Gulch segment right-of-way.

5. If BSB subsequently intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

6. Pursuant to the provisions of 49 CFR 1152.29(e)(2), BSB shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by BSB's filing of a notice of consummation by October 4, 2003, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

7. This exemption will be effective on November 3, 2002. Petitions to stay must be filed by October 15, 2002; petitions to reopen must be filed by October 24, 2002.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams
Secretary