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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35164

BNSF RAILWAY COMPANY—PETITION FOR DECLARATORY ORDER

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

BNSF RAILWAY COMPANY—ABANDONMENT EXEMPTION—
IN OKLAHOMA COUNTY, OK

Decided: June 12, 2009

By decision served on May 20, 2009, the Board granted BNSF Railway Company (BNSF) a declaratory order in part and, on its own motion, permitted abandonment by granting BNSF exemptions from the provisions of 49 U.S.C. 10903, 49 U.S.C. 10904, and 49 U.S.C. 10905, pursuant to 49 U.S.C. 10502 (May 20 Decision). The decision became effective on June 9, 2009. On June 8, 2009, John Kessler (J. Kessler)[1] filed a petition for reconsideration of the Board's decision, asserting, as a threshold matter, that the May 20 decision was not a final Board action. In this decision, we reject that assertion. We will address the merits of the reconsideration petition in a subsequent decision

BACKGROUND

In a petition filed on July 15, 2008, BNSF requested that the Board issue a declaratory order finding that what it characterized as two track relocation projects in Oklahoma City, OK, did not require prior Board approval. BNSF also asked for an expedited decision so that a project to facilitate the relocation of Interstate 40 in Oklahoma City could go forward.

In the May 20 Decision, the Board granted a declaratory order, in part, finding that the eastern segment project was a relocation, but it declined to make that finding as to the middle segment project.[2] The Board went on to find, however, that the evidence compiled in both the declaratory order proceeding and a prior abandonment proceeding offered ample support for

[1] This description will be used to differentiate petitioner from his brother, Edwin Kessler, who is also a party to this proceeding.

[2] The eastern segment is located between mileposts 540.15 and 539.96; the middle segment is located between mileposts 540.15 and 541.69.

authorizing abandonment of the middle segment.[3] 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. The Board also, on its own motion, 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. The Board ordered that any petitions for stay would be due by May 26, 2009. No stay petitions have been filed with the Board (although on June 11, 2009, Edwin Kessler, along with James Riffin, a non-party, sought an "emergency" stay of the decision before the United States Court of Appeals for the District of Columbia Circuit).

On June 8, 2009, J. Kessler filed a petition for reconsideration of the May 20 Decision. Petitioner asserts that the Board's May 20 decision should not be treated as an administratively final action because the Board acted on its own motion with respect to the middle segment, thereby providing interested parties no opportunity to address the issues associated with that action. Therefore, J. Kessler argues, his petition for reconsideration should be considered as an appeal of an initial Board action that would stay the effect of the Board's action pending determination of the appeal, citing 49 CFR 1115.[4]

DISCUSSION AND CONCLUSIONS

The provision which J. Kessler cites, 49 CFR 1115, does not apply to abandonment proceedings. See 49 CFR 1115.1. But even if 49 CFR 1115 did apply to abandonments, under 49 CFR 1115.2, the Board's decision would not qualify as an "initial decision" entitled to an appeal of right, because under the Board's rule that term applies to a "decision of an administrative law judge, individual Board member, or employee board," and not to a decision of the entire Board.

A decision of the entire Board in an abandonment proceeding is administratively final on the date it is served. The Board does not entertain administrative appeals of abandonment decisions. See 49 CFR 1152.25(e)(2). Parties seeking administrative relief from such decisions must file a petition to reopen under 49 CFR 1152.25(e)(4), which is not an appeal of right and does not operate to stay the decision sought to be reviewed. The fact that the Board acts on its own motion does not change the applicable procedures. Petitioner cites no cases to the contrary.

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[3] The track segments at issue had previously been the subject of a notice of exemption in BNSF Railway Company—Abandonment Exemption—in Oklahoma County, OK, STB Docket No. AB-6 (Sub-No. 430X), et al., that was rejected in a Board decision served June 5, 2008.

[4] J. Kessler asserts in his petition that the Board made a material error regarding the availability of service to shippers located on a segment to the west of the segments at issue here. This issue will be addressed in a later decision.

Therefore, the Board's decision is not an initial decision and is administratively final. Petitioner is not entitled to an appeal of right, and his petition does not automatically stay the effect of the Board's decision. His petition for reconsideration will be treated as a petition to reopen under 49 CFR 1152.25(e)(4), and will be addressed in a later decision.

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

It is ordered:

1. John Kessler's request that his petition be treated as an appeal of right is denied.

2. This decision is effective on the service date.

By the Board, Acting Chairman Mulvey, and Vice Chairman Nottingham.

Anne K. Quinlan
Acting Secretary