

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33753 (Sub-No. 1)

SOUTH PLAINS SWITCHING, LTD. CO.—ACQUISITION EXEMPTION—
BNSF RAILWAY COMPANY

Decided: September 14, 2006

We are denying the petition to revoke in this proceeding.

BACKGROUND

In South Plains Switching, Ltd. Co.—Acquisition Exemption—The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 33753 (STB served and published June 7, 1999) (64 FR 30375), South Plains Switching, Ltd. Co. (SAW), a Class III rail common carrier, invoked the Board's class exemption at 49 CFR 1150.41 for the acquisition of approximately 67,784 feet of rail lines from BNSF Railway Company (BNSF)¹ in Lubbock, TX, as follows: (1) former ATSF side tracks 0310-0313, 032, 0330-0332, 0340-0341, 0370, 0372-0373, 0380-0382, 0385, 0387, and 0390; and (2) former BN side tracks 9201-9204, 9208, 9220, 9298, 9310, 9320, 9322, 9330, Orchard Lead, 9304, 9311-9312, 9321, 9323-9326, 9331, 9333, 9401-9406, 9409-9412, 9415, and 9420-9424. In conjunction with the acquisition of these rail lines, SAW acquired approximately 18 miles of incidental trackage rights over BNSF's tracks 0340, 9200, 9205 and 9208 and BNSF's main line between track 9298 and BNSF's Lower Yard at Lubbock.

Pursuant to that authority, SAW has switched rail cars for shippers and transported these cars to and from BNSF's yard for interchange with BNSF. One such shipper, PYCO Industries, Inc. (PYCO), is heavily rail dependent and was served only by SAW until we authorized interim alternative rail service under 49 U.S.C. 11123(a) and 49 CFR 1146.1 in PYCO Industries, Inc.—Alternative Rail Service—South Plains Switching, Ltd. Co., STB Finance Docket No. 34802 (STB served Jan. 26, Feb. 24, and June 21, 2006).² At Lubbock, PYCO has two plants from which it ships annually more than 6,000 carloads of cottonseed oil and related products. Beginning in 2005, there were a series of service-related disagreements between SAW and

¹ On December 31, 1996, The Atchison, Topeka and Santa Fe Railway Company (ATSF) merged with Burlington Northern Railroad Company (BN) to form The Burlington Northern and Santa Fe Railway Company. Effective January 20, 2005, the corporation changed its name to BNSF Railway Company.

² See also the decision served August 18, 2006, tolling the deadline for the period of alternative service.

PYCO. In addition to the relief requested here, and in the interim alternative service proceeding, PYCO has sought relief under the feeder line provisions of 49 U.S.C. 10907 and 49 CFR 1151 to purchase certain lines of SAW at Lubbock, in STB Finance Docket No. 34890, PYCO Industries, Inc.—Feeder Line Application—Lines of South Plains Switching, Ltd. Co.

On June 19, 2006, PYCO filed, in this proceeding, a petition to revoke the acquisition exemption pursuant to 49 U.S.C. 10502(d) and 49 CFR part 1121. PYCO alleges that SAW has engaged in a pattern of threats and intimidation against shippers on its line such that PYCO can no longer count on reliable or adequate rail service. PYCO further alleges that SAW has misrepresented its willingness and ability to provide common carrier service and to assume BNSF's responsibilities with respect to the trackage acquired through the class exemption in 1999. PYCO submits that revocation of that exemption is necessary to carry out the rail transportation policy of 49 U.S.C. 10101 and, therefore, that the Board should revoke SAW's acquisition exemption to return the lines to BNSF in order to preserve the integrity of the Board's processes.

On July 6, 2006, SAW filed a reply in opposition to PYCO's petition, arguing that: (1) PYCO has failed to sustain its burden of proof under 49 U.S.C. 10502(d); (2) PYCO cannot use the revocation process as an alternative to the relief it seeks in the feeder line proceeding in STB Finance Docket No. 34890 and the interim alternative service proceeding in STB Finance Docket No. 34802; (3) PYCO's petition is barred by laches; and (4) PYCO does not have standing to seek to revoke the 1999 acquisition exemption.

On July 10, 2006, BNSF filed a reply to PYCO's petition. BNSF expressed no position with respect to whether revocation should be granted. BNSF did, however, urge the Board to ensure that BNSF's operations at Lubbock not be disadvantaged or adversely impacted should the Board grant the revocation.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10502(d), we may revoke an exemption, in whole or in part, if we find that: regulation is necessary to carry out the rail transportation policy of 49 U.S.C. 10101;³ or revocation is necessary to ensure the integrity of the Board's processes.⁴ Moreover, a notice of

³ See, e.g., Indiana Hi-Rail Corporation—Lease and Operation Exemption—Norfolk and Western Railway Company Line Between Rochester and Argos, IN, and—Exemption from 49 U.S.C. 10761, 10762, and 11144, Finance Docket No. 32162 et al. (STB served Jan. 30, 1998).

⁴ See, e.g., SF&L Railway, Inc.—Acquisition and Operation Exemption—Toledo, Peoria and Western Railway Corporation Between La Harpe and Peoria, IL, STB Finance Docket No. 33995 et al. (STB served Oct. 17, 2002).

exemption is void ab initio if it contains false or misleading information.⁵ As the party seeking revocation, PYCO has the burden of demonstrating that the exemption authority should be withdrawn. We believe that PYCO has not met its burden. Therefore, the petition to revoke will be denied.

First, PYCO has not shown that SAW's notice of exemption contained false or misleading information. PYCO notes that, while SAW's notice had stated that all of the track acquired from BNSF was subject to Board jurisdiction, SAW has since argued in the alternative service proceeding that some of its track should be treated as exempt from our regulation. That was a legal argument that we did not find persuasive in the alternative service proceeding, and it does not demonstrate that any portion of SAW's 1999 notice should now be treated as void ab initio.

Second, PYCO has not demonstrated that the notice of exemption should be revoked to carry out the rail transportation policy of 49 U.S.C. 10101. Acquisitions such as this one are intended to promote and preserve the availability of rail service. SAW has provided switching services for its customers since the exemption became effective in 1999, and continues to do so for customers other than PYCO. The service-related problems that now exist between SAW and PYCO do not demonstrate that SAW's continuing exemption must be revoked in order to carry out the rail transportation policy.

Finally, we are not persuaded that revocation is necessary to ensure the integrity of the Board's processes. PYCO has sufficient means of recourse for its service-related problems through its two other pending proceedings.⁶

It is ordered:

1. PYCO's petition to revoke is denied.

⁵ 49 CFR 1150.42(c). See, e.g., The St. Louis Southwestern Railway Company—Abandonment Exemption—In Gasconade, Maries, Osage, Miller, Cole, Morgan, Benton, Pettis, Henry, Johnson, Cass, and Jackson Counties, MO, Docket No. AB-39 (Sub-No. 18X), et al. (ICC served Apr. 1, 1994).

⁶ In view of our denial of PYCO's request, we see no need to address here the laches and standing arguments in SAW's reply.

2. This decision is effective on its date of service.

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

Vernon A. Williams
Secretary