

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33389

THE LAND CONSERVANCY OF SEATTLE AND KING COUNTY
--ACQUISITION AND OPERATION EXEMPTION--
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Decided: September 23, 1997

On April 15, 1997, The Land Conservancy of Seattle and King County (TLC), a noncarrier, filed a notice of exemption under 49 CFR 1150.31 to acquire and operate approximately 12.45 miles of rail line owned by The Burlington Northern and Santa Fe Railway Company (BNSF). The line extends between milepost 7.30, near Redmond, and milepost 19.75, at Issaquah, in King County, WA. The exemption became effective on April 22, 1997, and the transaction was consummated on that date. Notice of the exemption was published on April 29, 1997 (62 FR 23291) and served on April 30, 1997.

On July 14, 1997, the United Transportation Union (UTU) filed a petition seeking revocation of the exemption and requesting that, pending disposition of the revocation request, we hold in abeyance the processing of a related proceeding in The Land Conservancy of Seattle and King County--Abandonment Exemption--In King County, WA, STB Docket No. AB-508X. In that proceeding, TLC seeks, in a petition for exemption filed June 11, 1997, to abandon the same line it acquired here.¹ On July 18, 1997, UTU filed a supplement to its petition to revoke.² TLC separately replied to both the petition to revoke and the stay request on July 29, 1997. BNSF replied to the petition to revoke on August 8, 1997.

In this decision, we are granting the petition to revoke and ordering TLC to reconvey the subject line to BNSF. A separate decision will be issued dismissing the abandonment exemption petition in STB Docket No. AB-508X. In light of these actions, there is no need to consider the request to hold that proceeding in abeyance.

POSITIONS OF THE PARTIES

UTU assails the transaction, characterizing it as a component of a scheme by which BNSF would evade its obligation to protect those of its employees who would be adversely affected by an abandonment. If BNSF had abandoned the subject line itself, UTU asserts, the Board would have made approval of abandonment subject to the labor protective provisions specified in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979) (Oregon Short Line), and the interests of railroad employees would have been adequately protected. Instead, UTU contends, BNSF sold the line to a "straw organization" that, having no plan or ability to operate the line, immediately initiated the organization's own abandonment proceeding. UTU further asserts that the alleged straw organization, TLC, is a noncarrier that has no rail employees to protect.

¹ UTU terms its latter request as one for stay and addresses stay criteria. However, as the Board has taken no action that can be stayed, and UTU clearly seeks a delay in the processing of the abandonment exemption petition, its request will be treated accordingly.

² UTU styles its submission a "Notice of Supplemental Evidence." As no parties are prejudiced, we will accept UTU's supplement. We note, however, that filing a supplement could be viewed as perfecting a petition for revocation, thus initiating the revocation request and triggering new deadlines for replies and for a Board decision on the request. Thus, petitioners should make their entire presentation at one time.

UTU has introduced several documents in support of its argument that TLC never intended to provide service over the line. First, the union has submitted a copy of a May 1, 1997 letter signed by TLC Advisor Eugene Duvernoy indicating an expectation that the subject right-of-way will be acquired by King County, which assertedly hopes to build a recreational trail along it. The letter's salutation is "Dear Neighbor," and it apparently was intended for distribution to interested persons in the area of the line. Next, UTU has provided a copy of a letter dated May 5, 1997, signed by counsel for TLC advising the reader of TLC's expectation to file an abandonment exemption petition on or about June 5, 1997, and apprising the reader of an opportunity to submit to the Board comments on environmental and historic preservation matters. The letter indicates it was intended for circulation to "Addresses Listed In Appendix," but the appendix is not attached to the copy UTU has submitted. Finally, UTU has submitted newspaper articles apparently published May 2, May 8, and June 25, 1997, regarding an asserted TLC plan to "decommission" the subject line and sell it to King County for development into a hiking and biking trail. The articles highlight opposition of some landowners to rail-to-trail plans.

In reply, TLC avers that UTU erroneously has assumed (a) that BNSF employees were displaced at the time of the sale of the line to TLC, and (b) that the transaction was a surreptitious way to avoid labor protection. In fact, TLC asserts, no BNSF employees were displaced or in any way adversely affected as a result of the line transfer. TLC also argues that its petition for an abandonment exemption, essentially upon acquisition of the line, and TLC's expressed willingness to enter into a trail use agreement do not amount to an abuse of acquisition authority. There can be no abuse here, TLC asserts, because there was no impact on rail labor or shippers. As to the latter, TLC asserts that, although it is able and willing to provide rail service through an agreement with a contract operator, no person has requested any service. Moreover, TLC points out, the Washington Department of Transportation (WDOT) has asked TLC promptly to obtain authority to discontinue service over the line so that the state can avoid making substantial expenditures in connection with crossings in the course of current highway construction. All that has happened, TLC concludes, is that, prompted by WDOT, it has evaluated a clearly marginal line and found that shippers are prepared to support rail banking rather than rail service.

BNSF replies that, due to safety concerns, it embargoed the subject line on August 8, 1996, and that no scheduled train operations have taken place on the line since that date. Upon evaluating the line's condition, BNSF concluded that extensive rehabilitation would be required to sustain safe operations. However, in light of the low density on the line, the railroad determined that the capital investment required was unwarranted. BNSF therefore began discussions with its remaining active customer, Darigold, and the local community to explore the best plan of action for disposition of the line. King County and TLC reportedly approached BNSF with a plan for the transfer of the right-of-way to TLC. BNSF maintains that it saw three available options: (1) restore the line at substantial and unjustifiable cost; (2) seek to abandon the line with potential opposition from Darigold; and (3) negotiate an agreement for the immediate transfer of the line on terms acceptable to Darigold. BNSF states that it selected the third option and that the choice was reasonable. BNSF avers that there were substantial business reasons for the line sale, and that not only was avoidance of labor protection never the purpose of the transaction, it was never even an issue. According to BNSF, this is because no employees have been displaced by the sale transaction or could have been displaced by the alternative of abandonment.³

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10502(d), we may revoke an exemption if we find that regulation is necessary to carry out the rail transportation policy of 49 U.S.C. 10101. Labor interests may raise, in a petition for revocation, issues concerning the appropriate level of labor protection. See 49

³ In support of the latter statement, BNSF submits a statement of its Manager, Asset Rationalization, Richard A. Batie, who discusses the assignments and work schedules of the three men who operated the BNSF train on the line prior to the August 8, 1996 embargo. Mr. Batie asserts that these three employees have not been harmed by the transaction as the train's engineer and conductor continue to work on the same train on a different line, and the brakeman was granted a requested reassignment.

U.S.C. 10502(g) and Simmons v. ICC, 900 F.2d 1023 (7th Cir. 1990). To the extent that a party wishes to challenge the bona fides of a transaction, we retain the right to review the transaction to protect the integrity of our processes. Minnesota Comm. Ry. Inc.--Trackage Exempt.--BN R.R. Co., 8 I.C.C.2d 31 (1991) (Minnesota). The party seeking to revoke an exemption must meet its burden of proof by articulating reasonable, specific concerns to satisfy the revocation criteria. Wisconsin Central Ltd.--Exemption Acquisition and Operation--Certain Lines of Soo Line Railroad Company, Finance Docket No. 31102 (ICC served July 28, 1988), and Minnesota, supra, 8 I.C.C.2d at 35. Accord, Norfolk Southern Railway Company--Trackage Rights Exemption--Norfolk and Western Railway Company, Finance Docket No. 32661 (STB served Feb. 21, 1996).

UTU's submission and the record as a whole have raised serious questions regarding the propriety of the parties' use of the Board's procedures in this manner to accomplish their goals. TLC appears to believe that the prompt petitioning for an abandonment exemption following the acquisition of a line under the exemption procedures of 49 CFR 1150.31 does not constitute a misuse of the Board's procedures. TLC has argued that there can be no such misuse when there is no adverse impact on rail labor or shippers. Even assuming the lack of adverse impact on labor and shippers in this case (the latter being particularly unclear, especially given BNSF's vague references to the concerns of Darigold),⁴ we disagree. The policy underlying the governing acquisition exemption procedures is to support the continued operation of rail lines in lieu of abandoning them. There is no set period of time during which a line must be operated before abandonment authority can be sought. However, when an acquiring noncarrier initiates abandonment proceedings within days after consummating the acquisition of the line, and there are no extenuating circumstances, our processes are being abused. The facts here support the conclusion that TLC never had any intention of reinstating rail service on the line. It appears, rather, that TLC has put into effect a plan to convert the line to trail use as soon as possible following its acquisition of the line. This constitutes a misuse of our procedures, which envision that a party that acquires an active rail line does so to continue to provide rail service. Manifestly, TLC never had any such intent.

To protect the integrity of our processes, we will revoke the exemption and order TLC to reconvey the line to BNSF. BNSF itself may pursue abandonment, and interested persons, such as King County, may seek trail use/rail banking conditions or make an offer of financial assistance to provide for continued operations at that point.

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

It is ordered:

1. The petition to revoke the exemption in this proceeding is granted.
2. TLC shall immediately reconvey to BNSF the 12.45-mile rail line extending between milepost 7.30, near Redmond, and milepost 19.75, at Issaquah, in King County, WA.
3. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

⁴ BNSF states that none of its employees would be adversely affected by the transaction because, the railroad says, no employee would qualify for Oregon Short Line protection if the line were abandoned. The railroad has described the factual basis for that assertion and the union has not challenged it. But we have some concern about embracing a practice that eliminates the need to obtain appropriate authority for what is in effect an abandonment rather than a purchase, contingent upon representations that employees will not be harmed. In this case, BNSF's assertions have not been tested by an employee's claim nor, if this transaction were allowed to stand, could the assertion be tested. The current procedures are the product of long years of experience and protect the interests of both employees and carriers. We are not going to readily embrace practices that circumvent those procedures as well as the established procedures for obtaining rail right-of-way for trail use.

Vernon A. Williams
Secretary