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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 6 (Sub-No. 470X)

BNSF RAILWAY COMPANY—DISCONTINUANCE OF TRACKAGE RIGHTS EXEMPTION—IN PEORIA AND TAZEWELL COUNTIES, ILL.

PETITION FOR STAY

Decided: July 2, 2010

The petition to stay the effectiveness of the exemption in this proceeding, filed by the Toledo, Peoria and Western Railroad Co. (TP&W), is being denied.

BACKGROUND

By decision served on June 4, 2010 (June 4 decision), the Board granted an exemption[1] under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10903 for BNSF Railway Company (BNSF) to discontinue overhead trackage rights over approximately 3 miles of rail line (the Line) owned by Peoria and Pekin Union Railway Company (P&PU), between Bridge Junction in Peoria and P&PU Junction in East Peoria, in Peoria and Tazewell Counties, Ill.[2] The trackage rights had not been used in 28 years prior to the granting of the discontinuance. Since 1982, BNSF has continued to interchange traffic with TP&W, but instead of doing so pursuant to these trackage rights, it has done so indirectly via intermediate switching (originally by P&PU and now by Tazewell & Peoria Railroad, Inc. (TZPR), which leases the line from P&PU). TZPR describes this intermediate switching as follows: BNSF delivers both TP&W and TZPR traffic to TZPR. TZPR then sorts the traffic destined to TP&W, makes up a train, and delivers it to TP&W. When TP&W brings the cars back to be interchanged with BNSF, TZPR combines that traffic with its own traffic destined to BNSF, for pickup by BNSF.

By petition filed on June 21, 2010, TP&W requests a stay of the effectiveness of the discontinuance exemption pending consideration of its petition to revoke the exemption, which was filed on June 29, 2010. TP&W argues that it has a strong likelihood of success on the merits of this petition, asserting that BNSF's refusal to allow TP&W to use one of the alternate means of direct interchange that BNSF had previously stated were available indicates that regulation is necessary to carry out the rail

[1] The exemption was granted subject to standard employee protective conditions.

[2] There was no information in the petition about mileposts associated with the Line.

transportation policy of 49 U.S.C. § 10101 and also that BNSF has abused the Board's processes. TP&W also claims that it will suffer irreparable harm in the absence of a stay, because, rather than being able to exercise its right to require BNSF to provide it with reasonable facilities for interchange of traffic, it will have to continue to use the intermediate switch by TZPR that TP&W describes as costlier and less efficient. TP&W states that a stay will not harm BNSF, because BNSF has not been paying fees for the trackage rights since the trackage rights were last used in 1982. Finally, TP&W asserts that the public interest supports the granting of a stay, because direct interchange between TP&W and BNSF would provide shippers with a more competitive alternative to the intermediate switch.

BNSF replied in opposition to the stay petition on June 29, 2010. BNSF argues that TP&W has failed to submit evidence sufficient to support a finding that it has met the criteria for a stay. TZPR filed a reply to the stay petition.

DISCUSSION AND CONCLUSIONS

The standards governing disposition of a petition for stay are: (1) whether petitioner is likely to prevail on the merits (here, of a request for revocation); (2) whether petitioner will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay would be in the public interest. Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977), and Va. Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C. Cir. 1958). The party seeking a stay carries the burden of persuasion on all of the elements required for a stay. Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974) (Callaway). TP&W has not made the required showing in this case.

Likelihood of Prevailing on the Merits. TP&W claims that it is likely to prevail on the merits in the petition to revoke because: (1) the Board erred in the previous decision by relying on BNSF's representations that TP&W had alternate means of direct interchange with BNSF, and (2) BNSF abused Board processes by stating that TP&W had direct means of interchange with BNSF and recanting those statements in subsequent discussions with TP&W.

TP&W's arguments mischaracterize the central premise of the Board's June 4, 2010 decision. That decision dismissed TP&W's objections to the proposed discontinuance, because the Board held that even if the trackage rights agreement between BNSF and TP&W remained in effect, it is not clear how that would benefit TP&W. The Board pointed out that, given the discretion afforded to TZPR under the original agreement, "TP&W may not be able to interchange directly more frequently or at lower cost than it currently does via the intermediate switch." As the Board explained, TZPR charges a switching fee and consumes time because it must break up trains delivered from BNSF into consists to be delivered to TZPR and, separately, to TP&W. If BNSF were to switch directly with TZPR, it would have to perform the same services, and there is no indication on the record that it would be any cheaper or faster than TZPR. Most importantly, the Board focused on the statutory criterion under 49 U.S.C. § 10502,

providing that exemptions are to be granted when "regulation of the proposed transaction is not necessary to protect shippers from an abuse of market power." The Board pointed out that, because the trackage rights at issue are overhead rights, "there are no shippers on the line to be affected by the granting of the discontinuance authority. In addition, none of the customers served through the switch operations have complained about the intermediate switch, and none would lose service if the trackage rights were discontinued."

In short, the central focus of the Board's June 4 decision is the statutory finding that regulation of the proposed transaction is not necessary to protect shippers from an abuse of market power. Furthermore, the Board held that TP&W had failed to make its case that that it would be harmed by the discontinuance because it had not shown that it would fare any better by interchanging directly with BNSF over the trackage rights being discontinued than it was faring under the interchange with TZPR. Finally, as an additional point, the Board noted that "it appears" that TP&W has alternative means of directly interchanging traffic with BNSF.

In its June 29, 2010 petition to revoke as well as in the stay petition, TP&W made no effort to challenge either the Board's "abuse of market power" finding or its analysis of the likely effect of interchanging directly with BNSF over the trackage rights. Rather, TP&W focuses entirely on the issue of whether there is an alternative direct interchange with BNSF. While BNSF has admitted that it erred on the issue of alternative interchange possibilities, even if TP&W were to prevail on this argument, that would not constitute a basis for revoking the discontinuance exemption granted by the Board in its June 4 order. As discussed above, that decision rests primarily on findings which TP&W has not even challenged.

Irreparable Injury. A stay is an extraordinary remedy and should not be sought unless the requesting party can show that it faces unredressable actual and imminent harm that would be prevented by a stay. See Tri-State Brick & Stone of N.Y., Inc.—Pet. for Declaratory Order, FD 34824, slip op. at 2 (STB served Feb. 12, 2008). Only those injuries that cannot be redressed by the application of a remedy after a hearing on the merits can properly justify a stay. Callaway at 573.

Here, the strongest ground for denial of TP&W's stay request is the carrier's failure to show that it would be irreparably harmed in the absence of a stay. The trackage rights at issue have not been used since 1982. The discontinuance exemption granted in this case merely formalized a state of affairs that had been in effect for the past 28 years. Therefore, denying the request for stay would not result in any change in rail operations, much less any change that would substantially harm TP&W. Furthermore, although TP&W argues that a direct switch might be less costly for TP&W than the interchange with TZPR, alleged monetary damages, even if proven, do not constitute irreparable harm. See, e.g., Suffolk & S. R.R.—Lease & Operation Exemption—Sills Rd. Realty, FD 35036, slip op. at 6 (STB served Nov. 16, 2007).

Harm to Other Parties. TP&W claims that BNSF would not be harmed by a stay. In its reply, BNSF states that, if the stay were granted and it were required to reinstate its trackage rights operations over TZPR, it would have to make significant operational changes. Given that BNSF has not conducted operations over the TZPR trackage at issue for 28 years, it is difficult to see how such a change in operations would not be disruptive to BNSF.

Public Interest Considerations. Finally, TP&W asserts that the issuance of a stay is in the public interest because direct interchange would provide shippers with a competitive alternative to the intermediate switch. However, the trackage rights at issue are overhead in nature, no shippers or community residents would be affected by the discontinuance of the trackage rights, and none have objected to it. Accordingly, the public interest does not warrant a stay.

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

It is ordered:

1. TP&W's petition for stay is denied.

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

By the Board, Daniel R. Elliott, Chairman.