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SERVICE DATE – JANUARY 26, 2007

SURFACE TRANSPORTATION BOARD

DECISION

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

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

STB Docket No. AB-1040X

STILLWATER CENTRAL RAILROAD, INC. – DISCONTINUANCE OF SERVICE  
EXEMPTION – IN OKLAHOMA COUNTY, OK

Decided: January 22, 2007

Bio-Energy Wellness Center and the North American Transportation Institute (collectively, petitioners) request that we reject the notice of exemption filed jointly by BNSF Railway Company (BNSF) and Stillwater Central Railroad, Inc. (SLWC) (collectively, the railroads). For the reasons discussed below, we will deny the motion to reject the notice as to BNSF, which will confirm BNSF's right to abandon the line at issue. On our own motion, we will grant SLWC an exemption permitting it to discontinue its service over that line.

BACKGROUND

On September 23, 2005, the railroads filed a notice seeking to invoke the class exemption under 49 CFR 1152 Subpart F for authority for BNSF to abandon, and for SLWC to discontinue service over, approximately 2.95 miles of railroad between milepost 539.96 and milepost 542.91 in Oklahoma City, Oklahoma County, OK.<sup>1</sup> Notice of the exemptions was served and published in the Federal Register on October 13, 2005 (70 FR 59802), and the exemptions were scheduled to take effect on November 12, 2005. On November 10, 2005, the Board served a decision imposing conditions to mitigate potential environmental impacts of the abandonment.

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<sup>1</sup> The record indicates that SLWC has authority to operate portions of the line between milepost 539.96 and milepost 540.0 (as part of a leased segment between milepost 536.4 and milepost 540.0) and between milepost 542.0 and milepost 542.91 (as part of a leased segment between milepost 542.0 and milepost 549.01), a total of about 0.95 miles. See Stillwater Central Railroad, Inc. – Lease Exemption – The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 34610 (STB served Jan. 19, 2005) (SLWC Lease Exemption). SLWC does not appear to possess operating authority for the middle portion of the line between mileposts 540.0 and 542.0.

On November 7, 2005, Oklahoma State Representative Al Lindley (Representative Lindley) and Bio-Energy Wellness Center (Wellness Center or the Center) filed comments urging that the notice be rejected. On November 9, 2005, petitioners filed a joint petition to reject the notice of exemption. The railroads replied to those filings on November 10, 2005.

Petitioners requested the issuance of a protective order on November 21, 2005, to facilitate limited discovery in this proceeding and to protect the confidentiality of certain information that petitioners anticipated filing with the Board. The Board granted that motion in a decision served on November 23, 2005.

On December 23, 2005, petitioners filed a statement in support of their petition to reject. On December 30, 2005, BNSF and SLWC filed a joint motion seeking information about certain shippers that the petitioners asserted have tendered or received local traffic on the line during the past 2 years. On January 3, 2006, petitioners responded to the motion, asserting that the shipper information should remain “highly confidential” subject to the protective order. Also on January 3, the railroads filed a motion to compel responses from petitioners based on their alleged refusal to disclose the shippers’ identity and other relevant information.

On January 12, 2006, the railroads jointly replied to petitioners’ statement in support of their petition to reject, to which petitioners responded on January 17, 2006. Petitioners also replied in opposition to the railroads’ motion to compel on January 23, 2006. On February 6, 2006, BNSF and SLWC filed a joint motion to strike petitioners’ January 17 and January 23 filings, and requested that their pending motion to compel be granted. Finally, on February 13, 2006, petitioners filed a reply in opposition to the railroads’ motion to strike.

#### PRELIMINARY MATTERS

Although purportedly filed to address alleged misrepresentations of the record and mischaracterization of the decisions cited by the railroads in their reply, petitioners’ January 17 filing is an impermissible reply to a reply. The Board’s regulations do not permit the filing of a reply to a reply. 49 CFR 1104.13(c). We find no reason to make an exception to our rules here. The Board can determine whether a party has properly relied upon a particular decision or group of decisions, and thus a reply to a reply addressing alleged mischaracterizations of cited cases does not warrant a departure from our rules. Moreover, the asserted factual misrepresentation of the record has been raised in petitioners’ earlier pleadings, and thus is already before us. Accordingly, we will strike petitioners’ January 17 filing.

We will not, however, strike petitioners’ January 23 reply to the railroads’ motion to compel. Petitioners’ January 23 filing is responsive to the railroads’ discovery requests and provides relevant supplementary information. Further, petitioners had good reason here to submit discovery materials to the Board to demonstrate their effort to satisfy the railroads’ discovery requests. 49 CFR 1114.21(f).

## DISCUSSION AND CONCLUSIONS

The railroads plan to abandon and discontinue service over the line to facilitate the proposed relocation of Interstate Highway I-40 in Oklahoma City by the Oklahoma Department of Transportation (ODOT). Petitioners and Representative Lindley oppose both the railroads' efforts to assist with this project and the resulting diversion of any overhead traffic to adjacent lines, which they claim would compromise the safety of area residents at the grade crossings traversed by the diverted rail traffic. Petitioners challenge the railroads' use of the class exemption process.

Rail carriers may use the class exemption procedures to obtain authority to abandon a rail line and/or discontinue operations over a line upon certification that no local traffic has moved over the line for at least 2 years, that any overhead traffic on the line can be rerouted over other lines, and that no user of the line has filed a formal complaint regarding cessation of service. 49 CFR 1152.50(b). BNSF and SLWC have made the required certifications here.

Petitioners contend that the railroads cannot use the class exemption for this line. First, they allege that local traffic has moved over the line in the past 2 years, and that the joint notice is false and misleading because it does not treat as local traffic shipments to or from ready-mix cement plants just beyond the terminal mileposts at either end of the line. Petitioners also assert that the railroads have been misleading about the extent of SLWC's leasehold rights on the line. Second, they assert that the railroads' notice represents an impermissible effort to combine, or "tack," their respective operating experiences to satisfy the 2 year out-of-service requirement, thus contravening precedent established by the Board's predecessor, the Interstate Commerce Commission (ICC), in Tulare Valley R. Co. – Aban. – Kings & Tulare County, CA, 9 I.C.C.2d 1205 (1993) (Tulare Valley). We will address each of these arguments in turn.

### Traffic Movement Over the Line.

Petitioners have failed to offer any support for their attack on the railroads' certifications that the line has carried no local traffic for at least 2 years. Petitioners have offered only circumstantial evidence, third-person testimony, and photographs, all of which they refuse to allow railroad personnel to evaluate and address.<sup>2</sup> For us to be able to give this evidence any weight, the railroads must have an opportunity to assess it and respond to it. Petitioners have

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<sup>2</sup> Petitioners have resisted the railroads' request to allow railroad personnel to have access to this information, on the ground that they have promised to keep secret the shippers' identities to protect them from possible retribution from OKDOT and other highway project proponents. Petitioners have supplied no specific traffic data, such as waybill information and shipping dates, and have indicated that they would be unable to do so in any event. We see no reason why affected shippers would decline to come forward with detailed traffic information, under a protective order, to substantiate petitioners' claim and to protect their interests in preserving rail service. But none has come forward.

stated that they would rather withdraw their local traffic allegation than allow that to happen.<sup>3</sup> Accordingly, we will not consider this claim further.

Equally unpersuasive is Petitioners' argument that the notice should be rejected because there are ready-mix shippers located at points east and west of the relevant mileposts. Traffic from those shippers, which can be rerouted, is not local to the line. Because this traffic could continue to move even if this track is removed, the past movement of this non-local traffic over the line does not undercut the veracity of the railroads' certification.<sup>4</sup> Moreover, although petitioners suggest that these shippers would be harmed by the proposed abandonment, none of them has come forward to claim any injury. Petitioners' allegations of local traffic are therefore without merit.

#### Tacking of Carriers' Experiences.

SLWC obtained from BNSF a leasehold interest in, and operating rights over, two segments of the line on or about December 28, 2004, approximately 9 months prior to the filing of its discontinuance notice. See SLWC Lease Exemption. Petitioners contend that Tulare Valley bars these railroads from combining – that is, tacking – their respective operating experiences to avail themselves of the 2-year out-of-service class exemption. This argument, however, affects only the SLWC notice. BNSF has owned the line for at least 2 years prior to the filing of the notice. Because BNSF has carried no local traffic over the line for at least 2 years, petitioners' tacking argument affords no basis for rejecting BNSF's notice.

The railroads argue that the Tulare Valley precedent does not apply here at all. In their view, the Tulare Valley proscription against tacking applies only to situations where the line in question was sold less than 2 years before the acquiring carrier seeks to abandon it. Here, a portion of the rail line was leased to SLWC, but it was not sold. Moreover, BNSF and SLWC maintain that the agency's concerns in Tulare Valley regarding possible evasion of labor protection are not present here, because the standard labor protective conditions will apply to BNSF as the abandoning carrier, unlike the line seller in Tulare Valley.

The railroads' argument fails to support their claim that SLWC should be entitled to invoke the class exemption. The rationale for precluding two or more carriers from tacking periods of inactivity on a line to be abandoned or discontinued, so as to meet the requirement that a line have carried no local traffic for at least 2 years, is not limited, as the railroads suggest, to situations where a carrier could seek to escape the imposition of labor protective conditions by

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<sup>3</sup> See Petitioners' Reply to Applicants' Motion to Strike, at 6. Because petitioners have withdrawn their local traffic claim, the railroads do not need the traffic and shipper information now under seal or to engage in discovery on this issue. Accordingly, the motions to redesignate and to compel discovery will be denied as moot.

<sup>4</sup> Petitioners also argue that the railroads made misleading statements about the extent of SLWC's operating rights on the line. But petitioners have not shown how the alleged misrepresentation about the scope of SLWC's operating rights, even if correct, is material to this proceeding.

transferring the line. Nor is it limited so as to exclude situations in which a line segment is leased.

In Tulare Valley, the ICC stated,

We have noted that “the class exemption is intended to provide a simple, expedited procedure for railroads to discontinue service or abandon lines and remove track and materials from lines *that are not needed \* \* \**.” *Exemption*, 2 I.C.C.2d at 155 (emphasis supplied). The new buyer, presumably, saw a need in acquiring the line.

9 I.C.C.2d at 1206.

Here, the acquisition of rights over a portion of this line—albeit by a lessee rather than a buyer—indicates a perception of a demand for service, at least at the time of the transaction, over that portion of the line. Such a perception contravenes the predicate of the class exemption: that 2 years of inactivity indicates no need for service. Moreover, in order for the class exemption procedure to be simple and expedited, its application needs to be straightforward. Were tacking allowed in some situations but not in others, that objective would not be achieved. Accordingly, we find that, for the segments that it operates, SLWC does not qualify to use the class exemption.

#### Grant of an Individual Exemption.

In the particular circumstances here, however, even though SLWC does not qualify for the class exemption, we will, on our own motion, grant it an individual exemption to allow it to discontinue serving the line.<sup>5</sup> That is because the record that has already been presented to us enables us to find that conducting a further proceeding under 49 U.S.C. 10903 to consider whether SLWC should be allowed to discontinue serving this line is not necessary to carry out the rail transportation policy set forth in 49 U.S.C. 10101 nor necessary to protect shippers from the abuse of market power. See 49 U.S.C. 10502(a).<sup>6</sup>

Indeed, what SLWC seeks to discontinue serving are two unconnected segments, one only .04 of a mile long and the other .91 of a mile long. The two segments are 2 miles apart. These two small disconnected segments do not allow SLWC to operate over the 2.95-mile line that the petitioners wish to preserve and that BNSF seeks to abandon. Without any shippers on these tiny, isolated rail segments, it is difficult to see how SLWC has any market power at all.

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<sup>5</sup> In appropriate circumstances, we may exercise our section 10502 authority on our own motion. See, e.g., Norfolk Southern Railway Company – Abandonment Exemption – In Fayette County, AL, STB Docket No. AB-290 (Sub-No. 190X) (STB served Feb. 12, 1998); Brotherhood of Maintenance et al. v. Soo Line RR. et al., 3 S.T.B. 1076, 1082 (1998); Southern Pacific Transportation Company – Abandonment Exemption – In Fresno County, CA, Docket No. AB-12 (Sub-No. 179X), et al., slip op. at 5 (ICC served May 8, 1995).

<sup>6</sup> Given our finding of no potential abuse of market power, we need not address whether the proposed transaction is limited in scope, although it clearly is.

As discussed above, none of the four shippers that the petitioners claimed would be affected by closing of the line is on SLWC line segments, as the map submitted by the railroads shows. Thus, SLWC has no authority to serve any of the shippers that the petitioners claim need service.

Nor do we see any other need for further regulatory scrutiny here. The Wellness Center and Representative Lindley set out their public interest arguments in opposition to the closing of this line in their November 7, 2005 comments. The Wellness Center criticizes what it perceives to be “ODOT’s one-sided plan to sacrifice existing rail lines and rail heads in favor of the trucking and road building interests.”<sup>7</sup> Similarly, Representative Lindley argues that this line should not be closed because it is the only rail link from Will Rogers World Airport and much of Southwestern Oklahoma to downtown Oklahoma City, and that closing it would be inappropriate in times of rising fuel prices. But such general concerns about preserving existing lines and about the relative fuel efficiency of rail operations do not warrant requiring a carrier to maintain a line that is not used and not likely to be used in the future.

Representative Lindley also suggests that, by re-routing existing BNSF traffic to a line that contains at-grade (as opposed to grade-separated) crossings on Robinson and Walker Streets, the ODOT highway project would adversely affect safety. The Board’s Section of Environmental Analysis (SEA) examined this safety concern as part of its environmental analysis of this case. As SEA pointed out, the Oklahoma Corporation Commission and the Federal Railroad Administration have specific safety regulations in place for at-grade crossings that would mitigate the potential safety impacts of such diversion of traffic.<sup>8</sup> Therefore, we do not believe that any further regulatory scrutiny is needed to examine this issue.

In sum, more detailed scrutiny under section 10903 is not necessary to carry out the rail transportation policy set forth in 49 U.S.C. 10101. Moreover, by minimizing the administrative expense of such a further proceeding, this exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)].

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, the employee protective conditions set forth in Oregon Short Line R. Co. – Abandonment – Goshen, 360 I.C.C. 91 (1979), apply to both BNSF and SLWC.

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

It is ordered:

1. The joint motion to strike petitioners’ January 17 reply to a reply is granted.

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<sup>7</sup> November 7, 2005 comment, at 1.

<sup>8</sup> See the decision served in this proceeding on November 10, 2005, at 2.

2. The joint motion to strike petitioners' January 23 reply to the railroads' motion to compel is denied.
3. The joint motions of BNSF and SLWC to redesignate highly confidential materials and to compel petitioners to respond to discovery requests are dismissed as moot.
4. The petition to reject the notice of exemption filed by BNSF is denied.
5. Petitioners' request to reject SLWC's notice of exemption is granted.
6. Pursuant to 49 U.S.C. 10502(a), SLWC is exempted from the prior approval requirements of 49 U.S.C. 10903 to discontinue service over the portions of the line that it leases from BNSF.
7. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroads and the Board by February 5, 2007, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by the filing fee, which is currently set at \$1300. See 49 CFR 1002.2(f)(25).
8. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **"Office of Proceedings, AB-OFA."**
9. Provided no OFA has been received, the exemption in STB Docket No. AB-1040X will be effective on February 25, 2007. Petitions to stay must be filed by February 12, 2007, and petitions to reopen must be filed by February 20, 2007.

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

Vernon A. Williams  
Secretary