

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34399

BG & CM RAILROAD, INC.--EXEMPTION FROM 49 U.S.C. SUBTITLE IV

STB Finance Docket No. 34398

BG & CM RAILROAD, INC.– ACQUISITION AND OPERATION EXEMPTION –
CAMAS PRAIRIE RAILNET, INC.¹

Decided: October 17, 2003

By petition filed on September 9, 2003, BG & CM Railroad, Inc. (BG & CM), a non-carrier, seeks an exemption under 49 U.S.C. 10502 from certain requirements of 49 U.S.C. Subtitle IV. BG & CM wants to provide limited rail service on a 52-mile portion of a rail line formerly owned by Camas Prairie Railnet, Inc. (Camas Prairie) between Spalding and Grangeville, in Lewis, Nez Perce, and Idaho Counties, ID. The Board authorized the 66.8-mile line (the Line) to be abandoned, subject to a certificate of interim trail use (CITU) and environmental, historic, and other conditions, in Camas Prairie Railnet, Inc. – Abandonment – between Spalding and Grangeville in Lewis, Nez Perce, and Idaho Counties, ID, STB Docket No. AB-564 (STB served Sept. 13, 2000) (Camas Prairie Abandonment). Petitioner also seeks vacation of the CITU for the portion of the line where the rail service will take place.

In addition to its petition, BG & CM also filed a notice of exemption to acquire and operate the Line in BG & CM Railroad, Inc. – Acquisition and Operation Exemption – Camas Prairie Railnet, Inc., STB Finance Docket No. 34398. That exemption became effective on September 23, 2003, and the notice has been published in the Federal Register. Simultaneously with its notice, BG & CM filed a motion to dismiss the notice on grounds that petitioner already possesses the authority sought therein.²

For the reasons discussed below, the petition for exemption from Subtitle IV (except as noted and conditioned) and the request for partial vacation of the CITU will be granted. The exemption

¹ These proceedings have not been consolidated. They are being considered together here for administrative convenience.

² BG & CM also requested expedited action on its petition in order to meet shippers' needs during the autumn grain rush.

granted here renders unnecessary the exemption that was the subject of the previously filed notice. Thus, the motion to dismiss will be granted.

BACKGROUND

Camas Prairie discontinued service on the Line on November 30, 2000, but has not consummated the abandonment. By a decision and CITU served on January 6, 2003, BG & CM was authorized to negotiate an interim trail/rail banking agreement pursuant to 16 U.S.C. 1247(d) for the Line.³ An interim trail arrangement has been reached, and BG & CM has also acquired from Camas Prairie the track, ties, and related material, and sufficient real estate for purposes of operating a trail and railroad on the Line.

BG & CM has discussed reactivating rail service with the two major shippers on the Line, Primeland Cooperatives and Columbia Grain, Inc. BG & CM proposes to serve these two shippers, both grain elevators, under contract during the peak grain traffic season (roughly from September through January).⁴ However, to begin operating, BG & CM states that it needs to secure financing. BG & CM asserts that, as a condition to any loan to finance this “last ditch” effort to provide any rail service, petitioner’s lender has required that petitioner secure an exemption from Subtitle IV, particularly from the prior approval requirements for abandonment at 49 U.S.C. 10903 and the common carrier obligations at 49 U.S.C. 11101.⁵ BG & CM’s petition is supported by the two shippers in question, by Camas Prairie, and by the governments of the three counties through which the Line passes.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10502, the Board must exempt a person, class of persons, transaction, or service from regulation when it finds that: (1) regulation is not necessary to carry out the transportation

³ Originally, a CITU was granted to the Nez Perce Tribal Executive Committee. A subsequent CITU was issued to the Camas Prairie Trail Conservancy on May 15, 2001. In the decision and CITU served on January 6, 2003, BG & CM was substituted as the interim trail user, and BG & CM eventually reached a trail use agreement under 16 U.S.C. 1247(d) with Camas Prairie.

⁴ BG & CM indicates that it intends to provide service only on that portion of the Line between milepost 0.0 and 52.0. As for the remainder of the Line, between milepost 52.0 and 66.8, it requests that the existing CITU for that portion remain in place.

⁵ BG & CM adds that it is neither its intent, nor the intent of Camas Prairie, that the latter retain any residual common carrier obligation for the line.

policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not needed to protect shippers from the abuse of market power.

Here, the transaction and proposed service before the Board embodies a final effort to preserve rail service over an economically marginal line already authorized for abandonment and over which service has been discontinued. A grant of this exemption will allow use of a rail banked line for service to two shippers, albeit pursuant to contract, rather than on a common carrier basis. Without an exemption from regulation, including the common carrier obligation provisions at 49 U.S.C. 11101, this service will not be provided. In light of these facts, regulation of BG & CM in connection with its acquisition, operation, and possible future abandonment of the subject line is not necessary to carry out the rail transportation policy codified at 49 U.S.C. 10101. Granting the exemption will minimize the need for Federal regulatory control over rail transportation [49 U.S.C. 10101(2)]; ensure the development and continuation of a sound rail transportation system with effective competition with other modes of transportation, to meet the needs of the public [49 U.S.C. 10101(4)]; and reduce regulatory barriers to entry into and exit from the industry [49 U.S.C. 10101(7)]. Other aspects of the rail transportation policy are not adversely affected.

Competition will not be affected, as the grant of this exemption will facilitate the resumption of rail service on this economically marginal line. There is no evidence in the record that any community or shipper will be adversely affected; to the contrary, all three county governments and the two largest shippers on the line have expressed strong support for the proposal. Moreover, regulation is not needed to protect shippers from the abuse of market power. BG & CM intends to contract with two shippers who support its proposal to provide limited rail service during the peak grain traffic season. Absent this exemption from regulation, these shippers would have no rail service and fewer transportation alternatives.⁶

Petitioner has specifically requested an exemption from the prior approval requirements to abandon or discontinue service under 49 U.S.C. 10903. BG & CM has, however, agreed to a condition requiring it to give 30 days' written notice of the cessation of the planned service by first class mail to all shippers under contract within the two years prior to terminating service and to the Board. Furthermore, petitioner has also specifically requested that the Board reserve jurisdiction to reimpose an interim trail use/rail banking condition on the segment from milepost 0.0 to milepost 52.0 should BG & CM cease service on the Line. The Board will impose a condition requiring that BG & CM give written notice prior to the cessation of service. In addition, the Board will explicitly carve out from its exemption the authority to again impose a trail use condition over this portion of the Line should BG &

⁶ Given this market power finding, the Board need not determine whether the proposal is limited in scope.

CM cease service.⁷ Requests to permit negotiations for trail use should be made during BG & CM's 30-day notice period.

Under 49 U.S.C. 10502(g), the Board may not relieve a carrier of its statutory obligation to protect the interests of employees. Thus, if BG & CM subsequently engages in a transaction subject to 49 U.S.C. 10903(b)(2) and 11326, affected employees may request the Board to impose appropriate conditions. However, if the entire line were abandoned, the Board would not normally impose labor conditions except under unusual circumstances. See, e.g., Northampton and Bath R. Co. – Aban., 345 I.C.C. 784, 786 (1976).

Because this exemption has the effect of authorizing the abandonment or discontinuance of service over the Line, the Board is required by the National Environmental Policy Act, 42 U.S.C. 4321 et seq., to analyze the potential environmental impacts. See Rutherford Railroad Development Corporation – Exemption – 49 U.S.C. Subtitle IV, Finance Docket No. 31623 (ICC served May 29, 1991). However, in conjunction with the recent Camas Prairie Abandonment, the Board's Section of Environmental Analysis (SEA) conducted a thorough environmental review and issued a detailed environmental assessment (EA) of the environmental impacts of the abandonment of the Line, concluding that, with SEA's recommended environmental and historic conditions (all of which the Board imposed), the abandonment would not significantly affect the quality of the human environment. Because no significant changes have taken place affecting the Line since the EA process was completed in August 2002, there is no need to undertake further environmental review of the possible future abandonment at this point, so long as the environmental and historic conditions imposed in Camas Prairie Abandonment are met. BG & CM has agreed to assume responsibility for satisfying the remaining environmental conditions contained in the September 6, 2002 decision in STB Docket No. AB-564. As such, the exemption granted here will be subject to a condition requiring BG & CM's compliance with these specific conditions.⁸ Moreover, the September 6, 2002 decision removed the

⁷ In any event, by virtue of the Subtitle IV exemption granted here, the Board will retain jurisdiction over the entire line, including the segment from milepost 0.0 to milepost 52.0. The issuance of an exemption merely removes Board regulation, which can be reasserted in the event the exemption is subsequently revoked.

⁸ These conditions are: (1) notify the National Geodetic Survey not less than 90 days prior to commencement of salvage operations, if such operations are expected to destroy or disrupt any of the 23 geodetic station markers listed in Camas Prairie's Environmental Report; (2) consult with the City of Cottonwood's Highway Engineer prior to conducting salvage activities at or near grade crossings; (3) consult with the U.S. Environmental Protection Agency and secure all necessary permits prior to initiation of salvage or disposal activities; and (4) obtain from the Idaho Department of Environmental Quality all required discharge permits and plans to prevent hill/slope mass wasting prior to initiation of

(continued...)

historic preservation condition imposed in Camas Prairie Abandonment because Camas Prairie had executed an MOA that included appropriate mitigation for historic sites and structures. Nothing in this decision removes Camas Prairie's historic preservation and other obligations under that agreement.⁹

Finally, petitioner's motion to dismiss the notice of exemption to acquire and operate the Line raises issues about the Trails Act that are worth addressing here. Essentially, BG & CM argues that its motion to dismiss should be granted because the transfer of Camas Prairie's rail assets under the CITU and/or the parties' private Trails Act agreement carried not only the right to establish a trail but the right to reactivate rail service as well. Petitioner is incorrect. Notwithstanding any understanding or agreement between the abandoning carrier and the trail user in their particular Trails Act arrangement, the right to reactivate rail service on all or part of a rail banked line does not transfer to the trail user without the Board's approval. See Norfolk and W. Ry., Co.–Aban–Between St. Mary's and Minister in Auglaize County, OH, 9 I.C.C.2d 1015, 1018 (1993); Iowa Power – Const. Exemption – Council Bluffs, IA, 8 I.C.C.2d 858, 866-67 (1990). In this case, however, petitioner is obtaining the right to operate on the Line pursuant to the Subtitle IV exemption granted here. As such, the motion to dismiss the notice of exemption to acquire and operate the Line will be granted because the notice is unnecessary.

As conditioned, this decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Under 49 U.S.C. 10502, BG & CM is exempted from the requirements of 49 U.S.C. Subtitle IV pertaining to its acquisition and operation of the subject line, except as discussed herein and subject to the conditions that BG & CM: (1) serve notice by U.S. mail, postage pre-paid, first class,

⁸(...continued)

salvage or disposal activities. BG & CM has also agreed to abide by the terms of that portion of the Memorandum of Agreement (MOA) agreed to by Camas Prairie, the Nez Perce Tribe, the Idaho State Historic Preservation Office, the Advisory Council on Historic Preservation, and the Board governing stream restoration activities affecting Lapwai Creek and its tributaries. However, because BG & CM is not a signatory to the MOA, compliance will be left to signatory Camas Prairie. The Board will, however, impose a condition on BG & CM to the effect that it may not take any actions that would undermine the fulfillment by Camas Prairie of its obligations under the MOA.

⁹ BG & CM has also requested authorization to enter into contracts pursuant to 49 U.S.C. 10709 (a)-(c) and an exemption from the remainder of 49 U.S.C. 10709. However, in light of the Board actions taken here, petitioner's requests in this regard are neither necessary nor appropriate and will not be granted.

upon all shippers with whom it has contracted to provide service in the most recent two year period, and also serve the Board, no less than 30 days prior to discontinuing such service; (2) comply with the environmental conditions specifically identified herein; and (3) take no actions to undermine the fulfillment by Camas Prairie of its obligations under the Memorandum of Agreement, including the historic preservation mitigation provisions.

2. The CITU for this line is vacated between mileposts 0.0 and 52.0, but will remain in effect between mileposts 52.0 and 66.8. The Board reserves jurisdiction to issue a CITU on the portion of the Line between mileposts 0.0 and 52.0 if BG & CM ceases service and a request for a CITU, as provided in 49 CFR 1152.29, is made during BG & CM's 30-day notice period.

3. Notice of this decision will be published in the Federal Register on October 23, 2003.
4. BG & CM's motion to dismiss the notice of exemption is granted.
5. This decision is effective on October 27, 2003.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary