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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35164

BNSF RAILWAY COMPANY—PETITION FOR DECLARATORY ORDER

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

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

Decided: May 19, 2009

By petition filed on July 15, 2008, BNSF Railway Company (BNSF) asks the Board to issue a declaratory order finding that what it characterizes as two track relocation projects in Oklahoma City, OK, do not require prior Board approval.[1] The request for a declaratory order is granted in part, as discussed herein, and the Board on its own motion grants exemptions from the provisions of 49 U.S.C. 10903, 49 U.S.C. 10904 and 49 U.S.C. 10905 pursuant to 49 U.S.C. 10502.

BACKGROUND

The Rail Lines. This case centers on three intersecting rail lines owned by BNSF in Oklahoma City. From milepost 539.96, the Chickasha Subdivision runs west for about 1.5 miles before turning southwest and crossing the North Canadian River at milepost 541.45. At milepost 542.91, the Chickasha Subdivision connects with the Packingtown Lead, which runs east, mostly parallel with the Chickasha Subdivision, until connecting with the north-south Red Rock Subdivision. About a mile north of that intersection, the Red Rock Subdivision crosses the Chickasha Subdivision near milepost 540.2. The two lines connect via trackage referred to as the Shields Spur.

The Abandonment Proceeding. In September 2005, BNSF and Stillwater Central Railroad, Inc. (SLWC) filed a joint notice invoking the class exemption in 49 CFR 1152 Subpart

[1] BNSF initially asked the Board to rule that the U.S. District Court for the Western District of Oklahoma lacked jurisdiction to enjoin these relocation projects. On August 25, 2008, BNSF sought to amend its petition by dropping that request as no longer necessary. In support, BNSF cited an August 14, 2008 order issued by the U.S. District Court granting a BNSF motion to dismiss a complaint by Edwin Kessler. On September 5, 2008, Edwin Kessler replied that he had no objection to the request. The sought amendment will be granted.

F (for lines that have been "out-of-service" for at least 2 years) in order for BNSF to abandon approximately 2.95 miles of the Chickasha Subdivision rail line between milepost 539.96 on the east and milepost 542.91 on the west (we will refer to this portion as the Chickasha Line) in Oklahoma City, OK, and for SLWC to discontinue service over two separate segments of that line, totaling 0.95 miles. BNSF sought abandonment (in STB Docket No. AB-6 (Sub-No. 430X)) and SLWC sought discontinuance authorization (in STB Docket No. AB-1040X) to facilitate the relocation of I-40 through downtown Oklahoma City.

In support of their requests for abandonment and discontinuance authorization, the carriers sought to comply with various regulatory requirements. They certified that no local traffic had moved over the Chickasha Line for at least 2 years and that all overhead traffic could be rerouted over other lines, that they had served notice of the exemptions on various federal and state agencies, and that they had published notice of the proposed abandonment in a local newspaper. They also submitted to the Board Environmental and Historic Reports and certified that they had sent copies of those reports to various federal, state, and local agencies. Notice of the exemptions was served and published in the Federal Register (70 FR 59802).

After receiving numerous comments on the proposed abandonment, the Board's Section of Environmental Analysis (SEA) in October 2005 issued an environmental assessment (EA) recommending that certain conditions be imposed on any decision granting abandonment authorization. Relying on the EA, the Board served a decision imposing conditions to mitigate potential environmental impacts of the proposed abandonment. See BNSF Railway Company—Abandonment Exemption—in Oklahoma City, Oklahoma County, OK, STB Docket No. AB-6 (Sub-No. 430X) (STB served Nov. 10, 2005).

Before the exemptions became effective on November 12, 2005, however, Oklahoma State Representative Al Lindley and Bio-Energy Wellness Center (Bio-Energy) filed comments urging the Board to reject the notices of exemption. In addition, Bio-Energy and North American Transportation Institute (NATI) filed a joint petition to reject the notices of exemption.

In January 2007, the Board denied the request to reject BNSF's notice of exemption, but granted the request to reject SLWC's notice of exemption. The Board found that SLWC could not avail itself of the class exemption because it had not acquired the right to operate the two segments until just 9 months before prior to filing the notice. BNSF Railway Company—Abandonment Exemption—in Oklahoma County, OK, STB Docket No. AB-6 (Sub-No. 430X), et al., slip op. at 4-5 (STB served Jan. 26, 2007). On its own motion, however, the Board granted SLWC an individual exemption to discontinue operations on the segments. Id. at 5. SLWC's discontinuance exemption became effective on February 25, 2007.

On February 21, 2007, Edwin Kessler filed a petition to reopen the January 2007 decision. He asked the Board to reject BNSF's abandonment exemption notice as void ab initio, arguing that, contrary to the carrier's certification, there had indeed been local traffic on the Chickasha Line in the 2 years before BNSF filed its notice of exemption. Edwin Kessler urged

the Board to grant BNSF an individual exemption to abandon the Chickasha Line on its own motion and allow 15 days for parties to file offers of financial assistance (OFAs) to purchase the line.

Following BNSF's response, the Board on June 5, 2008 reopened the January 2007 decision as to the abandonment exemption, found that BNSF's certification regarding the absence of local traffic on the Chickasha Line was false and misleading, and rejected BNSF's notice of exemption as void ab initio. The Board noted that BNSF was not foreclosed from seeking abandonment authorization through a petition for an individual exemption or an application to abandon the line. The Board declined Edwin Kessler's invitation to grant BNSF an individual abandonment exemption sua sponte at that time. The Board explained that the record showed the presence of some unspecified level of local traffic on the portion of the line to be abandoned and that before considering whether to grant an individual exemption under 49 U.S.C. 10502(a), the Board would require a more developed record.

Following the Board's decision, Edwin Kessler sued BNSF in the Federal District Court for the Western District of Oklahoma. Edwin Kessler sought to enjoin BNSF from engaging in any salvage activities or the alteration of the Chickasha Line.

The Declaratory Order Proceeding. Rather than seeking abandonment authorization through either an individual petition or an application, on July 15, 2008, BNSF filed a petition for a declaratory order in Finance Docket No. 35164. BNSF's petition for declaratory order concerns what BNSF characterizes as a project to relocate two track segments of the Chickasha Line between milepost 541.69 and milepost 539.96 to facilitate the relocation of the I-40 highway through downtown Oklahoma City. BNSF explains, supported by letters from ODOT, that the existing highway handles far more traffic than it was designed for in 1965,[2] is below current engineering standards, and is in deteriorating condition.[3] As an example, BNSF points to one particular bridge on the existing highway that, in 1989, was forced to close because of a crack in one of the pier beams and, in 2007, was restricted to one lane when a hole in the floor of the bridge appeared. The cost to inspect the bridge is over $1 million per year. According to BNSF, any substantial delays in the project to relocate I-40 caused by BNSF's inability lawfully to relocate the two track segments could result in millions of dollars of cost overruns at taxpayer expense and could potentially jeopardize the safety of the traveling public.

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[2] See Letter of Gary M. Ridley (filed Jan. 30, 2009) (Ridley Letter) at 1. Id., (stating that the highway was designed to handle 70,000 vehicles per day); Letter of Eric M. Hocky (filed Nov. 6, 2008) (attaching letter of Gary M. Ridley dated Oct. 13, 2008, stating that the highway now carries 120, 000 vehicles per day).

[3] See also Ridley Letter (stating that the highway's bridges are obsolete, that they must be monitored continuously, and that "new serious issues including cracks in fracture critical members are constantly being discovered and repaired").

To make way for the new highway, BNSF states that the segment of the Chickasha Line between milepost 540.15 and milepost 541.69 (referred to as the middle segment) has been relocated to BNSF's reconstructed Packingtown Lead to the south. BNSF further states that the portion of the Chickasha Line between milepost 540.15 and milepost 539.96 (referred to as the eastern segment) would also be relocated to the south.[4] BNSF adds that a contractor for the Oklahoma Department of Transportation (ODOT) is constructing: (1) a new railroad bridge to elevate BNSF's Red Rock Subdivision where it crosses the Chickasha Subdivision and where the new highway will be located, and (2) new industry tracks to connect the two shippers located adjacent to the eastern segment, Producers Cooperative Oil Mill (Producers) and Mid-States Wholesale Lumber (Mid-States), directly to BNSF's Red Rock Subdivision north of the Chickasha Subdivision.

By decision served October 2, 2008, the Board instituted a declaratory order proceeding and, through a notice in the Federal Register, sought public comment on the issue of whether the two planned projects are merely track relocations not requiring Board authorization or whether they would eliminate service to shippers and/or extend BNSF's operations into new territory. The Board asked the parties to address the issue of continued rail service to Boardman, Inc. (Boardman), a shipper located on the western segment, and whether any specific new territory could be served as a result of the projects. The Board also specifically directed BNSF to submit a statement from ODOT confirming that its contractor is obligated to construct both a new railroad bridge to elevate the Red Rock Subdivision over the planned location of the new highway and new industry tracks to connect Producers and Mid-States directly to the Red Rock Subdivision.

BNSF filed its supplemental comments on October 17, 2008, and a number of parties filed comments in reply.[5]

POSITIONS OF THE PARTIES

BNSF argues that neither of these relocation projects requires the Board's authorization, because neither would affect service to shippers or involve an extension into or an invasion of

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[4] BNSF states that it plans to file an individual exemption request or an application to abandon the western segment—the portion of the Chickasha Line between milepost 541.69 and milepost 542.91—in the future. Therefore, the western segment is not at issue here.

[5] Comments were submitted by ODOT; Mick Cornett, Mayor of Oklahoma City; the Greater Oklahoma City Chamber; Boardman; Edwin Kessler; Oklahomans for New Transportation Alternatives Coalition (ONTRAC); Mary Francis; the Oscar Romero Catholic Worker House; Cindy S. Rosenthal, Mayor of the City of Norman; Bio-Energy Wellness Center and NATI (collectively, Bio-Energy); Orville Gail Poole; John Kessler; Allen Parleir; Randy Terrill, State of Oklahoma House of Representatives; Paul Daniels; Scott Myers; Bettie Dean Robinson; and Richard Robinson.

new territory. BNSF cites among other authorities Missouri Pac. R. Co. Trustee Construction, 282 I.C.C. 388 (1952), and City of Detroit v. Canadian National Ry. Co., et al., 9 I.C.C.2d 1208 (1993), aff'd sub nom. Detroit/Wayne County Port Authority v. ICC, 59 F.3d 1314 (D.C. Cir. 1995).

BNSF states that, to accommodate the highway project, the middle segment needed to be moved slightly to the south. BNSF determined that the fastest and least expensive way to accomplish this was to rebuild the old Packingtown Lead, a BNSF line that parallels the middle segment that has not carried traffic in some time but has never been abandoned. BNSF states that the middle segment was relocated to the right-of-way of the Packingtown Lead with the same throughput capacity and operating speeds as the Chickasha Line. To rebuild this corridor, BNSF constructed a turnout at milepost 542.91 to reconnect it to the Chickasha Subdivision, replaced all of the rail and ties, constructed all new crossings, gates, and flashers along the corridor, and constructed a new wye connection to the Red Rock Subdivision on the eastern end.

BNSF argues that, because the Packingtown Lead was an existing BNSF rail corridor, the physical relocation of the middle segment does not involve an extension into or invasion of new territory. BNSF explains that the Packingtown Lead has been in the BNSF corporate family since it was constructed by BNSF's predecessor, The Atchison, Topeka and Santa Fe Railway Company (ATSF), over 50 years ago, and that until recently BNSF and its predecessor provided service over the Packingtown Lead since that time. Additionally, the railroad argues that removal of the middle segment did not affect service to shippers because there are no shippers located on the segment and no local shippers have been served from this segment for more than 10 years. According to BNSF, the middle segment was used only for overhead movements, and service to those shippers is unaffected, as those movements have been rerouted over the rebuilt Packingtown Lead. For these reasons, BNSF argues that the reconstruction of the Packingtown Lead does not require Board authorization.

As to the eastern segment, BNSF states that it plans to relocate that segment slightly to the south (30 to 400 feet) to accommodate the highway project and to allow for the realignment of the Chickasha/Red Rock connection. BNSF argues that removal of the eastern segment from its current location will not affect service to shippers because the only two shippers located on the segment will be served directly from the Red Rock Subdivision. According to BNSF, once the new industry tracks to Mid-States and Producers are constructed and the old ones removed, there will no longer be any shippers located on the eastern segment. That segment will then be used solely for the movement of overhead traffic. Finally, BNSF maintains that the physical relocation of the eastern segment will not involve an extension into or invasion of new territory because the relocated line will lie only a few feet south of its current location and BNSF will not be able to access any new customers from the relocated line. Therefore, BNSF argues that the relocation of the eastern segment also does not require Board authorization.

BNSF states that it is willing to meet the needs of Boardman, located on the western segment, for rail service and maintains that, even if the middle segment is relocated, there will

still be more than enough track remaining in place to serve Boardman. BNSF indicates that it will serve Boardman from the west. In that regard, BNSF states that it has reached a tentative arrangement with SLWC for the latter to relocate a signal mast[6] located at the intersection of the Chickasha Line and the Packingtown Lead and to repair the tracks leading to Boardman.

ODOT provides a copy of a letter it sent in November 2008 to all cities and towns in Oklahoma explaining why the I-40 Crosstown Relocation project is critically needed. As the Board requested, ODOT also provides confirmation that it has entered into contracts to construct both a new railroad bridge to elevate the Red Rock Subdivision over the planned location of the new highway and new industry tracks to connect Producers and Mid-States directly to the Red Rock Subdivision.[7] Finally, ODOT states that although its February 2008 plans anticipated that Union Pacific Railroad Company (UP) would use the middle segment as a temporary detour while UP's main line was being relocated to accommodate the highway project, its current plans do not require UP to use the middle segment.

Edwin Kessler argues that BNSF has failed to demonstrate that its proposed actions would be mere relocations of track and asks the Board to deny BNSF's request for a declaratory order. He maintains that BNSF's plans for the middle segment would result in an unauthorized abandonment. Specifically, Edwin Kessler argues that BNSF's middle segment project is not a relocation because BNSF is not replacing that segment with new tracks placed adjacent to the existing track, but rather is proposing to reroute all traffic onto another existing line (the Packingtown Lead) and abandon the middle segment. Because the Packingtown Lead was formerly owned by a competing carrier (the ATSF) and served distinct shippers, Edwin Kessler also argues that the rebuilding of the Packingtown Lead would allow BNSF to serve a totally different market. Further, he asserts that the middle segment is needed by UP. He bases this claim on ODOT's prior 2008 plans for the highway project that called for UP to use the middle segment for overhead traffic while its line adjacent to the middle segment is out of service.

Edwin Kessler concedes that BNSF's proposed relocation of the eastern segment would not adversely affect Producers and Mid-States and that overhead traffic would not be adversely affected. But Edwin Kessler argues that, if BNSF is permitted to access Producers and Mid-States from the Red Rock Subdivision as proposed, the new track would permit BNSF to penetrate a new market, as the Red Rock Subdivision was historically owned by a separate railroad than that owning the Chickasha Line. He also questions whether removal of two diamonds and the construction of new spur track to serve Producers and Mid-States require Board authority and whether BNSF will have the "necessary easements" to ensure continued service to Producers.

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[6] A signal mast is a pole that supports a device similar to a traffic light used to transmit information to a train engineer.

[7] BNSF Supplemental Comments, Exhibit 5 (v.s. of Gary M. Ridley, Director of ODOT) and Exhibits A, B, C, and D.

With respect to Boardman, Edwin Kessler argues that removal of the middle segment adversely affects service to that shipper. He asserts that the western approach to Boardman has been severed by the removal of track and blocked by a signal mast, and that if BNSF were permitted to relocate the middle and eastern segments, Boardman would lose its connection to the national rail system, resulting in a permanent loss of rail service.

Another individual named Kessler—John Kessler—argues that, even if the proposed track removal were considered part of relocation, it would need Board authorization under 49 U.S.C. 10903. According to John Kessler, this is because these projects would adversely affect rail service to Boardman by isolating the track segment on which Boardman is located from the national rail system. He maintains that BNSF's placement of a traffic signal mast and removal of trackage from the western segment make it impossible for Boardman to receive rail service from the west. Consequently, he argues that an abandonment of the middle segment is involved here.

Bio-Energy argues that BNSF's proposal is not a relocation of a line of railroad, but rather is a rerouting of traffic from one of BNSF's lines to another. It maintains that BNSF is not constructing a new rail line to replace the middle segment of the Chickasha Line, and that the removal of that segment therefore requires abandonment authorization from the Board.[8]

Boardman states that it would be unaffected by BNSF's plans for the middle segment, provided that rail service would be available to it from the west. Boardman adds that, in the event it needs rail service, BNSF must be able to ensure pickup and delivery directly to its siding or via transload.

The remaining commenters fall into three groups: (1) supporters of BNSF's proposal and the I-40 Crosstown Relocation Project generally,[9] (2) opponents of BNSF's proposal,[10] and (3) opponents of ODOT's proposal to remove the Oklahoma City Union Station.[11]

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[8] Several parties concur in this argument, including John Kessler, ONTRAC, Representative Terrill, Richard Robinson, Bettie Dean Robinson, Scott Myers, and Paul Daniels.

[9] Mick Cornett, Mayor of Oklahoma City, and the Greater Oklahoma City Chamber.

[10] ONTRAC; Mary Francis; the Oscar Romero Catholic Worker House; Cindy S. Rosenthal, Mayor of the City of Norman; Bio-Energy ; Orville Gail Poole; Allen Parleir; Randy Terrill, State of Oklahoma House of Representatives; Paul Daniels; Scott Myers; Bettie Dean Robinson; and Richard Robinson.

[11] ONTRAC, Orville Gail Poole, Cindy S. Rosenthal, the Oscar Romero Catholic Worker House, Mary Francis, Richard Robinson, Bettie Dean Robinson, Scott Myers, and Paul Daniels.

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. 554(e) and 49 U.S.C. 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. See InterCity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Authority—Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). It is appropriate for the Board to issue a declaratory order here, because there is a dispute among the parties regarding whether what BNSF claims is merely track relocation in Oklahoma City requires Board authorization. We will issue this declaratory order to resolve the issue and remove the uncertainty.

In the past, the agency has held that carrier actions to replace existing track with substitute track constructed nearby is not within the ambit of 49 U.S.C. 10901 and 10903 if there is no effect on: (1) service to shippers; (2) the carrier's territory or traffic; (3) competition; or (4) the carrier's revenue or operating expenses. See Denver & R.G.W.R. Co.—Jt. Proj.—Relocation Over BN, 4 I.C.C.2d 95, 97-99 (1987). Thus, no prior authorization is required where the proposed relocation is to operate in the same manner as the existing line, no shippers are affected, and no new service territory is reached. See, e.g., The State of Texas, Department of Transportation—Petition for Declaratory Order Regarding Highway Construction in Tarrant County, TX, Finance Docket No. 32589 (ICC served Feb. 7, 1995).

No party disputes that Producers and Mid-States, the only shippers located on the eastern segment, will continue to receive service from BNSF as a result of the construction of the new connection from the shippers' industry track to the Red Rock Subdivision. And no party disputes that there are no shippers located on the middle segment who are affected by this project, or that there have been none for at least 10 years. Several parties have alleged that Boardman, located on the western segment, will be adversely affected by the removal of the track on the middle segment. Boardman itself, however, has stated that it does not believe it would be affected, as long as it continues to have access to rail service. BNSF has explained how Boardman will continue to have access to rail service from the west. Further, the middle segment is not needed to handle UP's rail traffic while UP's nearby main line is being realigned to make way for the new highway. ODOT has made alternative plans for handling that traffic.

Neither would BNSF's project appear to extend BNSF's service into new territory. There is no merit to Edwin Kessler's argument that the project involves a penetration of a new market because the Red Rock Subdivision and the Packingtown Lead were at one time owned by different carriers than the Chickasha Subdivision. All three of these lines were owned by predecessors to BNSF and have been in BNSF's corporate family for many years. It is undisputed that BNSF is currently serving and operating in this area and has been for some time. Relocating the eastern segment and moving the middle segment to the reconstructed Packingtown Lead will not, contrary to the opponents' assertions, allow BNSF to serve any new markets or to penetrate new territory. Nor has any party claimed that the relocation would have an effect on competition or the revenues and expenses of BNSF. Based on these facts, we find

that the project as to the eastern segment is a relocation that does not require our prior authorization. Because separate issues have been raised regarding the middle segment, we continue our analysis as to that segment only.

Certain parties contend that BNSF's plan for the middle segment involves not relocation but rather an unauthorized abandonment. They argue that BNSF has not replaced an existing line with new track nearby, but has instead rerouted traffic over another existing (albeit extensively refurbished) line, the Packingtown Lead, and that this brings BNSF's action within the ambit of 49 U.S.C. 10903. Bio-Energy argues that BNSF's project does not qualify as a relocation because in a relocation "a new railroad line had been constructed to replace the railroad line being abandoned." Bio-Energy November 3, 2008 comments at 4. Edwin Kessler stresses that prior to the project, two BNSF lines ran through this part of Oklahoma City, and that following the completion of the project there will only be one line. He argues that, therefore, abandonment authority is required if the middle segment is to be removed. Edwin Kessler argues that service south of the North Canadian River constitutes local service in a different market than service north of the river, and that the availability of the Packingtown Lead is therefore not an alternative to local service over the middle segment.

As BNSF notes, there is no loss of local service or derogation of overhead service as a result of the project. The three shippers that have direct access to the eastern or western segments of the line—Boardman, Mid-States and Producers—will continue to have direct rail access. No shippers receive local service on the middle segment and there have not been any receiving local service in more than 10 years. Overhead service will likewise continue to be made available, and has been provided without shipper complaint since traffic has been shifted to move over the Packingtown Lead. ONTRAC argues that the current overhead service is not as efficient and that it interferes with traffic, but has not shown any significant adverse effect on overhead traffic.[12] Thus, Edwin Kessler's claims that the project will have adverse effects on shippers are without merit.

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[12] We also find no merit to Edwin Kessler's arguments that: (1) the removal of two crossing diamonds and the construction of new spur track to serve Producers and Mid-States requires Board authorization, and (2) BNSF may lack proper easements over Mid-States' property to ensure service to Producers in the future. As to the first, under 49 U.S.C. 10906 the Board has no licensing authority over the construction of spur or industry tracks such as those involved here, or over crossings related thereto. And as to the second, we note BNSF's statement that the new industry tracks will be located on property over which it already has an easement with one very minor exception, and it has already reached an oral agreement with that property owner to slightly shift that easement to accommodate the new industry tracks. BNSF Response to Comments, August 25, 2008 at 9. BNSF's response satisfactorily addresses Edwin Kessler's concerns.

Edwin Kessler also focuses on the lack of new track construction in connection with the moving of the middle segment. There is little precedent at the Board, or at our predecessor agency, the Interstate Commerce Commission, on the subject of whether or not construction of a new right-of-way is an essential part of a relocation. BNSF cites to agency precedent where new track is built to replace track being removed, but to no case that involves a situation that is identical to that presented here, where the railroad is rerouting traffic over an existing, albeit unused line. Due to the lack of precedent directly on point, we decline to provide, on the facts presented here, the declaration that BNSF seeks as to the middle segment.

Exemption from 49 U.S.C. 10903. We do find, however, that the evidence before us compiled in both the abandonment proceeding and this declaratory order proceeding offers ample support for authorizing abandonment of the middle segment:[13] the three existing shippers on the adjoining segments will continue to receive local service; all overhead service can be rerouted; no one has requested local service on the middle segment in over 10 years; and there is no indication of any need for service over the middle segment in the future. Because any shipper's traffic that might need to move over this line in the future could move over the refurbished Packington Lead, the public convenience and necessity does not require BNSF to keep that segment in the national rail system.

BNSF has not sought abandonment of the middle segment since its notice was rejected in 2008. We determine that it is appropriate to exempt BNSF pursuant to 49 U.S.C. 10502 from the prior approval requirement of 49 U.S.C. 10903 on our own motion. Congress has directed the Board "to the maximum extent consistent with" 49 U.S.C. 10101-11901, to exempt a person, transaction, or service whenever the application of a provision (1) is not necessary to carry out the transportation policy of 49 U.S.C. 10901; and (2) either (a) the transaction or service is of limited scope, or (b) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power. 49 U.S.C. 10502(a). The Board may grant exemptions on its own initiative. See 49 U.S.C. 10502(b); e.g., Consolidated Railway Corporation—Abandonment Exemption—in Mercer County, NJ, STB Docket No. AB-167 (Sub-No. 1185X), et al. (STB served Jan. 26, 2007) (granting discontinuance of service exemption sua sponte); BNSF Railway Company—Abandonment Exemption—in Oklahoma County, OK, STB Docket No. AB-6 (Sub-No. 430X), slip op. at 5 (STB served Jan. 22, 2007) (same).

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[13] As noted, supra at 4, in our decision served June 5, 2008 in AB-6 (Sub-No. 430X), we declined Edwin Kessler's request that we grant BNSF an abandonment exemption on our own motion In doing so, we noted the "presence of some undefined level of local traffic on the Line." We stated that before deciding whether to grant an individual exemption, "we would require a more developed record on that issue than we have now." It now appears that the local traffic mentioned in that decision is on the eastern segment, not on the middle segment. The additional evidence we have received in the declaratory order proceeding about the lack of local traffic on the middle segment and the successful rerouting of overhead traffic over the Packingtown Lead provides the evidence we lacked when issuing our prior decision.

Here, detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the time and administrative expense of the application process, an exemption will minimize the need for federal regulatory control over the rail transportation system and expedite regulatory decision making, 49 U.S.C. 10101(2), and will reduce regulatory barriers to exit, 49 U.S.C. 10101(7). And by relieving BNSF of the costs of owning and maintaining a line that neither originates nor terminates rail traffic and is not needed for overhead traffic, an exemption will foster sound economic conditions and encourage efficient management. 49 U.S.C. 10101(5). Other aspects of the rail transportation policy will not be affected. Moreover, regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. No local traffic has moved over the middle segment in the past 10 years, and all overhead traffic is being rerouted over the nearby Packingtown Lead.

Exemption from 49 U.S.C. 10904. In seeking a declaratory order, BNSF asked the Board for an expedited decision so that the relocation project to facilitate the construction of the I-40 highway could go forward. On our own motion, we will exempt the abandonment of the middle segment from the statutory offer of financial assistance (OFA) provisions so that the project may proceed. Applying the provisions is not necessary to carry out the rail transportation policy. In previous cases, we have granted exemptions from the OFA provisions when a line proposed for abandonment is needed for a valid public purpose and there is no overriding public need for rail service on the line. E.g., Central Kansas Railway, L.L.C.—Abandonment Exemption—in Sedgewick County, KS, STB Docket No. AB-406 (Sub-No. 14X), slip op. at 10 (STB served Apr.10, 2001). In appropriate cases, the Board has taken such action on its own initiative. See Central Michigan Railway Company—Abandonment Exemption—in Saginaw County, MI, STB Docket No. AB-308 (Sub-No. 3X), slip op. at 9 (STB served Oct. 31, 2003) (Central Michigan) (granting exemption from offer of financial assistance provisions sua sponte); CSX Transportation, Inc.—Abandonment—in Barbour, Randolph, Pocahontas, and Webster Counties, WV, STB Docket No. AB-55 (Sub-No. 500), slip op. at 3 (STB served Jan. 9, 1997) (Barbour) (same).

Here, the relocation of the I-40 highway is clearly a valid public purpose, and, as discussed above, there has been no local traffic on the middle segment in the last 10 years. There is no evidence to suggest that a public need for rail service on the middle segment outweighs the public purposes associated with replacing a deteriorated, outdated and overcapacity interstate highway.[14] We therefore conclude that applying the OFA provisions in this situation is not

[14] Certain parties argue that the particular alignment chosen for the relocated highway is contrary to the public interest because it will displace the rail yard at Oklahoma City's Union Station, thereby undermining that now-shuttered facility's potential to serve as a hub for freight (civil and military) and for commuter rail service in the future. But even assuming without conceding that the potential need for rail service at Union Station is relevant to the exemption of the abandonment of the middle segment from sections 10903 and 10904, we find that that need is

(continued…)

necessary to carry out the rail transportation policy. Expediting the abandonment will minimize federal regulatory control over the rail system, expedite regulatory decisions, and reduce regulatory barriers to exit, 49 U.S.C. 10101(2), (7). Other aspects of the rail transportation policy will not be affected.[15] And because no local traffic originates or terminates on the middle segment and all overhead traffic can be rerouted over the Packingtown Lead, application of section 10904 is not necessary to protect shippers from an abuse of market power.

Public Use. We will grant an exemption on our own motion from the public use provisions of 49 U.S.C. 10905. We have granted similar exemptions in the past; see Central Michigan and Barbour, supra. BNSF has already agreed to make the right-of-way available to ODOT for public use, the construction of I-40. Therefore, the purpose sought to be achieved by section 10905—to provide an opportunity to public bodies to negotiate for the acquisition of abandoned rail properties—has already been fulfilled by the agreement reached between BNSF and ODOT. Further proceedings under section 10905 are not needed to carry out section 10101 or to protect shippers from the abuse of market power, and indeed could frustrate the public use to which the property is to be put.

Employee Protection. 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, we will impose the employee protective conditions of Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), as a condition to granting this exemption.

Environmental Issues. We have already reviewed the potential environmental impacts associated with our action here. When BNSF previously sought abandonment authorization for that portion of the Chickasha Subdivision comprising the eastern, middle, and western segments in BNSF Railway Company—Abandonment Exemption—in Oklahoma County, OK, AB-6 (Sub-No. 430X), the carrier submitted an environmental report and notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impact of the proposed abandonment. See 49 U.S.C. 1105.11. SEA prepared an EA for the proposed abandonment of those portions of the line, recommending the imposition of several conditions. See BNSF Railway Company—Abandonment Exemption—in Oklahoma County, OK, STB Docket No. AB-6 (Sub-No. 430X) (STB served Oct. 18, 2005). Before

(…continued)
far too speculative to overcome the valid and immediate public purpose of relocating the I-40 highway.

[15] Oklahoma State Representative Randy Terrill contends that loss of the middle segment would harm the national defense by removing from service one of two rail bridges across the North Canadian River. But BNSF served its notice of exemption to abandon the Chickasha Line on the Military Traffic Management Command of the Department of Defense, and the Board received no objection either to the proposed abandonment or to BNSF's proposed declaratory order.

ultimately rejecting BNSF's abandonment effort for having invoked the wrong procedures, see BNSF Railway Company—Abandonment Exemption—in Oklahoma County, OK, STB Docket No. AB-6 (Sub-No. 430X) (STB served June 5, 2008), the Board accepted SEA's recommendations and ordered that the exemption for abandonment of the line be subject to five conditions. BNSF Railway Company—Abandonment Exemption—in Oklahoma County, OK, STB Docket No. AB-6 (Sub-No. 430X) (STB served Nov. 10, 2005).

Those conditions—which essentially require consultations with various agencies—remain valid.[16] Accordingly, an exemption for abandonment of the middle segment is subject to the conditions we imposed previously. See Consolidated Rail Corporation—Abandonment Exemption—in Mercer County, NJ, STB Docket No. AB-167 (Sub-No. 1185X), slip op. at 5 (STB served Jan. 26, 2007) (sua sponte granting discontinuance authority and relying on environmental conditions imposed in connection with notice of exemption to abandon the line). Those conditions are that BNSF must: (1) take precautions during salvage operations to ensure public safety and ensure that salvage contractors satisfy all applicable health and safety laws and regulations; (2) consult with the Natural Resources Conservation Service (NRCS) before beginning salvage activities regarding NRCS's recommendations for the use of erosion and sediment control structures; (3) consult with the Oklahoma Tourism and Recreation Department (OTRD) before beginning salvage activities to address OTRD's concerns regarding the Wheeler Park Softball Stadium; (4) consult with the Oklahoma Department of Environmental Quality (ODEQ) before beginning salvage activities and comply with the reasonable requirements of ODEQ; and (5) submit final salvage plans to the U.S. Army Corps of Engineers (Corps) and comply with reasonable requirements of the Corps.

Trails Use. The Board's abandonment procedures typically provide for interested parties to request that the abandoning railroad consent to the rail banking of all or a portion of the line to be abandoned, usually to provide for use of the property as a recreational trail during the interim between abandonment and restoration for rail service. Here, BNSF, whose consent would be required to permit negotiation for the acquisition of the line segment in question for rail banking and interim trail use, has already agreed to transfer the property to ODOT to be used in the construction of a highway. BNSF can be expected to decline any offer to negotiate for interim trail use/rail banking. BNSF has asked us to proceed promptly in order to give effect to that agreement so that the highway project can move forward. Therefore, we will waive the provisions of our regulations at 49 CFR 1152.29 governing the prospective use of rights-of-way for interim trail use and rail banking. Barbour, slip op. at 3.

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[16] The Council on Environmental Quality, in its guidance on the preparations of supplements to environmental analyses, discusses the need to supplement those analyses if they are more than 5 years old; 46 Fed. Reg. 18026, March 23, 1981. As noted, the environmental analysis in this proceeding was issued on October 18, 2005, less than 5 years ago.

In conclusion, the particular circumstances of this case warrant our granting an exemption from the provisions of sections 10903, 10904 and 10905 on our own motion at this time. It is the manifest intent of the BNSF to remove a section of its track running through Oklahoma City, OK from the national rail system. It wishes to do so in order to make the underlying real estate available to ODOT to permit it to relocate the I-40 highway. BNSF has made this intention clear over a period of time which now exceeds 4 years.

These central requests—that rail service over the Chickasha Line should be rerouted, and the land should be used for a highway—have not changed during that period. Interested parties have had an opportunity to express their opinions, and the Board has compiled an extensive record on the project, including environmental review. We see no benefit to the public if this agency's resolution of this issue is further prolonged by requiring BNSF to restart the abandonment process as to the middle segment. Thus we have addressed the issues raised by the parties through the exemption process, a mechanism Congress gave us to handle circumstances when further regulation is not required.

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 for declaratory order is granted in part as discussed in this decision.

2. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903 the abandonment by BNSF of the segment of the Chickasha Subdivision between milepost 541.69 and milepost 540.15 in Oklahoma City, OK, subject to the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment --Goshen, 360 I.C.C. 91 (1979) and subject to the conditions that BNSF shall: (1) take precautions during salvage operations to ensure public safety and ensure that salvage contractors satisfy all applicable health and safety laws and regulations; (2) consult with the NRCS prior to beginning salvage operations regarding NRCS's recommendation for the use of erosion and sediment control structures; (3) consult with the OTRD prior to beginning salvage activities to address OTRD's concerns regarding the Wheeler Park Softball Stadium; (4) consult with ODEQ prior to beginning salvage activities and comply with the reasonable requirements of ODEQ; and (5) submit final salvage plans to the Corps and comply with the reasonable requirements of the Corps.

3. Under 49 U.S.C. 10502, we exempt from the provisions of 49 U.S.C. 10904, as described above.

4. Under 49 U.S.C. 10502, we exempt from the provisions of 49 U.S.C. 10905 as described above.

5. Pursuant to the provisions of 49 CFR 1152.29(e) (2), BNSF shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by BNSF's filing of a notice of consummation by May 20, 2010, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

6. This decision is effective June 9, 2009; petitions for stay are due May 26, 2009; and petitions for reconsideration are due June 9, 2009.

7. This proceeding is discontinued.

By the Board, Acting Chairman Mulvey, and Vice Chairman Nottingham.

Anne K. Quinlan
Acting Secretary