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SERVICE DATE – JUNE 5, 2008

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: June 3, 2008

On February 21, 2007, Edwin Kessler (Mr. Kessler) filed a petition to reopen the Board's decision in these proceedings served on January 26, 2007 (January 2007 decision). The petition to reopen will be granted as to the abandonment proceeding based on new evidence, and the related notice of exemption will be rejected as void ab initio. The petition will be denied as to the discontinuance proceeding. Other requests for relief will be denied as moot.

BACKGROUND

On September 23, 2005, BNSF Railway Company (BNSF) and Stillwater Central Railroad, Inc. (SLWC) filed notices invoking the class exemption in 49 CFR 1152 Subpart 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 rail line between milepost 539.96 and milepost 542.91 in Oklahoma City, Oklahoma County, OK (the Line) (in STB Docket No. AB-6 (Sub-No. 430X)), and for SLWC to discontinue service over two separate segments of the Line, totaling 0.95 miles (STB Docket No. AB-1040X).¹ The railroads sought abandonment and discontinuance authority to facilitate a proposed highway relocation project. Notice of the filings was served and published in the Federal Register on October 13, 2005 (70 FR 59802), and the exemptions became effective on November 12, 2005.

¹ SLWC obtained operating authority as to the 0.91-mile line segment between milepost 542.0 and milepost 542.91 and the 0.04-mile line segment between milepost 539.96 and milepost 540.0. 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) (Stillwater).

On November 7, 2005, Oklahoma State Representative Al Lindley and Bio-Energy Wellness Center (Bio-Energy) filed comments urging that the notices be rejected. On November 9, 2005, Bio-Energy and North American Transportation Institute (NATI) filed a joint petition to reject the notices of exemption, to which the railroads jointly replied.

In the January 2007 decision, the Board denied the Bio-Energy/NATI request to reject BNSF's notice of exemption, but granted their 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 prior to filing the notice. See Stillwater supra, note 1. On its own motion, however, the Board granted SLWC an individual exemption to discontinue operations on the segments.

On February 21, 2007, Mr. Kessler filed the present petition to reopen the January 2007 decision, asking the Board to reject BNSF's abandonment exemption notice. On March 7, 2007, BNSF filed a reply in opposition and a request to strike or reject the petition as an improper reply to a reply.

In a decision served on February 27, 2007, the Board denied a request from Mr. Kessler for an extension of time to file, and his petition to toll the due date for filing, an OFA. The Board also rejected, as neither persuasive nor supported by the cases cited, Mr. Kessler's argument that the January 2007 decision rejecting SLWC's notice of exemption for discontinuance authority obviated the effectiveness of BNSF's abandonment exemption and permitted the filing of a new OFA to purchase the Line.

Mr. Kessler filed a petition for an emergency stay of the effective date of the abandonment exemption and a supplement to the petition to reopen on March 21, 2007. Upon reopening, Mr. Kessler seeks: (1) rejection of BNSF's notice of abandonment exemption or revocation of BNSF's exemption; (2) revocation of SLWC's discontinuance exemption; and (3) the granting of new individual exemptions on the Board's own motion, followed by the opportunity to file an OFA to purchase the Line. Also on March 21, 2007, Mr. Kessler filed a motion for protective order. On March 26, 2007, BNSF filed a reply in opposition to the stay petition and a request to strike or reject the supplement as an improper reply to a reply. BNSF urged the Board to reject Mr. Kessler's new evidence as hearsay and speculative, but neither admitted nor denied the factual allegation that the Line had carried local traffic during the 2-year "out-of-service" period.

On February 7, 2008, the Board directed BNSF to respond to Mr. Kessler's evidence alleging that BNSF had served shippers on the Line during the 2-year period prior to filing the notice, and directed BNSF not to consummate the abandonment until the Board ruled on Mr. Kessler's petition to reopen. BNSF filed a reply on February 12, 2008, to which Mr. Kessler responded on February 19, 2008. On February 15, 2008, Mr. Kessler filed comments alleging that BNSF had begun dismantling the Line and asking that BNSF be required to cease and desist from prematurely consummating the abandonment. BNSF replied to these comments on

February 20, 2008. Mr. Kessler supplemented his comments on February 22, 2008, and BNSF responded to this supplementary filing on March 12, 2008. On March 24, 2008, Mr. Kessler filed a formal request that the Board order BNSF to cease and desist from any further salvage activities on the Line, and a second supplement to his comments. On April 8, 2008, BNSF filed a reply to this request, and on April 11, 2008, Mr. Kessler filed a motion for clarification of the Board's February 7, 2008 decision. On May 1, 2008, BNSF filed a reply to Mr. Kessler's motion for clarification, arguing that the February 7, 2008 decision was clear on its face and does not require clarification.

POSITIONS OF THE PARTIES

Mr. Kessler contends that both notices of exemption contained false and misleading information.² Specifically, Mr. Kessler claims that new evidence demonstrates that BNSF served a shipper located on the Line within the 2-year period prior to September 23, 2005 (the filing date of the notice of exemption), and that it served another shipper as recently as February 27, 2007. Additionally, he contends that, contrary to SLWC's statements and the Board's prior finding, new evidence demonstrates that SLWC possessed operating authority over the entire 2.95-mile Line, not just the segments at each end.

To show that BNSF provided service on the Line within the 2-year period prior to September 23, 2005, Mr. Kessler has submitted a verified statement of Thomas Elmore, spokesperson for NATI. Attached to Mr. Elmore's verified statement are copies of two letters from BNSF, dated August 22 and September 23, 2005, that Mr. Elmore acquired from the Oklahoma Department of Transportation through a Freedom of Information Act request.³ In the letters, BNSF described a construction project that would remove a crossing diamond near Mid-States Lumber Company (Mid-States), requiring the industry track accessing Mid-States to be temporarily taken out of service. In the August 22 letter, BNSF stated that it "currently serves Mid-States via this track" and offered to transload lumber for Mid-States at an alternate location, provided that the State of Oklahoma reimburses BNSF for the additional expense of transloading. The letter concluded by asking representatives of Mid-States and the State to sign the letter "agreeing to the conditions noted above . . . to commence the transload process." In the September 23 letter, BNSF informed the State that "the estimated cost for transloading cars for

² Mr. Kessler also asserts that the Board committed material error by improperly granting BNSF abandonment authority prior to granting SLWC discontinuance authority. The Board addressed and rejected this argument in its decision served February 27, 2007, and Mr. Kessler's claim of material error must be rejected here as well. Nonetheless, as subsequently discussed, Mr. Kessler's petition to reopen the abandonment proceeding will be granted on other grounds.

³ BNSF does not contend that these letters were "reasonably available" to Mr. Kessler before the Board's January 2007 decision. Accordingly, we treat them as "new evidence" for purposes of the petition to reopen.

[Mid-States] is \$22,800.00” based on an estimate of 24 cars per year. Mr. Kessler claims that these 2005 letters constitute verifiable proof that Mid-States—located one block north of Producers Co-Op Oil Mill (Producers) and connected to the Line by a lead near Producers’ facility—received rail service from BNSF within the 2-year period prior to September 23, 2005.

As for recent service, Mr. Elmore states that he has seen two photographs taken by Mr. Kessler showing rail cars at Producers’ facility on February 18, 2007, but no longer at that location on February 27, 2007. In support, attached to Mr. Elmore’s verified statement are two photographs allegedly taken by him on February 27, 2007. According to Mr. Elmore, one of the photographs shows a BNSF locomotive inside Producers’ facility delivering cars, while the other shows a BNSF locomotive departing that facility without cars. Mr. Kessler acknowledges that Producers’ facility is located adjacent to both a Union Pacific Railroad Company (UP) line and another BNSF line, known as the Red Rock Line, but he asserts that, because there is no lead connecting Producers’ facility to the UP line or the Red Rock Line, BNSF must have used the subject Line to serve Producers.

To demonstrate that SLWC possessed operating authority over the entire Line, Mr. Kessler has submitted a verified statement along with a photograph and diagram by Gail Poole. According to Ms. Poole, the photograph was taken on February 15, 2007, and shows a train being pulled by two BNSF locomotives, allegedly leased to SLWC, on the portion of the Line that was not leased to SLWC. Mr. Kessler argues that this evidence demonstrates that SLWC misled the Board about its authority and that the Board’s January 2007 decision erred in finding that SLWC did not have authority to operate over the entire Line.

Additionally, Mr. Kessler claims that two shippers along the Line, Boardman Company (Boardman), a manufacturer of large industrial condensers at milepost 541.75, and Producers, which makes cotton seed oil, have privately indicated that they do not want to lose rail freight service. Mr. Kessler has also submitted a letter from MDRC, a company that maintains and repairs rail cars, which expresses an interest in locating a facility on the Line, stating that “access to two Class I carriers is highly desirable.”⁴

Finally, Mr. Kessler alleges that BNSF has engaged a contractor to begin dismantling the Line and asks the Board to require BNSF to cease and desist from prematurely consummating the abandonment. Mr. Kessler has also submitted photographs and an affidavit from Mr. Elmore

⁴ We note that Mr. Kessler’s claim that Boardman and Producers do not want to lose rail freight service is undercut by the fact that neither Boardman nor Producers has filed pleadings in opposition to BNSF’s notice of exemption or in support of the petition to reopen. And the letter indicating that MDRC may be interested in locating a facility on the line is also irrelevant for our purposes here—determining what traffic may have moved in the past—and in any event is speculative in nature.

stating that he observed a crew cutting the rails on the Line and describing his conversations with the foreperson.

In response to Mr. Kessler's allegations, BNSF states that the last shipment over the Line was to Boardman Lumber in July-August 2003, and that there have been no shipments over the Line since that time. BNSF maintains that Producers is served from the Red Rock Line, not the Line to be abandoned here, and that Producers had been served from the Red Rock Line for more than 2 years prior to the filing date of its notice of exemption.⁵ BNSF raises questions about the evidentiary value of the photographs Mr. Kessler has submitted and speculates that they must have been taken on the Red Rock Line. BNSF states, without elaboration, that the two letters regarding service to Mid-States in 2005 dealt with a different project and different track.

With respect to Mr. Kessler's allegation that it is dismantling the Line, BNSF states that it "cut the line" on January 25, 2008, when it had authority to consummate the abandonment,⁶ but maintains that it has not conducted any salvage work since then. BNSF adds that it has not issued a signed contract for any salvage work, nor will it do so until the Board gives it permission to move ahead with consummation of the abandonment. BNSF states that any salvage activity occurring in February 2008 was done without its direction or permission, and asserts that it has since contacted local personnel operating in the area and instructed them not to take any action related to salvaging the Line.

DISCUSSION AND CONCLUSIONS

Petition to Reopen.⁷ Under 49 CFR 1152.25(e)(4), the Board will grant a petition to reopen an administratively final action only upon a showing that the Board's action would be affected materially because of material error, new evidence, or substantially changed circumstances. As discussed below, we conclude that the record before us demonstrates clear grounds for reopening the abandonment proceeding based on new evidence, but no basis for reopening the discontinuance proceeding.

⁵ In its March 12, 2008 filing, BNSF has submitted a map to illustrate how it serves Producers over the Red Rock Line. The map shows that cars destined for Producers are pulled from the Red Rock Line over a spur and onto the subject Line, from which the cars then access the Producers' switch. A notation on the map explains that "[n]ear-future track construction plans" call for the industry tracks serving Producers and Mid-States to "be re-aligned, including moving switches to location[s] on the Red Rock [Line]."

⁶ By decisions served October 6, 2006 and January 25, 2008, the Board granted BNSF's requests for an extension of time to consummate the abandonment.

⁷ Mr. Kessler purports to file a petition "to reopen/to reconsider" the January 2007 decision. But because the Board's rules do not permit petitions for reconsideration of entire Board decisions in abandonment or discontinuance proceedings, see 49 CFR 1152.25(e)(2), we will treat Mr. Kessler's petition as a petition to reopen under 49 CFR 1152.25(c)(4).

A. The abandonment proceeding.

The 2-year out-of-service class exemption was adopted to provide carriers with an expedited procedure for abandoning rail lines in those situation where we would undoubtedly grant the requested relief if the facts were as alleged by the carrier. See The St. Louis Southwestern Railway Company—Abandonment Exemption—in Gasconade, Maries, Osage, Miller, Cole, Morgan, Benton, Pettis, Henry, Johnson, Cass, and Jackson Counties, MO, Docket No. AB-39 (Sub-No. 18X), et al., slip op. at 2 (ICC served Apr. 1, 1994) (St. Louis). In administering the class exemption, the Board depends on the accuracy of the information in the carrier’s certification. To ensure the integrity of the class exemption procedure, our regulations provide that “[i]f the notice of exemption contains false or misleading information, the use of the exemption is void ab initio and the Board shall summarily reject the exemption notice.” 49 CFR 1152.50(d)(3). This rule contains no exception for de minimis errors in the notice of exemption concerning usage of the line. St. Louis, slip op. at 3.

As to the BNSF abandonment, we conclude that, in light of 49 CFR 1152.50(d)(3), reopening of the proceeding is warranted on the basis of new evidence introduced by Mr. Kessler and our analysis of that evidence and BNSF’s response. Mr. Kessler has repeatedly alleged that BNSF served Producers during the 2-year certification period, and that Producers could only be accessed via the Line. As noted in its February 12, 2008 reply to the Chairman’s order, BNSF denies that it has served any customer on the Line and states that “Producers’ Coop is served from the Red Rock Subdivision and has been for more than two years prior to the filing of AB-6 Sub-No. 430.” But BNSF’s March 12, 2008 reply to Mr. Kessler’s supplemental comments indicates that the carrier cannot access Producers from the Red Rock Line directly, at least not until it realigns Producers’ industry track. And more importantly, in that filing BNSF explains in detail how it accesses Producers via the Red Rock Line and has submitted a map to illustrate this service. BNSF’s own illustration shows that, to serve Producers via the Red Rock Line, it must operate over the Line at issue here for a short distance when switching between the Red Rock Line and the industrial spur leading to Producers. Finally, as indicated, BNSF explained in its February 12, 2008 reply that it had been serving Producers via this route prior to filing its notice of exemption in this proceeding. Consequently, BNSF’s own evidence shows that it operated over a portion of the Line during the 2-year period prior to September 23, 2005, confirming Mr. Kessler’s allegation that BNSF’s certification in its notice (that no local traffic had moved over the Line for at least 2 years prior to the filing date) was false or misleading.⁸

Furthermore, despite multiple opportunities, BNSF has failed to provide an adequate explanation for the 2005 letters, in which BNSF seems to indicate that it provided rail service to

⁸ See St. Louis, slip op. at 1-3 (concluding that carrier’s 2-year out-of-service certification contained false and misleading information because carrier had moved three shipments over a 0.71-mile segment of a nearly 200-mile line slated for abandonment).

Mid-States via the Line within the 2-year period prior to September 23, 2005. Indeed, in response to our February 7, 2008 order directing BNSF to address Mr. Kessler's new evidence, BNSF does not dispute that it served Mid-States during the 2-year period. Rather, BNSF merely states that the letters "deal[t] with a different project and different track," without explaining in any detail what other track was involved and how else BNSF could have served Mid-States during that period other than over the Line. We cannot credit BNSF's vague assertion, given that the map BNSF submitted with its March 12, 2008 reply shows that the industry track serving Mid-States connects only with the subject Line.

In sum, the new evidence before the Board—including the evidence submitted by BNSF itself—shows that BNSF moved local traffic over the Line for one or more shippers during the September 2003 to September 2005 time period. This means that its certification in September 2005 was false or misleading. As a result, we will reopen the January 2007 decision and reject BNSF's notice of exemption as void ab initio.

BNSF is not foreclosed from filing a properly supported petition for an individual exemption or an application to abandon the Line under a new docket number. We decline, however, Mr. Kessler's brief invitation to grant BNSF, on our own motion, an individual abandonment exemption. The new evidence before us here shows the presence of some undefined level of local traffic on the Line. Before considering whether to grant an individual exemption under 49 U.S.C. 10502(a), we would require a more developed record on that issue than we now have.

B. The discontinuance proceeding.

Despite Mr. Kessler's arguments to the contrary, the photograph and verified statement from Gail Poole fail to establish that SLWC is authorized to operate the entire Line (and not just the segments at each end), or that SLWC misled the Board about its authority. SLWC's operating authority is clearly set out in Stillwater. That decision authorized SLWC to operate only the 0.91-mile line segment between milepost 542.0 and milepost 542.91 and the 0.04-mile line segment between milepost 539.96 and milepost 540.0. Even if a SLWC train were on the portion of the Line not leased to it, this would not enlarge the scope of its operating authority under Stillwater. Mr. Kessler's allegations with respect to the scope of SLWC's authority are therefore without merit, and his request to reopen the discontinuance proceeding and revoke SLWC's exemption will be denied.

Other Matters. Mr. Kessler has sought various other forms of relief in a petition for emergency stay, a motion for a protective order, and a request for a cease and desist order. Because we are granting Mr. Kessler's petition to reopen the abandonment proceeding and rejecting BNSF's notice of exemption as void ab initio, these additional requests for relief have been rendered moot and will be denied as such. Likewise, BNSF's motions to strike various pleadings received from Mr. Kessler will be denied in the interest of compiling a complete record. (We note that the Board's ruling here relies primarily on the evidence submitted by

BNSF itself.) Finally, other issues and arguments raised by the parties have not been addressed here because they are not relevant to our findings.

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 reopen the Board's January 2007 decision as to the abandonment exemption is granted and BNSF's notice of exemption is rejected as void ab initio.
2. The petition to reopen the January 2007 decision as to the discontinuance exemption is denied.
3. BNSF's motions to strike are denied.
4. All other pending requests for relief are denied as moot.
5. This decision is effective on its date of service.

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

Anne K. Quinlan
Acting Secretary