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SERVICE DATE – MAY 7, 2010

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35164

BNSF RAILWAY COMPANY—PETITION FOR DECLARATORY ORDER

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

BNSF RAILWAY COMPANY—ABANDONMENT EXEMPTION—
IN OKLAHOMA COUNTY, OKLA.

Decided: May 5, 2010

In a prior decision in these dockets, the Board, on its own motion, authorized BNSF Railway Company (BNSF) to abandon a 1.54-mile segment of rail line in Oklahoma City, Okla., by exempting BNSF from the provisions of 49 U.S.C. § 10903 pursuant to 49 U.S.C. § 10502. John Kessler (J. Kessler)¹ filed a petition to reopen² the Board's decision, arguing that the Board materially erred when it concluded that the abandonment of this segment would not adversely affect a former shipper on an adjoining rail segment. J. Kessler asks the Board to condition its abandonment authorization on BNSF repairing the tracks on the adjoining segment. Oklahomans for New Transportation Alternatives Coalition (ONTRAC)³ asks us to revoke the abandonment exemption because of alleged significant adverse effects on unnamed overhead shippers that have not themselves appeared in this proceeding.

We will deny the requested relief. J. Kessler has not shown that the Board committed material error here warranting reopening and imposition of a condition. We will also deny ONTRAC's revocation request as untimely and, in any event, without merit.

¹ This description will be used to differentiate petitioner from his brother, Edwin Kessler, who is also a party to this proceeding. Edwin Kessler filed a separate petition for reconsideration of the Board's prior decision on August 25, 2009. That petition, which raises different issues, will be addressed in a separate Board decision.

² Although J. Kessler called his filing a petition for reconsideration, under 49 C.F.R. § 1152.25(c)(4), a request for further agency review of an administratively final action in an abandonment proceeding is designated a petition to reopen. Consequently, J. Kessler's petition will be referred to and treated as such.

³ ONTRAC describes itself as a not-for-profit public interest organization seeking to ensure the future of intermodal rail transportation opportunities in Oklahoma.

BACKGROUND

In 2005, to accommodate Oklahoma Department of Transportation's planned relocation of Interstate 40 in downtown Oklahoma City, BNSF invoked the Board's expedited class exemption procedures under 49 C.F.R. 1152 Subpart F—which are available only for lines that have not had any local traffic for at least two years—to abandon 2.95 miles of its Chickasha Subdivision between milepost 539.96 and milepost 542.91 (we refer to this portion of track as the “Chickasha Line”). BNSF provided the required public notice of the proposed abandonment, and no shippers objected. Certain non-shipper parties, however, did object to the removal of the Chickasha Line to make way for the new highway. One of these parties, Edwin Kessler, presented the Board with evidence that, contrary to BNSF's certification, there had been local traffic on the eastern end of the Chickasha Line within the relevant two-year time frame.

In June 2008, the Board determined that BNSF's use of the expedited procedures was inappropriate due to the presence of an undetermined level of local traffic on the eastern end of the line within the two-year period.⁴ Consequently, the Board rejected BNSF's notice of exemption. The Board noted, however, that BNSF could still seek abandonment authorization for the Chickasha Line by filing either a petition for an individual exemption or a formal abandonment application.

Instead, in July 2008, BNSF requested that the Board issue a declaratory order finding that what BNSF characterized as projects to relocate two segments of the Chickasha Line—the eastern segment (from milepost 539.96 to milepost 540.15) and the middle segment (from milepost 540.15 to milepost 541.69)—did not require prior Board approval. BNSF stated that it would relocate the eastern segment to the south, where it would connect to BNSF's existing Red Rock Subdivision, and that it would “relocate” the middle segment by refurbishing the Packingtown Lead, a dormant line south of and parallel to the middle segment, connecting the Red Rock Subdivision and the Chickasha Subdivision at milepost 542.91. BNSF noted that there were no rail customers located on or adjacent to the middle segment. BNSF asked for an expedited decision to avoid construction delays and cost overruns on the project to relocate Interstate 40. BNSF explained that, in the future, it expected to seek Board authorization to abandon the western segment (from milepost 541.69 to milepost 542.91) on which a former rail shipper, Boardman, Inc. (Boardman), is located.

In October 2008, the Board instituted a declaratory order proceeding and, through a notice in the Federal Register, sought public comment on whether BNSF's plans for the eastern and middle segments, which would result in rerouting overhead traffic onto the Packingtown Lead, would involve merely track relocations not requiring Board authorization or whether they instead would eliminate service to shippers and/or extend BNSF's operations into new territory.

⁴ BNSF Ry.—Aban. Exemption—in Okla. County, Okla., AB 6 (Sub-No. 430X), et al. (STB served June 5, 2008).

The Board specifically directed the parties to address the issue of continued rail service to Boardman.

The Board received numerous filings responding to the Federal Register notice. Among them was a supplemental filing by BNSF expressing doubts that Boardman had any intention to ship by rail. BNSF explained that an individual from its marketing department had met with Joseph Merry, Vice President and General Manager of Boardman, to discuss Boardman's shipping needs, but that, rather than embracing the offered rail service, Mr. Merry declined to identify any rail traffic that Boardman would tender if the tracks on the western segment were repaired. BNSF further stated that, if Boardman were to decide to resume using rail service, BNSF would provide service from the west. BNSF stated that it had reached a tentative deal with Stillwater Central Railroad, Inc. (Stillwater) for that carrier to relocate a signal mast currently blocking the tracks to the west of Boardman, to repair tracks on the western segment, and to provide service to Boardman.

Following BNSF's supplemental filing, Boardman filed a letter with the Board—in which it did not dispute BNSF's assertion that Boardman would not likely ship by rail—stating that it believed it would be unaffected by BNSF's plans for the middle segment. Boardman added that it made this statement with the understanding that the rail line would continue to be available to it from the west and that, in the event Boardman needed rail service, BNSF would be able to ensure pick up and delivery directly to its siding or via transload. Boardman did not raise any concerns about the adequacy of BNSF's stated plans for meeting any future request it might make for rail service.

J. Kessler filed a reply to BNSF's supplemental comments. He argued that BNSF's plans for the middle segment—whether characterized as an abandonment or as a relocation—would adversely affect Boardman and thus would require prior Board authorization. J. Kessler contended that BNSF has a common carrier obligation on the western segment, but that BNSF's plans for the middle segment would leave the western segment (where Boardman is located) isolated from the national rail network. In support of this claim, J. Kessler noted that BNSF had taken certain actions that prevented it from providing rail service on the western segment, i.e., placing a traffic signal mast in the center of the right-of-way of the Chickasha Line and removing substantial trackage, signal boxes, and a crossing diamond.

In February 2009, after the Oklahoma Department of Transportation had asked the Board to expedite its decision, ONTRAC submitted a letter stating, among other things, that the rerouting of overhead traffic from the Chickasha Line to the Packingtown Lead had caused such traffic to experience lengthy delays. ONTRAC included a verified statement from one of its members, Marion F. Hutchison II, stating that, on January 9, 2009, he observed two freight trains—one on the Packingtown Lead and the other trying to access the Packingtown Lead—blocked for two hours by a third freight train at a standstill on the Red Rock Subdivision.

In a decision served on May 20, 2009, the Board granted in part BNSF's request for a declaratory order, finding that the eastern segment project was a relocation not requiring prior Board authorization, but declining to make a similar finding as to the middle segment project. BNSF Ry.—Pet. for Declaratory Order, FD 35164, et al. (STB served May 20, 2009). The Board went on to find, however, that the evidence compiled in both the declaratory order proceeding and the prior abandonment proceeding offered ample support for authorizing abandonment of the middle segment. Pursuant to 49 U.S.C. § 10502, the Board, on its own motion, exempted BNSF from the prior approval requirements of 49 U.S.C. § 10903 to abandon that segment. The Board also, on its own motion, exempted the abandonment from the statutory offer of financial assistance (OFA) and public use provisions (49 U.S.C. §§ 10904 and 10905, respectively) so that the highway relocation project could proceed.

Although the Board acknowledged allegations that Boardman would be affected by the removal of the middle segment, it credited both Boardman's statement that it did not believe it would be adversely affected as long as rail service continued to be available to it, and BNSF's explanation as to how Boardman would continue to have access to rail service from the west. The Board also determined that ONTRAC had not shown that the abandonment of the middle segment would have a significant adverse effect on overhead traffic. The Board ordered that petitions to reopen would be due on June 9, 2009, the effective date of the exemption.

On June 8, 2009, J. Kessler filed his petition to reopen BNSF Railway—Petition for Declaratory Order, FD 35164, et al. (STB served May 20, 2009). He argued, as a threshold matter, that the decision should not be treated as an administratively final action because the Board had acted on its own motion in granting the abandonment exemption. On June 12, 2009, the Board rejected J. Kessler's claim that the decision was not administratively final and explained that the merits of his petition would be addressed in a later decision.

On the merits, J. Kessler asserts in his June 8, 2009 petition that the Board committed material error in accepting BNSF's explanation of how service would be provided to Boardman. He asks the Board to condition its abandonment authorization on the full restoration of rail service to the western segment. In a June 26, 2009 reply, BNSF states that it has had discussions with Boardman and stands ready to provide rail service to that shipper via the western segment or transload, whichever is most economically viable, should Boardman request service.

On June 29, 2009, ONTRAC submitted comments ostensibly in support of J. Kessler's petition for reopening. ONTRAC asks the Board to revoke BNSF's abandonment exemption due to traffic problems encountered on the Packingtown Lead, and to require BNSF to prepare an Environmental Impact Statement (EIS) in compliance with the National Environmental Policy Act.

On July 17, 2009, BNSF filed a motion to strike ONTRAC's comments as untimely or, alternatively, to deny ONTRAC the relief it requests. According to BNSF, no actual shippers have come forward to complain about degraded rail service as a result of the rerouting of traffic

over the Packingtown Lead, and no environmental review is required here as a railroad's decision to reroute overhead traffic does not require Board approval.

DISCUSSION AND CONCLUSIONS

Jurisdiction. On June 18, 2009, BNSF filed a letter notifying the Board that it had consummated abandonment of the middle segment on June 17, 2009. Because J. Kessler's petition to reopen was filed prior to the consummation letter, BNSF's actions were taken subject to that petition and the Board retains jurisdiction to consider it and grant relief, if appropriate.⁵ In contrast, ONTRAC's filing was made subsequent to the consummation letter and thus, would not normally be addressed by the Board. In the interest of resolving all issues raised, however, we will address ONTRAC's various arguments here.⁶

J. Kessler's Petition to Reopen. Under 49 U.S.C. § 722(c) and 49 C.F.R. § 1152.25(e)(4), a petition to reopen an abandonment decision must show that the prior action will be affected materially because of changed circumstances or new evidence, or that the prior action involves material error. J. Kessler argues that the Board materially erred in BNSF Railway—Petition for Declaratory Order, FD 35164, et al. (STB served May 20, 2009), by accepting BNSF's explanation of how it would provide service to Boardman. That explanation, according to J. Kessler, was too vague and indefinite to provide a valid evidentiary basis on which to conclude that BNSF's plans for the middle segment would not affect the availability of rail service to Boardman. J. Kessler complains that BNSF did not explain the nature of its "tentative agreement" with Stillwater to remove the signal mast and to repair the tracks leading to Boardman. He contends that currently available rail service from the west is an essential element of any rational finding that exemption of the middle segment from the abandonment provisions of 49 U.S.C. § 10903 would be consistent with the rail transportation policy. Accordingly, J. Kessler asks the Board, on reopening, to condition the exemption authorization for the middle segment on BNSF (or Stillwater) first fully restoring rail service on the western segment by removing the traffic signal mast from the rail line and by replacing the removed trackage, signal boxes, and crossing diamond.

We find J. Kessler's arguments unpersuasive. Fully functional trackage on the western segment is not essential to a valid exemption of the middle segment from the provisions of 49 U.S.C. § 10903. A rail carrier is not required to repair or replace missing or damaged track over a portion of a line that is not currently needed for rail service.⁷ A carrier may even remove

⁵ See, e.g., S.R. Investors, d/b/a Sierra R.R.—Aban.—In Tuolumne County, Cal., Docket No. AB 239X (ICC served Jan. 26, 1988).

⁶ BNSF's motion to strike ONTRAC's comments will thus be denied.

⁷ The Kan. City S. Ry.—Aban. Exemption—Line in Warrant County, Miss., AB 103 (Sub-No. 21X), slip op. at 9 (STB served Feb. 22, 2008).

track on a line over which it has a common carrier obligation, as long as no shipper seeks service and the carrier is prepared to restore the track should it receive a reasonable request for service.⁸ Here, Boardman does not currently seek rail service over the western segment. Boardman's last shipment by rail occurred in June 2003, and since 2000, it has shipped or received by rail a total of three cars. Boardman's letter to the Board confirmed that Boardman does not currently need rail service. There also appears little likelihood that Boardman has any intention of shipping by rail in the future. In its supplemental comments, BNSF suggested that Boardman has no such intention, based on a conversation with Mr. Merry, Boardman's Vice-President and General Manager. Boardman's subsequent letter to the Board did not dispute BNSF's suggestion.

Nor is the possibility that Boardman might one day decide to resume using rail service a proper basis on which to condition the abandonment of the middle segment on BNSF repairing the tracks on the western segment. If Boardman were to seek rail service in the future, BNSF has stated that it is prepared to meet such a request. Unless and until it receives abandonment authorization for the western segment, BNSF retains a common carrier obligation on that segment.⁹ To satisfy that obligation if Boardman requests rail service, BNSF has pointed to its tentative agreement with Stillwater for that carrier to relocate the signal mast, repair the tracks leading to Boardman, and provide service to Boardman.¹⁰ Boardman—the party that would be directly affected if BNSF failed to meet its common carrier obligation—has expressed no concerns to us over BNSF's explanation of how it would provide service.

J. Kessler, who has no direct stake in whether or how BNSF serves Boardman,¹¹ expresses dissatisfaction with BNSF's explanation. Ultimately, however, he offers nothing but speculation when he questions whether BNSF would in fact provide service to Boardman upon reasonable request. We see no reason to doubt BNSF's assurance that it "stands ready to provide rail service to Boardman by direct route from the Western Segment or transload, whichever is most economically viable should such rail service be requested by Boardman."¹² Accordingly, we remain satisfied that, should Boardman decide to resume using rail service at its Oklahoma City location, the abandonment of the middle segment would not preclude it from doing so.

⁸ Id.

⁹ See BNSF Pet. for Declaratory Order 6, July 15, 2008 (noting that BNSF plans to seek abandonment authorization for the western segment).

¹⁰ BNSF Supplemental Comments 6, Oct. 17, 2008.

¹¹ J. Kessler claims that, along with Edwin Kessler, he filed a notice of intent to file an OFA in the original abandonment proceeding. Our records show that only Edwin Kessler filed that document.

¹² BNSF Reply 7.

ONTRAC's Comments. ONTRAC, while purporting to support J. Kessler's petition, in fact raises a different argument—that abandonment of the middle segment will hurt unnamed existing shippers—and seeks different relief—revoking the abandonment exemption and requiring BNSF to prepare an EIS. Even if ONTRAC's filing had been made before consummation of the middle section abandonment, however, it would not warrant relief.

Suggesting that the abandonment of the middle segment would undermine the rail transportation policy of continuing a sound rail transportation system,¹³ ONTRAC claims that the Packingtown Lead is inferior to the middle segment for the movement of overhead traffic, leading to significant freight traffic delays. In support, ONTRAC provides a new letter from ONTRAC member Hutchison again discussing the operations he observed on January 9, 2009, and including, for the first time, his statement that he spoke with the engineer of one of the trains carrying overhead traffic who told him that trains were frequently experiencing delays of several hours as a result of rerouting of rail service to the Packingtown Lead.

To the extent the efficiency of the rerouting is relevant here, ONTRAC again has not shown that the Board materially erred or that new evidence undermines the Board's rejection of ONTRAC's claim. The single instance of alleged delay described in Hutchison's original verified statement is not enough to demonstrate a significant adverse effect on overhead traffic.¹⁴ Moreover, Hutchison's reporting of statements by the unnamed train engineer were available to ONTRAC before the Board issued its decision in BNSF Railway—Petition for Declaratory Order, FD 35164, et al. (STB served May 20, 2009). It is certainly not new evidence¹⁵ and would therefore not justify revoking the abandonment exemption even if ONTRAC had sought such action in a timely manner.¹⁶

¹³ 49 U.S.C. § 10101(4).

¹⁴ BNSF Ry.—Pet. for Declaratory Order, FD 35164, et al., slip op at 9 (STB served May 20, 2009).

¹⁵ See Town of Springfield v. STB, 412 F.3d 187, 189 (D.C. Cir. 2005).

¹⁶ Even if we were to consider Hutchison's reported conversation with the train engineer as "new" evidence, it would not undermine our decision in BNSF Railway—Petition for Declaratory Order, FD 35164, et al. (STB served May 20, 2009). The train engineer did not identify, in Hutchison's account, the cause of the alleged delays on the Packingtown Lead. The most logical explanation, however, would seem to be that any delays that may have occurred may have been attributable at least in part to the temporary work to relocate the eastern segment, as BNSF suggests. BNSF Motion to Strike 5-6, July 17, 2009. In any event, whatever delays there may have been, and whatever their cause, they have not been significant enough to cause any overhead shipper to complain about the rerouting of traffic or the removal of the middle segment. The absence of any complaint by shippers undermines ONTRAC's suggestion that the middle segment is essential to the continuation of a sound rail transportation system.

ONTRAC also claims that BNSF's failure to prepare an EIS in this proceeding deprived shippers of notice and an opportunity to submit comments. We disagree. The Board gave the public notice of, and an opportunity to comment on, BNSF's plans for the middle segment—which involved removing the tracks and rerouting overhead traffic over the Packingtown Lead¹⁷—and the environmental consequences of abandoning the Chickasha Line.¹⁸ No shipper took advantage of those opportunities to register a protest with the Board. Nor has any shipper complained to the Board about the purported delays or asked us to reopen the decision authorizing BNSF to abandon the middle segment in BNSF Railway—Petition for Declaratory Order, FD 35164, et al. (STB served May 20, 2009). In short, ONTRAC has not shown that keeping the middle segment in the national rail system is necessary to carry out the rail transportation policy in 49 U.S.C. § 10101.

Nor, contrary to J. Kessler's position, was BNSF or the Board required to prepare an EIS in the circumstances here. BNSF's rerouting of overhead traffic over the refurbished Packingtown Lead is within the carrier's managerial discretion¹⁹ and, therefore, triggered no environmental review.²⁰ While abandonments do require environmental review, they generally involve an Environmental Assessment (EA) rather than a full EIS.²¹ The Board's Section of Environmental Analysis (SEA) prepared an EA in connection with BNSF's proposed abandonment of the Chickasha Line and the Board made the exemption subject to all 5 of the environmental conditions recommended by SEA.²² ONTRAC has not shown why any additional environmental review was required.

Conclusion. For all of the foregoing reasons, the Board properly rejected the arguments of J. Kessler and ONTRAC in BNSF Railway—Petition for Declaratory Order, FD 35164, et al. (STB served May 20, 2009). We will deny both J. Kessler's petition to reopen and ONTRAC's request to revoke.

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

¹⁷ BNSF Ry.—Pet. for Declaratory Order, 73 Fed. Reg. 58,711-2 (Oct. 7, 2008).

¹⁸ BNSF Ry.—Aban. Exemption—in Okla. County, Okla., 70 Fed. Reg. 59,802 (Oct. 13, 2005).

¹⁹ See Consolidated Rail Corp.—Aban. Exemption—In Vermillion and Champaign Counties, Ill., AB 167 (Sub-No. 1161X), slip op. at 4 (STB served May 19, 2000).

²⁰ See 49 C.F.R. Part 1105.

²¹ See 49 C.F.R. § 1105.6(b)(1)-(b)(2).

²² BNSF Ry.—Pet. for Declaratory Order, FD 35164, et al., slip op. at 12-13 (STB served May 20, 2009).

It is ordered:

1. BNSF's motion to strike is denied.
2. J. Kessler's petition for reopening is denied.
3. ONTRAC's various requests for relief are denied.
4. This decision is effective on the service date.

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