

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 6 (Sub-No. 470X)

BNSF RAILWAY COMPANY—DISCONTINUANCE OF TRACKAGE RIGHTS
EXEMPTION—IN PEORIA AND TAZEWELL COUNTIES, ILL.

Decided: June 4, 2010

In this decision, we are granting, subject to standard employee protective conditions, an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10903 for BNSF Railway Company (BNSF) to discontinue overhead trackage rights over approximately 3 miles of rail line owned by Peoria and Pekin Union Railway Company (P&PU), between Bridge Junction in Peoria and P&PU Junction in East Peoria, in Peoria and Tazewell Counties, Ill. (the line).¹

BNSF filed its petition for exemption on February 16, 2010. On March 8, 2010, the Board served and published in the Federal Register (75 Fed. Reg. 10,550-51) notice of the filing of the petition. On March 29, 2010, the Toledo, Peoria & Western Railroad Co. (TP&W) filed a reply in opposition to the discontinuance. BNSF filed a response to TP&W's reply on April 14, 2010. On April 16, 2010, Tazewell & Peoria Railroad, Inc. (TZPR), filed a notice of intent to participate and request to accept a late-filed reply. TZPR concurrently filed a reply to TP&W's protest. On April 26, 2010, TP&W concurrently filed a petition for leave to respond and a sur-reply to BNSF's and TZPR's responses. On May 4, 2010, BNSF filed a sur-reply to TP&W's sur-reply.

PRELIMINARY MATTER

We will accept TZPR's late-filed response, and the additional filings by BNSF and TP&W. Although our rules prohibit a "reply to a reply," 49 C.F.R. § 1104.13(c), it is within the Board's discretion to permit late-filed or otherwise impermissible filings, and it is appropriate to do so here. These filings provide a more complete record, clarify the arguments, will not prejudice any party, and do not unduly prolong the proceeding.

BACKGROUND

The line is owned by P&PU and leased by TZPR, and includes a bridge over the Illinois River. According to BNSF, one of its predecessors, Burlington Northern Railroad Co. (BN),

¹ There are no known mileposts associated with the line.

acquired the trackage rights at issue in 1973. BNSF states that the purpose of the trackage rights was to enable BN to continue to interchange traffic with TP&W at TP&W's East Peoria Yard via the PP&U Bridge over the Illinois River after a parallel bridge owned by TP&W was damaged. According to BNSF, the trackage rights are overhead, and BNSF does not serve any shippers on the line.

It is undisputed that the trackage rights that BNSF now seeks to discontinue have not been used in 28 years.² Since 1982, BN/BNSF has continued to interchange traffic with TP&W, but instead of doing so directly by using the trackage rights at issue, it has done so indirectly via intermediate switching (originally by P&PU and now by TZPR). TZPR describes this intermediate switching as follows: BNSF delivers both TP&W and TZPR traffic to TZPR. TZPR then sorts the traffic destined to TP&W, makes up a train, and delivers it to TP&W. When TP&W brings the cars back to be interchanged with BNSF, TZPR combines that traffic with its own traffic destined to BNSF, for pickup by BNSF.

TP&W claims that this intermediate switching is inefficient and costly, adding 1 or 2 more days of transit time for cars moving to TP&W from BNSF than it would take if the cars were interchanged directly. TP&W also states that about 2,700 cars per year are handled through this intermediate switch, and that TZPR charges \$106 per car, each way, for handling the intermediate switch, resulting in a cost to TP&W of \$572,400 per year. Finally, TP&W claims that having TZPR as a third carrier in the route prevents TP&W from offering competitive routes to shippers in the area. In its most recent filing, BNSF states that it, not TP&W, pays the intermediate switch charge for the traffic that is delivered by TZPR from BNSF to TP&W, while TP&W pays the charge for traffic moving in the other direction, from TP&W to BNSF.

BNSF and TZPR both state that a direct interchange may not benefit TP&W, as traffic and operational conditions have changed in the 28 years since BNSF and TP&W last directly interchanged traffic. According to BNSF and TZPR, BNSF would have to make up a special train to serve TP&W, and TP&W would have to pay trackage rights and interchange fees. Therefore, direct interchange may be neither less costly nor more efficient than the intermediate switch. Further, BNSF and TZPR assert, because the trackage rights are overhead in nature, the intermediate switch does not harm shippers or the community, and no shippers or community groups have protested the discontinuance. Finally, BNSF states that TP&W has alternative means of directly interchanging traffic with BNSF: TP&W has its own trackage rights over the line, which would permit it to interchange with BNSF at BNSF's yard in Peoria, and it also has trackage and haulage rights over a BNSF line between Galesburg and Peoria, Ill.

² The parties dispute whether the trackage rights agreement itself remains in effect. BNSF asserts that PP&U unilaterally cancelled it in 1982 and admits that the agreement required BN to seek discontinuance authority upon that cancellation but BN failed to do so. TP&W, on the other hand, asserts that the trackage rights agreement is still in effect because it could not be cancelled until either the Board or its predecessor agency, the Interstate Commerce Commission, authorized discontinuance of the trackage rights.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10903, a rail line may not be abandoned or service discontinued without our prior approval. Under 49 U.S.C. § 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Requiring more detailed regulatory scrutiny of this proposal is not necessary to carry out the Rail Transportation Policy. Allowing BNSF to discontinue trackage rights that it has not used for 28 years through an exemption will expedite regulatory decisions and reduce regulatory barriers to exit (49 U.S.C. §§ 10101(2) and (7)). An exemption will also encourage efficient railroad management by allowing BNSF to discontinue its service obligation (49 U.S.C. § 10101(9)). Other aspects of the rail transportation policy will not be adversely affected.

Regulation of the proposed transaction is not necessary to protect shippers from an abuse of market power. The trackage rights to be discontinued are for overhead traffic only, and, accordingly, there are no shippers on the line to be affected by the granting of the discontinuance authority. In addition, none of the customers served through the switch operation have complained about the intermediate switch, and none would lose service if the trackage rights were discontinued. Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

TP&W's objections to the discontinuance do not alter these conclusions. Its opposition appears to be rooted in two disputes between the parties: one between TP&W and BNSF over the validity of the original trackage rights agreement, and another between TP&W and TZPR over the level of intermediate switch fees. But TP&W's protest does not attempt to address whether BNSF has met the legal standard for granting a petition for exemption under section 10502. Nor has TP&W supported its own argument that the direct interchange that it seeks would be more competitive, more efficient, or less costly than the intermediate switch. It appears that, due to the many traffic and operational changes that have taken place over the last 28 years, a special train would have to be made to move traffic between BNSF and TP&W. TP&W has not provided any evidence that a new train operated by BNSF would provide cheaper, more frequent or efficient service than one operated by TZPR.

Moreover, even if the trackage rights agreement were to remain in effect, it is not clear how that would benefit TP&W. Under the original agreement, the movement of BN trains over the line was subject to P&PU's rules and regulations, and the interchange charges payable by TP&W were subject to any changes made by P&PU. See TZPR Reply, Agreement, 4-6. Given the discretion afforded to P&PU, which is now vested with TZPR, TP&W may not be able to interchange directly more frequently or at a lower cost than it currently does via the intermediate switch. Here, the desire to interchange traffic directly is not a sufficient reason to deny a request to discontinue trackage rights. See Del. & Hudson Ry.—Discontinuance of Trackage Rights—In Susquehanna County, Pa., & Broome, Tioga, Chemung, Steuben, Allegany, Livingston,

Wyoming, Erie, & Genesee Counties, N.Y., AB 156 (Sub-No. 25X) et al. (STB served Jan. 19, 2005) (granting a petition for exemption to discontinue trackage rights where another rail carrier opposed discontinuance so it could retain direct interchange with the carrier seeking discontinuance authority).

Finally, if TP&W does not wish to continue using the intermediate switch, it appears to have alternative means of interchanging traffic with BNSF. P&PU granted TP&W overhead trackage rights that enable TP&W to interchange traffic directly with BNSF at a connection between BNSF's and P&PU's rail lines located near Darst Street, in Peoria.³ Additionally, TP&W has both trackage rights and haulage rights over another BNSF line between Galesburg and Peoria.⁴ If the intermediate switch proves too costly or inefficient, TP&W could avail itself of these alternatives. Under these circumstances, we do not believe that regulation is necessary.

Under 49 U.S.C. § 10502(g), we may not use our exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, we will impose the employee protective conditions set forth in Oregon Short Line Railroad and The Union Pacific Railroad Company—Abandonment Portion Goshen Branch Between Firth and Ammon, In Bingham and Bonneville Counties, Idaho, 360 I.C.C. 91 (1979).

Because this is a discontinuance proceeding and not an abandonment, we need not consider offers of financial assistance (OFA) to acquire the line for continued rail service, trail use requests under 16 U.S.C. § 1247(d), or requests to negotiate for public use of the line. However, the OFA provisions for a subsidy to provide continued rail service (i.e., overhead trackage rights) apply to discontinuances of trackage rights.

This proceeding is exempt from environmental reporting requirements under 49 C.F.R. § 1105.6(c)(6) (discontinuance of trackage rights where the line will continue to be operated) and from historic reporting requirements under 49 C.F.R. § 1105.8(b). Therefore, this decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. TZPR's request to file a late-filed reply is granted.
2. TP&W's request for leave to file a sur-reply to BNSF's reply and TZPR's reply is granted.

³ Toledo, Peoria & W. Ry.—Trackage Rights Exemption—Peoria & Pekin Union Ry., FD 34009 (STB served Feb. 23, 2001).

⁴ Burlington N. Inc.—Control and Merger—Santa Fe Pac. Corp., 10 I.C.C. 2d 661, 813 (1995).

3. BNSF's request for leave to file a sur-reply to TP&W's sur-reply is granted.
4. Under 49 U.S.C. § 10502, we exempt from the prior approval requirements of 49 U.S.C. § 10903 the discontinuance of overhead trackage rights by BNSF as described above, subject to the employee protective conditions in Oregon Short Line Railroad and The Union Pacific Railroad Company—Abandonment Portion Goshen Branch Between Firth & Ammon, In Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979).
5. An OFA under 49 C.F.R. § 1152.27(b)(2) to subsidize continued rail service must be received by the railroad and the Board by June 14, 2010, subject to time extensions authorized under 49 C.F.R. § 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 C.F.R. § 1152.27(c)(1). Each OFA must be accompanied by a \$1,500 filing fee. See 49 C.F.R. § 1002.2(f)(25).
6. OFAs and related correspondence to the Board must refer to Docket No. AB 6 (Sub-No. 470X). The following notation must be typed in bold face on the lower left-hand corner of the envelope: **“Office of Proceedings, AB-OFA.”**
7. Petitions to stay must be filed by June 21, 2010. Petitions to reopen must be filed by June 29, 2010.
8. Provided no OFA to subsidize continued rail service has been received, the exemption in Docket No. AB 6 (Sub-No. 470X) will be effective on July 4, 2010.

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