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SERVICE DATE - LATE RELEASE AUGUST 11, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-544X<sup>1</sup>

SEA LION RAILROAD--ABANDONMENT EXEMPTION--  
IN KING COUNTY, WA

STB Finance Docket No. 33594

BALLARD TERMINAL RAILROAD COMPANY, L.L.C.--  
MODIFIED RAIL CERTIFICATE

STB Finance Docket No. 33486

ADVENTURE TRAIL D/B/A SEA LION RAILROAD--  
ACQUISITION AND OPERATION EXEMPTION--  
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Decided: August 11, 1998

In STB Docket No. AB-544X, by petition filed April 23, 1998, and supplemented on June 1, 1998, Adventure Trail, Inc., doing business as Sea Lion Railroad (Sea Lion), seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a line of railroad (hereafter, the Ballard Line) between milepost 0.09 and the end of the line at milepost 2.70, a distance of almost 3 miles in the Ballard District of Seattle, King County, WA. In addition, Sea Lion seeks to be exempted from the offer of financial assistance (OFA) provisions of 49 U.S.C. 10904 and the public use provisions of 49 U.S.C. 10905. A request by the City of Seattle for issuance of a notice of interim trail use (NITU) was filed with the petition. Pursuant to 49 U.S.C. 10502(b), the Board served and published notice of the petition in the Federal Register (63 FR 26676) on May 13, 1998.

Comments were filed by the National Association of Reversionary Property Owners (NARPO or the Association), Ballard Terminal Railroad Company, L.L.C. (BTRC), and BTRC's Operations Manager Byron Cole. Letters of support were filed by five shippers. Sea Lion replied to

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<sup>1</sup> These proceedings are consolidated in this decision.

the comments of NARPO.<sup>2</sup> We will grant the abandonment exemption, subject to standard employee protective conditions. We will deny the request for exemption from section 10904, and we will defer action on the request for issuance of a NITU. The request for an exemption from section 10905 will be denied as moot.

In STB Finance Docket No. 33594, on May 4, 1998, BTRC filed a notice for a modified certificate of public convenience and necessity under 49 CFR 1150, Subpart C, to operate the above-described line. BTRC says that it has been the operator of the line since the line was acquired by Sea Lion. BTRC and the City of Seattle state that they anticipate that, once abandonment is authorized, Sea Lion will transfer to Seattle the real estate underlying the right-of-way, Sea Lion will transfer to BTRC all track and rail assets, and BTRC will operate the line under a contract with Seattle. As discussed below, we will defer action on the notice because the request for a modified certificate is premature.

In STB Finance Docket No. 33486, on October 8, 1997, Sea Lion filed a verified notice of exemption under 49 CFR 1150.31 to acquire and operate the above-described line. Notice was published and served October 30, 1997. No comments were filed in response to the notice. The exemption became effective October 5, 1997. Sea Lion consummated the acquisition on December 19, 1997.

On May 20, 1998, the United Transportation Union (UTU) filed a petition to revoke the exemption in STB Finance Docket No. 33486. Sea Lion and BNSF individually replied to the petition on June 5, 1998. We will deny the petition to revoke.

#### BACKGROUND

These proceedings have arisen as a result of private negotiations between BNSF, Ballard Line shippers, the City of Seattle, and Sea Lion, which is a Washington State nonprofit corporation. As we understand it, BNSF wants to shed an unprofitable, low-traffic branch line and, at the same time, to retain the long-haul traffic the line generates. Shippers on the line want to preserve their rail service. Seattle wants to acquire the rail corridor in order to develop the final portions of its Burke-Gilman Trail.

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<sup>2</sup> NARPO has submitted a letter reply to a letter from The Burlington Northern and Santa Fe Railway Company (BNSF) that responds to certain allegations made in NARPO's comments. Sea Lion has moved to strike NARPO's letter as an impermissible reply to a reply, NARPO has replied to the motion, and Sea Lion has moved to strike portions of NARPO's reply. We will not consider the letters or the motions. We admonish the parties to confine their arguments to permissible pleadings and to refrain from attempting to supplement their cases by means of letters to the Secretary.

To accomplish this, the interested parties entered into negotiations, which resulted in a plan under which Sea Lion would become the “interim custodian” of the involved BNSF rail and real estate assets. Sea Lion would acquire the Ballard Line, secure an operator for the line, coordinate a transfer of assets, and assist in developing a rail-with-trail project. Pursuant to this plan, two shippers formed BTRC to become the new operator of the Ballard Line. Sea Lion entered into a contract with BTRC which contemplates that the latter would provide service on the line. After BNSF sold its Ballard Line assets to Sea Lion in December 1997 (pursuant to the acquisition exemption), Sea Lion evidently supplied BTRC start-up funds and facilitated a \$350,000 no-interest loan from the Washington State Department of Transportation (WSDOT). BTRC engaged a contractor to rehabilitate the line in early 1998 and thereafter began providing service.

Sea Lion now seeks an exemption to abandon the Ballard Line. If an abandonment is permitted, Sea Lion proposes to transfer ownership of the Ballard Line real estate to Seattle, sell the track and related rail assets to BTRC for a nominal amount, and assign its operating agreement with BTRC to Seattle. Seattle has entered into an agreement granting BTRC the right to own and operate a rail line on city property rent-free. Thus, under the parties’ plan, BTRC will continue to provide freight rail service over a portion of the corridor while, at the same time, Seattle builds and maintains a parallel trail on a portion of the corridor.

#### POSITIONS OF THE PARTIES

The acquisition exemption. The UTU seeks revocation of the exemption under which Sea Lion acquired the Ballard Line from BNSF. The union argues that Sea Lion never had any plan, ability, or intention to operate the line and that its notice is therefore false and misleading. The union claims Sea Lion’s acquisition of the line from BNSF was a bogus transaction designed to evade the imposition of labor protective conditions which would have benefitted BNSF employees had BNSF, rather than Sea Lion, filed for Board authorization or exemption for the abandonment of the line. Had BNSF abandoned the line itself, UTU asserts, that railroad’s employees would have been protected by the imposition of these conditions. In support of its arguments, UTU cites the decision in The Land Conservancy of Seattle and King County--Acquisition and Operation Exemption--The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 33389 (STB served Sept. 26, 1997) (Land Conservancy). There, the Board revoked an acquisition exemption based on a finding that it was a misuse of our processes for an entity to acquire an active rail line without having any intent to operate it.

In reply, Sea Lion asserts that its notice of exemption did not contain any “false and misleading information,” as alleged by UTU. Sea Lion avers that there was and is an intent to operate the line through BTRC. Sea Lion points out that the notice of exemption stated that Sea Lion had entered into a contract with BTRC for operational services. Sea Lion emphasizes that, pursuant to agreements between the parties, BTRC has rehabilitated and begun operating the line, subject to Sea Lion’s control of dispatching. Sea Lion also states that this transaction was not designed to avoid labor protection.

BNSF similarly argues that the assailed transaction was structured with its main purpose being to continue rail service. The carrier states that no jobs were lost and no work was reassigned as a result of either the carrier's cessation of service on the line or its subsequent transfer of the line. BNSF argues that the completion of significant rehabilitation and, most importantly, the conduct of actual rail operations belie UTU's assertions that Sea Lion never intended to continue service on the Ballard Line.

The abandonment exemption. Sea Lion indicates that, at the time it acquired the Ballard Line, it had been embargoed by BNSF. The only shippers to patronize the line in recent years were Western Pioneer, Inc. (inbound and outbound frozen fish products), Olsen Furniture, Inc. (inbound shipments of furniture), Salmon Bay Sand & Gravel Company (inbound shipments of sand), and Covich-Williams Co., Inc. (inbound shipments of fuel). The last shipments that moved on the line for these shippers were 155 shipments in 1996 and 47 shipments in 1997. Sea Lion asserts that the number of expected shipments available for handling on completion of rehabilitation, approximately 150 a year, would not generate sufficient revenue to cover operation and maintenance costs and to service debt. To the contrary, petitioner asserts, expected rail revenue of less than \$60,000 per year is barely sufficient to cover expected operating costs. Sea Lion believes, however, that, by virtue of agreements with Seattle, BTRC would be able to operate the line successfully. Sea Lion notes that Seattle will not charge BTRC for the capital cost of the line. Sea Lion adds that BTRC expects to stimulate business through shipper participation in the operation of that railroad.

Sea Lion seeks an exemption from the OFA provisions of section 10904. Sea Lion views the OFA provisions as "superfluous" in this case, as Sea Lion intends that BTRC will operate the line after abandonment. In petitioner's view, the purposes of the OFA provisions would be served without the application of those provisions because service for current or future shippers would be preserved.

Sea Lion also seeks exemption from the public use provisions of section 10905. Sea Lion views the provisions as redundant here because petitioner has entered into a memorandum of understanding with Seattle providing for the transfer of the line to that city for interim trail use, rail banking, and other public purposes.

As noted, Seattle has submitted a request for issuance of a NITU and has filed an appropriate "statement of willingness" under 49 CFR 1152.29. Sea Lion states that it consents to our issuance of the NITU.

NARPO questions the motives behind Sea Lion's overall plan. NARPO challenges the plan as a scheme designed, in part, to evade labor laws, gain tax deductions, and take land that otherwise would revert to adjacent landowners. NARPO opposes the request for exemption from the OFA procedures. It notes that there are short line operators other than BTRC in the Seattle area and around the country that would like the opportunity to serve the existing shippers and possibly attract new shippers. NARPO suggests the possibility that an operator more qualified than BTRC might make an offer.

Sea Lion replies that the shippers' interests are well protected without an OFA. In petitioner's opinion, all that an OFA would accomplish would be to drive up regulatory costs and "panic" both the shippers and BTRC, an entity in which the shippers have invested. BTRC asserts that, as part of the overall plan it negotiated with the interested parties, it gave up its right to file an OFA, and, thus, it would not be able to file one in the event the Board denies the exemption request. The four above-named shippers that previously used the line also have filed letters supporting an exemption from the statutory OFA requirements.

#### DISCUSSION AND CONCLUSIONS

The acquisition exemption. Under 49 U.S.C. 10502(d), we may revoke an exemption if we find that regulation is necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. 10101. In addition, if a notice of exemption contains false or misleading information, it is void ab initio. 49 CFR 1150.32(c). Labor interests may raise, in a petition for revocation, issues concerning the appropriate level of labor protection. See 49 U.S.C. 10502(g) and Simmons v. ICC, 900 F.2d 1023 (7th Cir. 1990). To the extent that a party wishes to challenge the bona fides of a transaction, we retain the right to review the transaction to protect the integrity of our processes. Minnesota Comm. Ry. Inc.--Trackage Exempt.--BN R.R. Co., 8 I.C.C.2d 31 (1991) (Minnesota). The party seeking to revoke an exemption, however, must meet its burden of proof by articulating reasonable, specific concerns to satisfy the revocation criteria. Wisconsin Central Ltd.--Exemption Acquisition and Operation--Certain Lines of Soo Line Railroad Company, Finance Docket No. 31102 (ICC served July 28, 1988), and Minnesota, supra, 8 I.C.C.2d at 35. Accord, Norfolk Southern Railway Company--Trackage Rights Exemption--Norfolk and Western Railway Company, Finance Docket No. 32661 (STB served Feb. 21, 1996).

The record fails to show either that the notice contained false or misleading information or that the exemption should be revoked. Accordingly, UTU's petition will be denied. While we remain committed to preserving the integrity of our processes, we do believe that the situation here substantially differs from the situation in Land Conservancy, where an entity acquired an active rail line and almost immediately sought to abandon it for conversion to nonrail use. Here, the record shows that it was always Sea Lion's intent to facilitate continued rail service. Service has resumed under Sea Lion's ownership, and Sea Lion says that it expects that another carrier will continue service after petitioner abandons the line. Moreover, as noted, no jobs were lost, and no work was reassigned as a result of BNSF's transfer of the line to Sea Lion. There was no demonstrated intention to avoid labor protection, and the record does not show that labor interests have actually been harmed.

The abandonment exemption. Under 49 U.S.C. 10903, a rail line may not be abandoned without prior Board approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation under 49 U.S.C. 10903 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.

We will grant the request for an abandonment exemption here. Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of the abandonment process, an exemption will reduce barriers to exit [49 U.S.C. 10101(7)]. An exemption will also foster sound economic conditions and encourage efficient management by relieving Sea Lion of the costs of owning and managing the line and allowing it to apply its assets more productively elsewhere [49 U.S.C. 10101(5), and (9)]. Other aspects of the rail transportation policy will not be affected adversely.

Regulation is not necessary to protect shippers from the abuse of market power. No shipper has opposed the petition for exemption. Nevertheless, to ensure that the shippers are informed of our action, we will require that Sea Lion serve a copy of this decision on them within 5 days of the service date of this decision and certify to us that it has done so. Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

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 in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979).

As required by our environmental regulations, Sea Lion submitted an environmental report with its petition and notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed action. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) examined the environmental report, verified its data, and analyzed the probable effects of the proposed action on the quality of the human environment. SEA served an environmental assessment (EA) on June 26, 1998, explaining, and requesting public comment on, its initial recommendation that the environmental impacts of the proposed abandonment would not be significant and that no environmental or historic conditions are warranted.

No comments to the EA were filed by the July 27, 1998 due date. Accordingly, we will adopt the recommendations in the EA and find that the proposed abandonment will not significantly affect either the quality of the human environment or the conservation of energy resources.

SEA states that, following the line's abandonment, the right-of-way may be suitable for other public use under 49 U.S.C. 10905. Requests for a public use condition were due June 2, 1998. No one has sought a public use condition, and none will be imposed.

Other requests. Exemption from the OFA provisions of section 10904 are only rarely granted (i.e., there must be a compelling need to use the property for a valid public purpose and no overriding public need for continued rail service). See, e.g., Norfolk and Western Railway

Company--Abandonment Exemption--In Cincinnati, Hamilton County, OH, STB Docket No. AB-290 (Sub-No. 184X) (STB served May 13, 1998), and cases cited there at p. 11. There is no basis for us to grant an exemption from the OFA provisions here. Given that there are shippers on the line that obviously wish to receive continued rail service, we cannot find that there is no need for continued rail service. While the right-of-way is proposed to be used for a public purpose--continued rail service with interim trail use--Congress in section 10904 has established a procedure to address the need for continued rail service when a carrier is authorized to abandon a line. It would be inappropriate for us to subordinate that process to a private agreement simply because interested parties find it preferable to use such a mechanism. Under section 10904, "any" financially responsible person has the right to offer financial assistance to avoid abandonment or discontinuance. Moreover, the statute specifically contemplates that multiple offers to subsidize or purchase a rail line may be made. In these circumstances, Sea Lion's request for an exemption from the OFA provisions will be denied. While the record does not warrant an exemption from the OFA provisions, we are mindful of the valid public purpose for which that exemption is being sought, and we will carefully review both the form and the substance of any OFA filed for the subject line. See The Burlington Northern and Santa Fe Railway Company--Abandonment Exemption--in King County, WA (In the Matter of an Offer of Financial Assistance), STB Docket No. AB-6 (Sub-No. 380X) (STB served Aug. 5, 1998).

As noted above, the due date for requests for a public use condition has passed. No requests have been filed, and no such condition will be imposed. Accordingly, we will deny the requested exemption from the provisions of section 10905 as moot.

Finally, given our decision on the request for an exemption from the OFA provisions, action on Seattle's request for issuance of a NITU would be premature. We will defer action on the request pending final action on any OFA that might be filed.

The modified certificate. As specified in section 1150.21 of our regulations, the terms of the rules governing modified certificates apply to operations over rail lines that have been fully abandoned or approved for abandonment and acquired by a state or political subdivision of a state through purchase or lease. In this case, the notice for a modified certificate has been filed prematurely. Neither of the preconditions has been met, as the abandonment exemption request is not administratively final, and, obviously, Seattle has not yet acquired the subject line. Accordingly, we will defer action on the notice pending final disposition of the abandonment exemption proceeding and receipt of notice from Seattle regarding its acquisition of the line.

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

It is ordered:

1. In STB Finance Docket No. 33486, the petition for revocation is denied.

2. In STB Docket No. AB-544X:

a. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903 the abandonment of the above-described line, subject to the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979).

b. Petitioner must serve a copy of this decision on all shippers on the line within 5 days after the service date of this decision and certify to the Board that it has done so.

c. Petitioner's requests for exemption from the offer of financial assistance (OFA) provisions of 49 U.S.C. 10904 is denied. Its request for an exemption from the public use provisions of 49 U.S.C. 10905 is denied as moot.

d. Action on Seattle's request for issuance of a notice of interim trail use (NITU) under 16 U.S.C. 1247(d) and 49 CFR 1152.29 is deferred pending final action on any OFA that might be filed under the provisions outlined below.

e. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by August 21, 1998, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by a \$1,000 filing fee. See 49 CFR 1002.2(f)(25).

f. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **"Office of Proceedings, AB-OFA."**

g. Provided no OFA has been received, this exemption will be effective on September 10, 1998. Petitions to stay must be filed by August 26, 1998. Petitions to reopen must be filed by September 8, 1998.

h. Pursuant to the provisions of 49 CFR 1152.29(e)(2), petitioner 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 petitioner's filing of a notice of consummation by August 11, 1999, 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 the satisfaction, expiration, or removal of the legal or regulatory barrier.

STB Docket No. AB-544X, et al.

3. In STB Finance Docket No. 33594, action on the notice for a modified certificate of public convenience and necessity is deferred pending final disposition of the abandonment exemption proceeding in STB Docket No. AB-544X and notice from Seattle that it has acquired the line.

4. In all three proceedings:

- a. These proceedings are consolidated in this decision.
- b. Except as noted in paragraph 2(g), above, this decision will take effect on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary