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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: February 27, 2007

Common Cause *Oklahoma* (CCO) seeks an extension of time to file an offer of financial assistance (OFA) to acquire a 2.95-mile rail line which BNSF Railway Company (BNSF) sought to abandon in this proceeding. For the reasons set out herein, CCO's request will be denied.

On September 23, 2005, BNSF and Stillwater Central Railroad, Inc. (SLWC) (collectively, the railroads) filed notices invoking the class exemption under 49 CFR 1152 Subpart F for authority for BNSF to abandon approximately 2.95 miles of railroad between milepost 539.96 and milepost 542.91 in Oklahoma City, Oklahoma County, OK (in STB Docket No. AB-6 (Sub-No. 430X)), and for SLWC to discontinue service over two separate sections of the BNSF track, one for 0.91 of a mile and the other for 0.04 of a mile (in STB Docket No. AB-1040X).¹ Notice of the exemptions was served and published in the Federal Register on October 13, 2005 (70 FR 59802), and the exemptions were scheduled to take effect on November 12, 2005.

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) (collectively, petitioners) filed a joint petition to reject the notices of exemption, to which the railroads replied.

¹ SLWC has operating authority only as to portions of the 2.95-mile segment BNSF proposes to abandon: between milepost 539.96 and milepost 540.0, and between milepost 542.0 and milepost 542.91, a combined total of about 0.95 miles. 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).

The Board did not stay the notices of exemption, and it took no action on the requests to reject the notices until January 26, 2007, when it served a decision denying the request to reject BNSF's notice of exemption but granting the request to reject SLWC's notice of exemption. The SLWC notice was rejected on the ground that SLWC could not avail itself of the class exemption for a line that has been out-of-service for at least 2 years, because SLWC had not acquired its right to operate those line segments until just 9 months prior to filing its discontinuance notice.

On its own motion, however, the Board granted SLWC an individual exemption permitting it to discontinue operations on the two line segments. The Board announced that offers of financial assistance to continue the SLWC service would be due on February 5, 2007. A party filing an OFA in a discontinuance proceeding is limited to providing a subsidy to keep service going for a 1-year period. It may not use the OFA process to purchase the line or obtain trackage rights over the line. See Delaware and Hudson Railway Company, Inc.—Discontinuance of Trackage Rights Exemption—In Susquehanna County, PA and Broome, Tioga, Chemung, Steuben, Allegany, Livingston, Wyoming, Erie, and Genesee Counties, NY, STB Docket No. AB-156 (Sub-No. 25X) (STB served Mar. 30, 2005) (Susquehanna County), and cases cited therein. The Board indicated that, if no OFA were filed, the discontinuance exemption would be effective on February 25, 2007.

On February 5, 2007, the Board received a letter from CCO in STB Docket No. AB-6 (Sub-No. 430X) requesting a 2-week extension of time to file an OFA to purchase the full 2.95-mile line from BNSF. CCO stated that it needed the time to obtain additional information from BNSF about the line.

The railroads filed a joint motion to reject CCO's request as untimely. They pointed out that, under the Board's rules at 49 CFR 1152.27(b)(2)(ii), when a line is authorized to be abandoned or discontinued pursuant to a class exemption, an OFA is due 30 days after Federal Register publication. Thus, the due date for filing an OFA in the BNSF abandonment case was November 12, 2005 (30 days after the October 13, 2005 Federal Register publication of BNSF's notice). The Board's January 26, 2007 decision permitted an OFA to be filed only in the SLWC discontinuance proceeding, because only in that case was the carrier's notice rejected and new (individual) exemption authority issued.

On February 12, 2007, CCO filed a "petition to toll the due date for an OFA" to purchase the BNSF line, and on February 13, 2007, CCO filed a notice of intent to file an OFA to purchase the line. CCO maintains that the Board's January 26, 2007 rejection of SLWC's notice of exemption to discontinue service not only triggered the OFA process for subsidy of SLWC's service, but also reinstated the OFA process to allow anyone to seek to compel the sale of the BNSF line.²

² CCO cites two cases as support for that proposition: Susquehanna County and Consolidated Rail Corporation—Abandonment Exemption—in Mercer County, NJ, STB Docket No. AB-167 (Sub-No. 1185X) et al. (STB served Jan. 26, 2007) (Mercer County).

The railroads replied in opposition to CCO's February 12, 2007 petition on February 20, 2007. They argue that the precedents cited by CCO do not support the relief it requests. The railroads point out that CCO knew of the October 13, 2005 notice, which specifically stated that an OFA to acquire the BNSF line had to be filed by November 12, 2005.

CCO's request for an extension of time to file an OFA and for tolling the OFA due date will be denied. CCO recognizes that OFAs in notice-of-exemption proceedings are due 30 days after the notice is published in the Federal Register (here, November 12, 2005). But it argues that the January 26 rejection of SLWC's notice of exemption to discontinue service over its portions of the line obviated the effectiveness of BNSF's November 2005 abandonment exemption and permitted the filing of a new OFA to purchase the BNSF line up until February 25, 2007.

CCO's arguments are not persuasive and the cases it cites do not support its proposition. In Susquehanna County, a case involving trackage rights only and not abandonment, a party sought, through the OFA process, to acquire trackage rights for itself over the subject line, rather than to subsidize continuing rail service by the incumbent trackage rights operator whose service was authorized for discontinuance. Moreover, the trackage rights that were sought extended beyond the limits of the subject line. The Board held that, where discontinuance of trackage rights is involved, an OFA offeror may seek to subsidize the continued operation of the incumbent trackage rights operator, but not to acquire its own trackage rights over the line; further, the Board noted that the OFA process is not a mechanism for acquiring rights over facilities broader than those proposed for abandonment or discontinuance. Neither issue has any relevance to the present case.

In Mercer County, an OFA offeror timely filed a notice of intent to file an OFA within 10 days after the notice of exemption was published in the Federal Register, in accordance with 49 CFR 1152.27(c)(2). Here, CCO failed to do so. The Board did note, in Mercer County, that an abandonment may not be consummated until all operating rights over the line are extinguished, and it is true, therefore, that as long as SLWC's operating rights remain in effect, BNSF may not consummate the abandonment of its 2.95-mile segment. But that fact does not lead to the result that CCO seeks, because, as noted, the 10-day deadline for filing an OFA notice of intent runs from the date the notice of exemption is published, not the date the abandonment is consummated. That BNSF cannot consummate the abandonment until SLWC's operating rights are extinguished does not alter the fact that the deadline for OFA notices of intent to acquire the line expired in 2005.

In short, neither Susquehanna County nor Mercer County stands for the proposition that the Board's rejection of SLWC's notice of exemption (and contemporaneous grant of an individual exemption) for the discontinuance of operations over part of BNSF's line in 2007 operated by force of law to revive the permissible period for CCO to indicate its intent to submit an OFA to purchase the entirety of the line, which expired in 2005.

Although Bio-Energy and NATI asked the Board to reject BNSF's notice of exemption, they did not seek to stay the notice and, as noted, it went into effect, as did the notice invoking the class exemption to permit the discontinuance of service on SLWC. The filing of the petitions

to reject did not act to stay the effectiveness of either notice. Rather, BNSF was put on notice that, if it sought to consummate the abandonment by ripping up the track or selling the line and the Board were to subsequently grant the petition, the railroad might have to replace the track or buy back the line. See Busboom Grain Co. Inc. v. ICC, 830 F.2d 74, 75-76 (7th Cir. 1987).

Here, the January 26 order rejecting SLWC's notice but granting individual exemption authority had the effect of again opening up SLWC's trackage rights to the OFA subsidy process. But under section 10904, if CCO (or anyone else) had wanted to file an OFA to acquire BNSF's line in Oklahoma City, it had the opportunity to do so in November 2005. CCO did not pursue that opportunity then, and it cannot now obtain a second bite at the apple. To do so would contravene the strict time limits imposed in section 10904, which limit the bounds of this agency's condemnation authority.

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

It is ordered:

1. CCO's requests for an extension of time to file an OFA and for tolling the OFA due date are denied.
2. This decision is effective on its date of service.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary