

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 6 (Sub-No. 477X)

BNSF RAILWAY COMPANY–ABANDONMENT EXEMPTION–IN LOS ANGELES
COUNTY, CAL.

Digest:¹ This decision allows BNSF Railway Company (BNSF) to end its responsibility to provide rail freight service over 4.85 miles of rail line owned by Los Angeles County Metropolitan Transportation Authority (LACMTA) in Los Angeles County, Cal., and grants an exemption from the law providing for the forced sale of BNSF's right to provide continued freight rail service. The cessation of freight service will facilitate LACMTA's plan to extend light rail passenger service to Azusa, Cal.

Decided: September 16, 2011

By petition filed on May 31, 2011, BNSF Railway Company (BNSF), seeks an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10903 to abandon its rail freight service easement over 4.85 miles of rail line (the Line) owned by Los Angeles County Metropolitan Transportation Authority (LACMTA). The Line extends between milepost 119.53, just east of the San Gabriel River, in Irwindale, and milepost 124.20, just east of the Santa Anita Blvd. grade crossing, in Arcadia, in Los Angeles County, Cal.

BNSF also seeks exemption 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. The Board served and published notice of BNSF's petition in the Federal Register on June 20, 2011 (76 Fed. Reg. 35,946-47). On July 8, 2011, the Board received replies in opposition to BNSF's petition from Excalibur Property Holdings, LLC and George Brokate (jointly Excalibur), and from Mount Olive Storage LLC (Mount Olive). By letter dated July 11, 2011, BNSF attached copies of comments from Senator Diane Feinstein, Congressmember Judy Chu, the City of Arcadia, the City of Azusa, and the City of Duarte, in support of the railroad's abandonment petition. On July 19, 2011, BNSF filed a response to the replies filed by Mount Olive and Excalibur and moved that the Board accept the response filing into the record.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

For the reasons discussed below, the Board will grant the exemption from 49 U.S.C. § 10903, thereby authorizing the abandonment of the rail freight service easement over the Line, subject to environmental conditions developed during the Board's environmental review under the National Environmental Policy Act (NEPA) and standard employee protective conditions. BNSF's request for an exemption from the OFA process also will be granted, but its request for an exemption from the public use provisions of § 10905 will be denied as moot.

PRELIMINARY MATTER

BNSF moves for leave to file a response to the protests of Excalibur and Mount Olive. Because BNSF's filing submits arguments only in reply to the issues raised and was filed in time for us to consider it adequately without jeopardizing our ability to meet our statutory deadline, we will accept it. Acceptance of the response also will provide a more complete record.

BACKGROUND

Petition. The Line is part of a group of rail lines that were the subject of an agreement between The Atchison, Topeka and Santa Fe Railway Company (ATSF), a predecessor of BNSF, and the Los Angeles County Transportation Commission (LACTC), a predecessor of LACMTA, in 1992.² In that transaction, LACTC acquired the right to direct ATSF's future disposition of the lines and acquired the ownership of the physical assets of the lines for mass transit use. The ATSF retained an exclusive and permanent easement to continue providing freight common carrier service over the lines.

Subsequently, the Board's predecessor, the Interstate Commerce Commission (ICC), found that the commuter service restrictions on ATSF's freight service in the parties' shared use agreement were so extensive that they would substantially impair the effect of the permanent easement, thus rendering the transaction subject to the ICC's jurisdiction.³ Based on this ruling, LACMTA sought a blanket exemption from the requirements of the Interstate Commerce Act at 49 U.S.C. Subtitle IV. LACMTA explained that it did not intend to operate any rail lines as a rail freight common carrier and did not intend to hold itself out to provide rail freight service on the rail lines it had acquired from ATSF. The Board granted LACMTA the blanket exemption, and further stated in its decision that, if the railroad (then ATSF, now BNSF) sought to abandon its rail freight service obligation over the lines at a future date, the Board would evaluate the

² See Los Angeles Cnty. Transp. Comm'n–Acquisition Exemption–The Atchison, Topeka & Santa Fe Ry., FD 32172 (ICC served Dec. 2, 1992).

³ See Orange Cnty. Transp. Auth.–Acq. Exempt.–The Atchison, Topeka & Santa Fe Ry., 10 I.C.C.2d 78 (1994).

potential environmental impacts of the abandonment at that time.⁴ The Board also noted that the blanket exemption did not extend to labor protection.

According to BNSF, LACMTA now desires to extend its light rail service eastward to Azusa, Cal., via the corridor comprising the Line. The Metro Gold Line Foothill Extension Construction Authority (Construction Authority) has conducted an environmental review of the proposed light rail project pursuant to the California Environmental Quality Act (CEQA), the adequacy of which is currently being challenged in California state court.⁵ The record reflects that a number of communities and elected officials support the light rail project.

BNSF states that it is willing to accommodate the light rail project, including through the filing of the instant petition, which will remove any freight rail service obligations from the Line. BNSF notes that there has been no local freight traffic on the Line in over 2 years, and that it is very unlikely that any local traffic will develop in the foreseeable future. According to the railroad, the Line is stub-ended and is not capable of handling overhead freight traffic. BNSF further states that the Line was being used for storing empty freight cars, and that arrangements have been made with LACMTA for alternative storage locations.

Shipper and Community Interests. As noted above, a number of communities and elected officials support BNSF's abandonment petition. These supporters contend that allowing BNSF to be relieved of a freight rail service obligation on the Line will facilitate a light rail project that will ease traffic congestion, create 7,000 jobs, and significantly stimulate the economy during construction.

Excalibur, a landowner in the area, opposes the petition, asserting that BNSF, among other things, has failed to: (1) promptly make available information regarding federally granted rights-of-way affected by the proposed abandonment; (2) notify a number of parties allegedly having an interest in the proposed abandonment, including a potential shipper, Miller/Coors in Irwindale, and local entities such as the City of Monrovia (Monrovia); (3) adequately justify its request for exemption from the OFA provisions; and (4) adequately address the ongoing state court proceeding where Excalibur challenges the adequacy of Construction Authority's environmental review of the light rail project under CEQA. Excalibur argues that the Board should deny the petition in light of the environmental questions and the harm that will occur if the light rail project becomes a reality. In the alternative, Excalibur asks that the Board delay its decision pending the resolution of the state court proceeding and until it can comment on the

⁴ See Orange Cnty. Transp. Auth.–Acq. Exempt.–The Atchison, Topeka & Santa Fe Ry., FD 32173 et al. (STB served Mar. 12, 1997).

⁵ See Excalibur Property Holdings LLC v. Pasadena Metro Blue Line Construction Authority, Los Angeles County Superior Court Case No. BS130732, filed February 17, 2011.

information pertaining to federally granted rights-of-way on the Line. Additionally, Excalibur indicates that abandonment would be inconsistent with Monrovia's land use plan, and that Monrovia opposes the proposed abandonment and light rail project.

In its rebuttal, BNSF responds to Excalibur's claims. BNSF indicates that Excalibur owns a parcel of land located a few hundred feet from the Line and has no interest in this abandonment proceeding other than to safeguard its property and to obstruct the light rail project. BNSF further states that the Board has no role to play in the proceeding pending in the California state court concerning the CEQA environmental review of the proposed light rail project prepared by the Construction Authority, given that the Board has no jurisdiction over light rail projects. The railroad asserts that, even if the Construction Authority's environmental review were invalidated by the state court, that action would have no effect on whether the Board should authorize the abandonment of the Line, which would be subject to a separate NEPA review by the Board and could go forward even if no light rail were ever constructed. BNSF notes that Miller/Coors is a customer of BNSF and that the shipper's service will not be affected by the proposed abandonment.⁶ As to Excalibur's procedural objections, the railroad notes that it submitted the information concerning all federally granted rights-of-way to Excalibur by letter dated July 11, 2011, and that it was in full compliance with the notice requirements of 49 C.F.R. § 1152.60(d) when it served its May 31 petition. In addition, BNSF includes a letter of support from Monrovia.

Mount Olive owns land along the Line, and it also opposes the proposed abandonment. It states that its land is currently zoned for heavy manufacturing, and that it has an easement from the State of California for purposes of rail ingress and egress to the Line. Mount Olive claims that it uses this rail easement to provide storage for rail cars owned by various customers. The landowner fears that, with abandonment of the Line, it may lose its zoning status, which would dramatically decrease the land's value. Mount Olive states that it has retained an expert appraiser to value the impact that the proposed abandonment would have on its land value and will submit the report as soon as it is available.⁷ It asks that the Board reject BNSF's exemption petition and follow its "regular procedures" (i.e., require a formal application), and conduct a hearing, to determine whether it is in the public interest to allow BNSF to abandon its obligation to provide service along the Line from Duarte to Irwindale.

In response to Mount Olive, BNSF states that the effect an abandonment may have on land values of entities, particularly entities that are not receiving service by rail, is not a relevant issue before this Board in assessing abandonment proposals. BNSF also states that it has searched its records and was unable to determine when, if ever, Mount Olive last utilized rail

⁶ BNSF Rebuttal at 6 n.2.

⁷ To date, Mount Olive has not submitted a report.

service. According to BNSF, the switch and spur track leading to Mount Olive's property have long been removed.

DISCUSSION AND CONCLUSIONS

Exemption from Section 10903. Under 49 U.S.C. § 10903, a rail line may not be abandoned without the Board's prior approval. Under 49 U.S.C. § 10502, however, the Board must exempt a transaction or service from regulation when it finds 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.

Detailed scrutiny under 49 U.S.C. § 10903 is not necessary to carry out the rail transportation policy. The Line has been dormant for over 2 years and resumption of service is highly unlikely. By minimizing the administrative expense of the application process, an exemption will reduce regulatory barriers to exit, in accordance with 49 U.S.C. §§ 10101(2) and (7). Consistent with 49 U.S.C. §§ 10101(5) and (9), an exemption will also foster sound economic conditions and encourage efficient management by allowing BNSF to avoid the unnecessary expenses associated with retaining the Line. Other aspects of the rail transportation policy will not be adversely affected by the use of the exemption process.

Excalibur's arguments concerning the potential light rail project do not persuade us otherwise. This agency has previously approved abandonments that led to the commencement of commuter or light rail service.⁸ The environmental analysis of the light rail project in question is squarely within the jurisdiction of the Construction Authority. Excalibur's concerns about the adequacy of the Construction Authority's CEQA environmental review for the light rail project do not warrant our denying BNSF's petition or delaying our decision. As discussed below, our Office of Environmental Analysis (OEA) has conducted its own thorough and independent analysis of the environmental impacts of BNSF's abandonment proposal in compliance with NEPA. This analysis is based on input from other agencies and on environmental and historic reports prepared by BNSF in accordance with the Board's environmental regulations at 49 C.F.R. §§ 1105.7 and 1105.8.

⁸ See Norfolk S. Ry.—Aban. Exemption—in Mecklenburg Cnty. N.C., AB 290 (Sub-No. 247X) (STB served Apr. 9, 2004); e.g., Norfolk S. Ry.—Aban. Exemption—in Norfolk and Va. Beach, Va., AB 290 (Sub-No. 293X) (STB served Nov. 6, 2007) (Va. Beach), petition for review dismissed sub nom. Riffin v. STB, No. 07-1483 (D.C. Cir. Apr. 22, 2009), and cases cited therein.

Excalibur's other arguments also lack merit. Despite Excalibur's claims to the contrary, BNSF has submitted evidence that Monrovia actually supports the proposed abandonment and encourages the agency to approve it expeditiously. Furthermore, BNSF served its petition for exemption on all entities required by 49 C.F.R. § 1152.60(d). While Excalibur had objected that BNSF failed to provide certain data concerning federal lands, the railroad rendered that objection moot by providing Excalibur with the requested information in a timely manner.

Mount Olive's concerns similarly fail to support denial of the petition for exemption. In deciding whether to authorize an abandonment, the Board balances the potential harm to shippers and communities against the present and future burden that continued operations could impose on the railroad and interstate commerce. Colorado v. United States, 271 U.S. 153 (1926). Mount Olive, however, does not currently ship or receive freight on the Line and does not propose to do so. Mount Olive has had a full and fair opportunity to participate in this proceeding and has failed to show why the more formal application process, including possibly holding a hearing, is needed for the Board to rule on BNSF's proposal to abandon this out-of-service rail freight line. Supporters of the proposed abandonment and the light rail project include a number of elected officials and communities. This public support in the potentially affected communities, along with the burden that would be associated with maintaining an out-of-service rail freight line as part of the national rail system, outweighs Mount Olive's specific monetary concerns related to the effect abandonment could have on the value of Mount Olive's land.

Regulation of the proposed transaction likewise is not necessary to protect shippers from the abuse of market power. As explained earlier, there are no active shippers on the Line, and no traffic has moved over the Line in more than 2 years. No actual shippers have opposed the proposed abandonment. The only shipper mentioned in the record, Miller/Coors, will not be affected by a cessation of freight service over the Line. Nevertheless, to ensure that Miller/Coors is informed of our action, we will require BNSF to serve a copy of this decision on Miller/Coors, so that it will receive it within 5 days of the service date of this decision, and to certify contemporaneously to the Board that it has done so.⁹

Exemption from Section 10904. Under 49 U.S.C. § 10904, a financially responsible person may offer to purchase, or subsidize continued rail operations over, a rail line sought to be abandoned. The Board has granted exemptions from the OFA provisions of 49 U.S.C. § 10904 when the record shows that the right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service.¹⁰

⁹ Because we find that regulation of the proposed abandonment is not necessary to protect shippers from the abuse of market power, we need not determine whether the proposed abandonment is limited in scope.

¹⁰ See cases cited in n. 8.

Here, BNSF argues that the Line will be used for a valid public purpose, the extension of passenger rail service. BNSF states that the proposed new light rail service will benefit the communities near the Line, promote energy efficiency and reduce pollution. Although Excalibur questions the validity of this public purpose, the support from affected communities and elected officials clearly demonstrates otherwise. The Board has found that mass transit is a valid public purpose in the past.¹¹ Additionally, the Board has not received any filings from former shippers or potential shippers indicating a commercial need for rail freight service over the Line.

The record here establishes that the proposed exemption from 49 U.S.C. § 10904 meets the criteria of 49 U.S.C. § 10502. No potential shippers have objected to the exemption from the OFA process, therefore, applying the OFA provisions in this instance is not necessary to carry out the rail transportation policy. Allowing the abandonment exemption to become effective expeditiously, without first being subject to these provisions, will minimize the need for Federal regulatory control over the rail transportation system, expedite the regulatory action, and reduce regulatory barriers to exit, consistent with 49 U.S.C. §§ 10101(2) and (7). Regulation is not necessary to protect shippers from an abuse of market power because there are no shippers on the Line.

Exemption from Section 10905. BNSF has also requested an exemption from the public use condition provisions of 49 U.S.C. § 10905. Requests for a public use condition were due by July 11, 2011, and no requests were filed. Therefore, BNSF's request will be denied as moot.

Employee protection. Under 49 U.S.C. § 10502(g), the Board may not use its 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—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979).

Environmental review. As previously noted, BNSF submitted environmental and historic reports with its petition and notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the environmental impacts of the proposed action. See 49 C.F.R. § 1105.11. The Board's OEA has examined the reports, verified the data they contain, and analyzed the probable effects of the proposed action on the quality of the human environment.

OEA issued an Environmental Assessment (EA) for public review and comment on July 29, 2011. The EA analyzes the environmental and historic effects of abandoning the Line however, the EA correctly explains that any subsequent reuse of the right-of-way is beyond the

¹¹ See id.

scope of the Board's environmental review.¹² In the EA, OEA concluded that the proposed abandonment of BNSF's freight rail easement would not significantly affect the quality of the human environment and recommended that 3 conditions be imposed on any decision granting abandonment authority.

First, OEA states in the EA that the proposed abandonment would not impact prime farmland or any farmland protection efforts in the area. OEA does recommend, however, a condition requiring that BNSF ensure that best management practices are followed during any salvage activities to prevent erosion.¹³

Second, OEA states that the U.S. Army Corps of Engineers (Corps) has not submitted any comments regarding the proposed abandonment. Because the bridge located at milepost 119.40 crosses the San Gabriel River, OEA recommends that BNSF consult with the Corps regarding the abandonment's potential impacts to the San Gabriel River and, if applicable, comply with any reasonable requirements proposed by the Corps, and report the results of these consultations in writing to OEA prior to the onset of any salvage operations.

Third, OEA states that BNSF served its historic report on the California Office of Historic Preservation (the State Historic Preservation Office or SHPO), pursuant to 49 C.F.R. § 1105.8(c). OEA notes there are 6 bridges on the line that are 50 years old or older and that, at the time the EA was served, the SHPO had not yet commented on the historic effects of the proposed abandonment. Accordingly, OEA recommends a condition requiring BNSF to retain its interest in and take no steps to alter the historic integrity of all historic properties including sites, buildings, structures, and objects within the project right-of-way (the Area of Potential Effects) eligible for listing or listed in the National Register of Historic Places (National Register) until completion of the Section 106 process of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470(f). As part of this condition, OEA also recommends that BNSF be required to report back to OEA regarding any consultations with the SHPO and the public, and that BNSF be prohibited from filing its consummation notice or begin any salvage activities

¹² See Iowa S. R.R.—Exemption—Aban. in Pottawattamie, Mills, Fremont & Page Cntys., Iowa, 5 I.C.C.2d 496, 501 (1989) (in abandonment cases, environmental review focuses on potential environmental effects of diversion of traffic and salvage), aff'd. sub nom. Goos v. ICC, 911 F.2d 1283, 1295-96 (8th Cir. 1990) (holding that no NEPA review is required where agency has no discretion to control subsequent use of the property, and thus no major federal action is involved).

¹³ This salvage condition and the second salvage condition discussed here “attaches to the property and applies to salvage activities whenever they occur, even if salvage is conducted years later by a successor interest.” Consummation of Rail Line Abans. that are Subject to Historic Pres. and Other Env'tl. Conditions, EP 678 at 5 (STB served Apr. 23, 2008).

related to abandonment (including removal of tracks and ties) until the Section 106 process has been completed and the Board has removed this condition.

Comments to the EA were due by August 29, 2011. OEA prepared a final EA stating that one comment was received from the U.S. Fish and Wildlife Service (USFWS). In its comment, the USFWS indicates that it is unclear whether federally listed threatened or endangered species could be affected by the proposed abandonment. In response to the USFWS' concerns, OEA recommends an additional condition requiring an assessment by a qualified biologist and, if warranted, consultation under Section 7 of the Endangered Species Act.

USFWS also recommends that BNSF be required to consult with the California Department of Fish and Game (CDF&G) to determine whether State-listed or other sensitive species are found in the area of potential impacts. In response, OEA recommends an appropriate condition to accomplish this.

Accordingly, we will impose the 5 final conditions recommended by OEA. Based on the environmental record, we conclude that the proposed abandonment, as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. BNSF's rebuttal is accepted into the record.
2. Under 49 U.S.C. § 10502, we exempt from the prior approval requirements of 49 U.S.C. § 10903 the abandonment by BNSF of the above-described line, subject to the employee protective conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979), and subject to the conditions that BNSF (or any holder of a successor interest in the rail property) shall: (1) ensure that best management practices are followed during salvage activities to prevent erosion; (2) prior to commencement of any salvage activities, consult with the Corps regarding the abandonment's potential impacts to the San Gabriel River and, if applicable, comply with any reasonable requirements, and report the results of these consultations in writing to OEA prior to the onset of salvage operations; and (3) retain its interest in and take no steps to alter the historic integrity of all historic properties including sites, buildings, structures, and objects within the project right-of-way (the Area of Potential Effects) that are eligible for listing or listed in the National Register until completion of the Section 106 process of the NHPA, report back to OEA regarding any consultations with the SHPO and the public, and not file its consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties) until the Section 106 process has been completed and the Board has removed this condition; (4) pursuant to Section 7 of the Endangered Species Act, prior to the commencement of salvage activities, retain a qualified

biologist to conduct an assessment of potential impacts from salvaging activities to federally listed threatened and endangered species that may occur in the vicinity of the Line, report the results of this assessment in writing to OEA, comply with appropriate mitigation measures developed by OEA following Section 7 consultations with USFWS to determine whether the abandonment is likely to adversely affect any federally threatened or endangered species found in the project area, and not file its consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties) until all issues regarding federally threatened and endangered species are addressed and the Board has removed this condition; and (5) prior to the commencement of any salvage activities, consult with the CDF&G regarding the abandonment's potential impacts to State listed or other sensitive species and, if applicable, comply with any reasonable requirements proposed by the CDF&G, and report the results of these consultations in writing to OEA prior to the onset of salvage activities.

3. BNSF is directed to serve a copy of this decision on Miller/Coors so that it is received within 5 days of the service date of this decision and certify contemporaneously to the Board that it has done so.

4. BNSF's request for an exemption from the provisions of 49 U.S.C. § 10904 is granted, and its request for an exemption from the provisions of 49 U.S.C. § 10905 is denied as moot.

5. The exemption will be effective on October 16, 2011. Petitions to stay must be filed by October 3, 2011, and petitions to reopen must be filed by October 11, 2011.

6. Pursuant to the provisions of 49 C.F.R. § 1152.29(e)(2), BNSF 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 BNSF's filing of a notice of consummation by September 16, 2012, 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 satisfaction, expiration, or removal of the legal or regulatory barrier.

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