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Public Record

Before the Surface Transportation Board

BNSF Railway - )  
Abandonment Exemption - ) AB 6 sub no. 490X  
In King County, WA )

City of Seattle's Comments on  
BNSF's Dec. 16 Supplemental Information

This case involves trackage on a portion of BNSF's former line along the south side of the Ship Canal in Seattle. BNSF has sought abandonment authority for portions of its former line along the south side of the Ship Canal in Seattle in several proceedings over the past decade or more. The City of Seattle ("City") has preserved all these line segments pursuant to agreements with BNSF (the "Burke-Gilman Agreements"<sup>1</sup>) providing for preservation of certain otherwise-to-be abandoned lines through transfer to the City pursuant to 16 U.S.C. 1247(d) ("railbanking") at the City's election. In order to prevent a severance of the already railbanked segments of the former line

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<sup>1</sup> The referenced agreements, which constitute a settlement agreement relating to an old ICC case involving an alleged unlawful abandonment of what is now the Burke-Gilman Trail in Seattle, in general bind BNSF to convey to the City a minimum 30 foot wide rail corridor should it receive abandonment authority from this Board for this particular line. The Board's policy in general has been to support settlement agreements.

along the south side of the Ship Canal, and in order further to implement the Burke-Gilman agreements as to the property at issue here, City seeks to "railbank" all of the length of the rail line at issue in this proceeding in the event of a lawful abandonment. City has sought the cooperation of BNSF in this process, consistent with the Burke-Gilman Agreements.

BNSF has elected to use 49 C.F.R. 1152.50 notice of exemption procedures as the foundation for abandonment/railbanking authority in this proceeding. In order to use 49 C.F.R. 1152.50 notice of exemption procedures, a railroad must "verify" or "certify" [1152.50(d)(2)] that its line has not been used for local traffic for the prior two years (or more). 49 C.F.R. 1152.50(b) & (d)(2). BNSF has so attested for all of this line, which extends from the west side of 13<sup>th</sup> Avenue in an easterly direction several blocks to end of line. The City, however, is concerned that there is some operational trackage east of 13<sup>th</sup> Avenue that has been used as storage or tail track for the remaining shipper on the line.

49 C.F.R. 1152.50(c)(3)(final sentence) in effect provides that the use of the two year out of service abandonment regulation is void ab initio if a railroad's certification that it has not used a line for local traffic for the past two years is false. If BNSF's use of the two year out of service exemption procedure is void ab initio, then the City of Seattle

cannot rely on the proceeding as successfully railbanking and preserving the party. The City naturally wishes this problem resolved.

The City has repeatedly asked the BNSF for information concerning the trackage at issue. So far as we can tell, it was constructed by BNSF at City expense as part of a track relocation project to accommodate City infrastructure several years ago. The track is the only operational trackage remaining in the abandonment area since BNSF did not replace any other trackage removed for relocation in that area. The trackage in question is located on property owned by BNSF and, according to the City's surveyors, in part is within the 30 foot corridor to be deeded the City under the Burke Gilman Agreements.

In its supplemental filing (December 16), BNSF excuses use of this trackage during the past two years on the following grounds: BNSF asserts that the track in question is owned by a shipper (Coastal) pursuant to a track agreement and is therefore unregulated track.<sup>2</sup> BNSF notes that it accesses this private industry track from a switch west of 13<sup>th</sup> Avenue, so no "line" east of 13<sup>th</sup> is used to serve Coastal. BNSF basically states

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<sup>2</sup> The only other track which could be the regulated track in the area was removed several years ago in a planned track relocation project but never replaced east of 13<sup>th</sup> Avenue.

that the only operational trackage in the abandonment area is unregulated in that it belongs to a shipper.

It is well-established that a railroad cannot avoid federal rail abandonment regulation by classifying a "line" as some kind of "spur" or other "unregulated" track. Compare Old Colony Railroad Co. et al Trustees Abandonment, 224 ICC 681, 682-83 (1938) (railroad may not reduce a line to spur status without prior ICC [now STB] abandonment authority) with Allegheny Valley Railroad -- Petition for Dec. Order, F.D. 35329, Decision served June 15, 2010 (Conrail trackage does not lose status as a line through non-use or spur use), quoting Atchison, T & S.F. -- Abandonment Exemption -- Lyon County, KS, AB 52 (Sub-no. 71X), slip op. at 3 (ICC, served June 17, 1991) (railroad may not avoid ICC/STB abandonment authority by reclassifying a line as a spur). The City has requested a copy of the track agreement that covers the line, but BNSF has not made one available and no copy appears to be of record. The City has requested a legal description of some sort for the area covered by the track agreement, but none has been provided.

If based on this record, STB concludes that 49 C.F.R. 1152.50 has been properly invoked by BNSF, then the City is protected from relying on a proceeding that was void ab initio. The City has no objection to abandonment (railbanking) the property; the City's concern relates to doing so lawfully.

On the other hand, if STB concludes that BNSF cannot use the two-year out-of-service exemption for the portion of right of way at issue, then City requests that the agency treat the notice of exemption as a petition for an exempt abandonment under 49 U.S.C. 10502. The facts qualify the proposed abandonment for exemption under section 10502(b). In particular, regulation is not necessary to carry out the purposes of 49 U.S.C. 10101. The proposed abandonment is clearly of limited scope, and further regulation is not needed to protect shippers from an abuse of market power. This is confirmed by the fact that there appear to be no substantive objections to abandonment, for none have been filed in this proceeding. Environmental and historic preservation procedures appear to be complete. No one has manifest an intent to file an OFA, or otherwise expressed interest in OFA. City accordingly requests this agency to exercise its power under its own initiative (49 U.S.C. 10502(b)) to grant an exempt abandonment/railbanking authorization for the line in question, in the event that the agency determines that 49 C.F.R. 1152.50 is unavailable. As noted, City is not opposed to abandonment and subsequent railbanking; City simply wants the procedural vehicle to be lawful to that end so the federal license involved is not void ab initio.

BNSF through its representative has expressed frustration and chagrin that the City has raised the issue of the lawfulness of 1152.50 procedures, and has even threatened non-cooperation in implementing the Burke-Gilman agreements. Ironically, the Burke-Gilman Agreements themselves arose out of litigation in response to BNSF's arbitrary classification of a regulated branch line as an unregulated spur some 30 years ago. The public and the City are best (and certainly more reliably) served by lawful actions rather than arbitrary actions. If BNSF in fact retaliates, then the City reserves the right to respond with additional proceedings in state court (e.g., to enforce the Burke-Gilman Agreements) or at this agency (e.g., an adverse abandonment application). The City seeks the cooperation both of BNSF and this agency in lawful and efficient procedures.<sup>3</sup> If the line does not qualify for a notice of exemption, then an exemption should be ordered nonetheless under 49 U.S.C. 10502(b).

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<sup>3</sup> On the assumption that STB in some fashion authorizes abandonment and railbanking, City continues to remind BNSF that in order efficiently to prepare a deed for conveyance of the relevant property to the City as provided under the Burke-Gilman agreements, BNSF needs to confirm to the City the area covered by the proposed reserved easement for the "industry" track sought of the centerline of that track as it otherwise exists within the 30 foot wide corridor to be conveyed to the City.

Respectfully submitted,

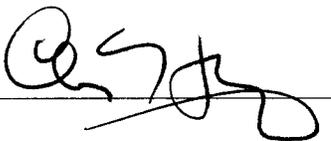


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Certificate of Service

By my signature below, I certify service by email delivery and by deposit in the US Mail, postage pre-paid, first class, addressed to Karl Morell, Esq., 655 Fifteenth Street, N.W., Suite 225, Washington, D.C. 20005, this 5<sup>th</sup> day of January, 2016.



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