



TESORO

Tesoro Corporation
19100 Ridgewood Pkwy
San Antonio, TX 78259

241609

September 28, 2016

Chairman Daniel R. Elliott III
Vice Chairman Deb Miller
Member Ann D. Begeman
United States Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423

ENTERED
Office of Proceedings
September 28, 2016
Part of
Public Record



Subject: STB Finance Docket No. 36041

Petition of Tesoro Refining & Marketing Company, LLC for Declaratory Order

Dear Mr. Elliott, Ms. Miller, and Ms. Begeman:

On June 3, 2016, Tesoro Refining & Marketing Company, LLC ("Tesoro") petitioned the Board for a declaratory order affirming its rights as a shipper under federal law to receive transportation service over rail lines that are subject to the jurisdiction of the Board.¹ In the time since the petition was filed, the urgency for the Board's declaration has become acute. Tesoro respectfully urges the Board to consider and act on the petition now, pursuant to its authority and obligation under the Interstate Commerce Commission Termination Act, 49 U.S.C. §10101 *et seq.* ("ICCTA") to ensure that Tesoro's rights as a shipper are not infringed.

As detailed in the petition, the Swinomish Indian Tribal Community ("SITC") brought suit against BNSF Railway Company ("BNSF") seeking, as a landowner, to prohibit or manage rail service to Tesoro's refinery in Anacortes, Washington.² SITC objects to the transport of Bakken crude across its lands as well as to the number of trains and cars crossing the property and the frequency of rail traffic serving Tesoro's refinery.³ SITC demands that the federal court constrain the number of trains per day and the cars per train that BNSF can ship across tribal lands and further demands that the court completely prohibit BNSF from shipping Bakken crude

¹ Petition of Tesoro Refining & Marketing Co., LLC, STB FD No. 36041 (filed June 3, 2016).

² Complaint at Section VIII.C, *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, No 2:15-cv-00543, ECF No. 1 (W.D. Wash. filed Apr. 7, 2015).

³ *See id.* at ¶¶ 3.12, 3.13, 3.16, 3.31, 7.2.

on the line. The court is now fully briefed and is considering its final action on SITC's demands.⁴ Tesoro's rights are directly and immediately in jeopardy.

It is important to emphasize that SITC's motion to the court specifically seeks a remedy that would render Tesoro's rights under ICCTA subservient to SITC's desire to dictate the operations of the rail service upon which Tesoro relies.⁵ Such an outcome would undermine Tesoro's federally protected right to uninterrupted rail service and would call into question the power of the Board to fulfill its mandate under ICCTA. The Board should act to clarify its authority and to affirm that federal law protects a rail shipper's interests in receiving rail service over the interstate rail network and does not allow landowners to restrict or manage rail service that a shipper needs.⁶

Tesoro does not ask the Board to adjudicate any aspect or allegation in the court proceeding between SITC and BNSF. Tesoro is not a party to the court proceeding. Tesoro's petition focuses on the relief that SITC demands because, if granted by the court, it would conflict with federal law, would injure Tesoro's legal and commercial interests, and would undermine the Board's jurisdiction. It is the relief under consideration by the court that justifies the Board's action now—and that justified action in 1980 in similar circumstances involving the same parties, the same court, and the same rail line.

In 1980, the Board's predecessor, the Interstate Commerce Commission ("ICC"), intervened in a prior proceeding between SITC and Burlington Northern (BNSF's predecessor) in order "to preserve the exclusive jurisdiction of the Commission to determine whether the abandonment sought by plaintiff is in the public interest under [the Interstate Commerce Act]"⁷ SITC had brought suit in court for injunctive relief against an alleged continuing trespass by the railway company, seeking the curtailment and effective abandonment of rail operations "without giving the Commission an opportunity to exercise its jurisdiction to weigh

⁴ Cf. Omnibus Response of SITC to BNSF Ry. Co.'s Motion for Summary Judgment and Reply in Support of SITC's Motion for Summary Judgment, *Swinomish Indian Tribal Cmty.*, No 2:15-cv-00543, ECF No. 65 (W.D. Wash. filed Aug. 24, 2016); BNSF Ry. Co.'s Reply in Support of Cross-Motion for Summary Judgment, *Swinomish Indian Tribal Cmty.*, No 2:15-cv-00543, ECF No. 68 (W.D. Wash. filed Sept. 2, 2016).

⁵ See, e.g., Amended Motion for Summary Judgment of SITC at 25, *Swinomish Indian Tribal Cmty.*, No 2:15-cv-00543, ECF No. 58 (W.D. Wash. filed July 21, 2016).

⁶ Tesoro's reliance upon rail service is documented in its petition and accompanying confidential verified statement. Petition of Tesoro Refining & Marketing Co., LLC and Confidential Verified Statement of Keith M. Casey, STB FD No. 36041 (filed June 3, 2016).

⁷ Motion of the Interstate Commerce Comm'n for Leave to Intervene at ¶ 1, *Swinomish Tribal Cmty. v. Burlington Northern, Inc.*, Civil No. C78-429V (W.D. Wash. filed 1980). This document is also Exhibit 34 to the Declaration of Christopher I. Brain in Support of Motion for Summary Judgment, *Swinomish Indian Tribal Cmty.*, No 2:15-cv-00543, ECF No. 33-6 (W.D. Wash. filed Mar. 10, 2016) and part of the "Special Submission" SITC made to the Board in the present case on July 13, 2016.

whether such abandonment is in the national interest.”⁸ As the ICC explained, “as a practical matter, the disposition of [the 1980 case] could result in the loss of the Commission’s jurisdiction in a matter exclusively within its domain, contrary to federal statute.”⁹

In the earlier case, the ICC’s intervention was denied (without prejudice to renewal) for one reason only, namely that the court had bifurcated the liability and remedy portions of the case, thereby deferring consideration of SITC’s requested relief.¹⁰ *It is such relief that is now being decided by the same court in the current court action by SITC.* That is, in the current lawsuit, the court has not bifurcated and deferred consideration of the specific issue that effectively challenges the Board’s jurisdiction and Tesoro’s rights. Under these circumstances, the Board should not recede from the position that its predecessor took in 1980 and should affirmatively declare its authority and Tesoro’s rights under ICCTA.

As in 1980, the Board need not be concerned with questions of tribal status or tribal law, contrary to the assertions of SITC. The reason is straightforward: the rights of shippers under ICCTA do not depend upon the status of the landowner whose land is traversed by a regulated rail line. ICCTA provides no exemption for lands owned by tribes and does not afford tribes any special status in relation to the management of rail traffic on regulated lines. Moreover, it would be anomalous for the Board to defer or modify its action in light of SITC’s tribal status, where SITC has pointedly refused to participate in this proceeding before the Board and has declined to accept the Board’s authority.¹¹ Neither Tesoro nor SITC is asking the Board to render a decision relating to laws governing tribes. The petition before the Board relates only to ICCTA.

Tesoro respectfully urges the Board to take action on its petition for declaratory relief in light of the specific relief demanded by SITC in federal court. The court is now fully seized of the demand, and the parties to the court case await a ruling at any moment. Tesoro’s interests as a shipper are directly and immediately in jeopardy. Now is the time when the Board’s

⁸ Motion of the Interstate Commerce Comm’n for Leave to Intervene at ¶ 3.

⁹ *Id.*

¹⁰ Order, *Swinomish Tribal Cmty.*, Civil No. C78-429V (W.D. Wash. Mar. 7, 1980). This document is also Exhibit 35 to the Declaration of Christopher I. Brain in Support of Motion for Summary Judgment, *Swinomish Indian Tribal Cmty.*, No 2:15-cv-00543, ECF No. 33-7 (W.D. Wash. filed Mar. 10, 2016) and part of the “Special Submission” SITC made to the Board in the present case on July 13, 2016.

¹¹ Special Submission by the Swinomish Indian Tribal Cmty. of Documents Filed in *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.* at 1, STB FD No. 36041 (filed July 13, 2016) (“The Tribe is not a party to the present proceeding before the Board The Tribe does not waive, but again expressly reaffirms, its sovereign immunity from unconsented suit, and to the extent it may be necessary the Tribe expressly reserves the right . . . to contend that the Tribe could not, as a result of sovereign immunity, be joined in the Board proceedings that are the subject” of the current proceeding before the Board.).

declaration of authority and rights under ICCTA can be most beneficial to the court and to Tesoro.

Sincerely,

A handwritten signature in black ink, appearing to read "Keith Casey". The signature is fluid and cursive, with a large initial "K" and a long, sweeping underline.

Keith Casey

Executive Vice President, Marketing & Commercial

CC: Anthony J. LaRocca, for BNSF Railway Company

Craig S. Trueblood, for Equilon Enterprises LLC

Stephen T. Lecuyer and Christopher I. Brain, for the Swinomish Indian Tribal Community

CERTIFICATE OF SERVICE

I hereby certify that this 28th day of September, I have caused a copy of the foregoing to be served by first-class mail upon the following:

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Respectfully submitted,


Brittany M. Pemberton