

SERVICE DATE – NOVEMBER 27, 2009

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-6 (Sub-No. 468X)

BNSF RAILWAY COMPANY — ABANDONMENT EXEMPTION —
IN KOOTENAI COUNTY, ID

Decided: November 25, 2009

By petition filed on August 10, 2009, 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 a 6.23-mile rail line between milepost 6.10, near Post Falls, and milepost 12.33, at Coeur d'Alene, in Kootenai County, ID (the line).¹ Notice of the filing was served and published in the Federal Register on August 28, 2009 (74 FR 44435-36). BNSF also seeks exemption from the offer of financial assistance (OFA) provisions of 49 U.S.C. 10904 and the public use condition provisions of 49 U.S.C. 10905.

On September 15, 2009, Pan-American Railway, Inc., d.b.a. Post Falls-Coeur d'Alene Railroad (PFCA-RR), filed a reply in opposition to the petition for exemption from the OFA provisions of 49 U.S.C. 10904. In its reply, PFCA-RR states that it intends to file an OFA for acquisition of the line. On September 30, 2009, the City of Coeur d'Alene, ID (City), filed a statement of support for the petition. On October 2, 2009, the North Idaho College Foundation (Foundation) and Stimson Lumber Company (Stimson) filed comments to PFCA-RR's reply supporting BNSF's exemption requests. On October 5, 2009, BNSF filed a petition for leave to file a reply to PFCA-RR's reply, and attached that reply. Finally, on October 23, 2009, the North Idaho Centennial Trail Foundation (NICTF) filed a request for a public use condition and for a Notice of Interim Trail Use (NITU). We will grant an exemption from 49 U.S.C. 10903, subject to environmental, historic preservation, and standard employee protective conditions, and deny the requested exemption from 49 U.S.C. 10904. We will also grant the request for exemption from the public use provisions at 49 U.S.C. 10905, because no requests for a public use condition were filed by the September 17, 2009 deadline.

PRELIMINARY MATTTTER

BNSF submitted a reply to PFCA-RR's reply and asked for leave to file this otherwise impermissible filing. 49 CFR 1104.13(c). We will accept BNSF's reply because it provides a more complete record, clarifies the arguments, will not prejudice any party, and does not unduly

¹ In its environmental and historic reports, BNSF erroneously stated that the end of the line was milepost 12.34; BNSF now indicates that the portion of the line between milepost 12.33 and 12.34 has already been abandoned.

prolong the proceeding. It is within the Board's discretion to permit otherwise impermissible filings, and it is appropriate to do so here.

BACKGROUND

BNSF states that there are no active shippers on the line. The last active shipper on the line, Stimson, closed its operations on May 18, 2008. BNSF further states that it serves no other customer on the line, there has not been any overhead traffic for several years prior to 2008, and it points out that Stimson supports the abandonment. Following abandonment, BNSF intends to convey the portion of the line between milepost 8.66 and milepost 12.33 for development of an educational corridor in Coeur d'Alene. BNSF informs us that the Bureau of Land Management (BLM) has reached a tentative agreement with the City of Coeur D'Alene to exchange the federally granted right-of-way on which the line is located for land in the same general area that is more suitable to BLM's use. Finally, BNSF states that the portion of the line between milepost 6.10 and milepost 8.66 will be converted to industry track and used for the storage of surplus rail cars.

BNSF also seeks exemptions from sections 10904 and 10905 to facilitate its planned conveyance of a portion of the line for an education corridor. BNSF contends that portion of the right-of-way is needed for the expansion of higher education institutions and other civic uses, that granting an OFA or public use request would stymie this planned expansion, and that there is no known potential for future rail traffic on the line.

PFCA-RR does not oppose the petition for exemptions from section 10903 and 10905, but opposes BNSF's request for exemption from section 10904, as it intends to file an OFA for acquisition of the line. PFCA-RR states that it is an Idaho corporation formed for the purpose of providing interstate and intrastate transportation of freight and passengers by rail. It is not yet a common carrier under the jurisdiction of the Surface Transportation Board, but it would become one upon acquisition of the line. According to PFCA-RR, Mr. Peter Cooper, a principal of PFCA-RR, is in the process of attempting to form a public-private partnership with the City of Post Falls, ID, and/or to form a Port Authority under Idaho law, to acquire the line and a site for the Port District on the Spokane River at its entrance into Lake Coeur d'Alene. PFCA-RR claims that the Port District intends to purchase half of the DeArmond mill site, one of the mills formerly owned by Stimson, to serve as a log terminal for transloading logs from water to rail and as a rail passenger terminal. According to PFCA-RR, the site is already served by rail, and the permit to handle logs is grandfathered. PFCA-RR plans to use the other mill site formerly owned by Stimson, the Atlas Mill site, as the Port District's main terminal. That facility would include an industrial park for a borate treatment plant, a sawmill, and a biofuels plant; a marine terminal, dry dock, and boat storage facility; and a mixed-use area with boardwalk. PFCA-RR states that its planned use of the line constitutes an interest in continued rail service sufficient to deny the exemption from 49 U.S.C. 10904.

In their statements of support for the exemptions, the City, Foundation, and Stimson (Supporting Parties) state that, despite PFCA-RR's claims, not only are there no shippers on the line, there are also no realistic prospective shippers within Coeur d'Alene. The Supporting Parties assert that Stimson sold the DeArmond mill site to the Foundation to allow for the

expansion of North Idaho College, the University of Idaho, and Lewis Clark State College (collectively, the Colleges) and is not for sale to PFCA-RR or anyone else. They also state that Stimson's Atlas mill site is under contract to be sold to a private developer, Black Rock Development Company, for development as a mixed-use residential and light commercial development. The Supporting Parties contend that these transactions allow for the construction of the aforementioned education corridor between milepost 10.96 and milepost 12.21 and are thus not available to PFCA-RR for possible industrial use. The City states that it plans to use the portion of the line between milepost 12.21 and milepost 12.33, which was gifted to the City for use as a park by act of Congress (subject to railroad use), to expand a public park, and that the Museum of North Idaho will construct a new museum building there. The City also states that it has begun discussions about expanding the existing Centennial Trail onto the portion of the right-of-way between milepost 6.23 and milepost 10.96. Finally, the City asserts that: neither it nor the City of Post Falls have discussed the creation of either a public-private partnership or a Port Authority with PFCA-RR; the right-of-way is not zoned for log transloading, the use for which PFCA-RR intends to put it; and PFCA-RR has not filed with the Idaho Secretary of State. As such, the City argues that, because the right-of-way is needed for a valid public purpose, and PFCA-RR does not present a plausible need for continued rail service, all of the exemptions, including the exemption from the OFA provisions of 49 U.S.C. 10904, should be granted.

In addition to corroborating the Supporting Parties' statements regarding the future plans for the right-of-way, BNSF's reply notes that PFCA-RR has failed to identify any shippers that would have any interest in or need for rail service for any of PFCA-RR's proposed uses. BNSF also claims that Mr. Cooper has a history of stating that he has made plans for transportation developments and not following through.² BNSF contends that, in light of Mr. Cooper's previous unrealized attempts to create a transportation-centered development in the area, PFCA-RR's proposed uses for the line are unrealistic.

DISCUSSION AND CONCLUSIONS

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

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 application process, an exemption will expedite regulatory decisions and reduce regulatory barriers to exit (49 U.S.C. 10101(2) and 10101(7)). An exemption will also foster sound economic conditions and encourage efficient management by allowing BNSF to avoid the opportunity costs of owning and maintaining a line without traffic (49 U.S.C. 10101(5) and (9)). Other aspects of the rail transportation policy will not be affected adversely.

² See, e.g., Union Pacific Railroad Company—Abandonment Exemption—in Kootenai County, ID, STB Docket No. AB-33 (Sub-No. 272X), slip op. at 1-2, n.2 (STB served May 4, 2009).

Regulation of the proposed transaction is not necessary to protect shippers from an abuse of market power. Stimson, the only shipper that has been active on the line within the past 2 years, has ceased operations on the line and supports the proposed abandonment. Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

Exemption from Section 10904. Exemptions from the OFA process of 49 U.S.C. 10904 have been granted from time to time, when the right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service. See, e.g., Union Pacific Railroad Company—Abandonment Exemption—In Pima County, AZ, STB Docket No. AB-33 (Sub-No. 141X) (STB served Feb. 16, 2000). Here, BNSF has not adequately justified an exemption from the OFA process. For example, BNSF informs us that it plans to convert a sizable section of the line to industrial track to store surplus rail cars. Also, the City of Coeur d’Alene seeks to incorporate part of the line into the Centennial Trail. It is well established, however, that OFAs to acquire rail lines for continued rail service or to subsidize rail operations take priority over rail banking. See BNSF Railway Company—Abandonment Exemption—in King County, WA, STB Docket No. AB-6 (Sub-No. 465X) (STB served Nov. 28, 2008); see also Rail Abandonments—Use of Rights-of-Way As Trails, 2 I.C.C.2d 591, 608 (1986). While the proposed education corridor could, at least in theory, constitute a valid public purpose, it is unclear from the record how much of the line would be used for that purpose. The expansion of City Park and the Colleges and the construction of a new building for the Museum of North Idaho all constitute public purposes. But the park and museum will occupy only the last 0.12 miles of the line. Moreover, the record does not reveal how much of the portion of the line between milepost 10.96 and milepost 12.21 has been sold to the Foundation for university campus expansion versus how much is under contract for a residential and commercial mixed-use development, which is not a public purpose. For these reasons, we will deny BNSF’s request for an exemption from the OFA provisions at 49 U.S.C. 10904.

Our denial of BNSF’s requested OFA exemption should not be viewed as an endorsement of PFCA-RR’s plans to return rail service to the line. As the record demonstrates, those plans are speculative and contingent on facts that may well be outside of PFCA-RR’s control. Rather, as we have recently articulated, any person seeking to file an OFA must provide not only evidence of its financial responsibility, but should also address one or more of the following: whether there is a demonstrable commercial need for rail service, as manifested by support from shippers or receivers on the line being abandoned or as manifested by other evidence of immediate and significant commercial need; whether there is community support for continued rail service; whether acquisition of freight operating rights would interfere with current and planned transit services; and whether continued rail service is operationally feasible. See CSX Transportation, Inc.—Abandonment Exemption—In Glynn County, GA, STB Docket No. AB-55 (Sub-No. 697X), slip op. at 3 (STB served July 9, 2009); see also Los Angeles County Metropolitan Transit Authority—Abandonment Exemption—in Los Angeles County, CA, STB Docket No. AB-409 (Sub-No. 5X) (STB served June 16, 2008).

Exemption from Section 10905. As noted above, BNSF requested exemption from the public use provisions of 49 U.S.C. 10905 in order to facilitate the development of the education corridor and expansion of City Park between milepost 10.96 and milepost 12.33. Notice of the abandonment petition and the request for exemption from the public use provisions was published in the Federal Register. Requests for a public use condition were due by September 17, 2009. NICTF did not file its request for a public use condition until October 23, 2009, well after the deadline. Accordingly, the petition for exemption of the proposed abandonment from the public use condition provisions of 49 U.S.C. 10905 will be granted.

Trail use. NICTF has also filed a request for issuance of a NITU under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act) for that portion of the line between milepost 6.10 and milepost 10.96. NICTF has submitted a statement of willingness to assume financial responsibility for the right-of-way and has acknowledged that use of the right-of-way would be subject to possible future reconstruction and reactivation of the right-of-way for rail service as required under 49 CFR 1152.29. BNSF has not expressed a willingness to negotiate with NICTF for interim trail use. Under the Trails Act, the trail use program is voluntary and consensual between the railroad and the trail user. See 49 CFR 1152.29; Citizens Against Rails to Trails v. STB, 267 F.3d 1144 (D.C. Cir. 2001); National Wildlife Federation v. I.C.C., 850 F.2d 694, 699-702 (D.C. Cir. 1988); Rail Abandonments—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 598 (1986) (Trails). The Board will not impose a trail use condition on an unwilling party. See, e.g., Consolidated Rail Corporation—Abandonment Exemption—Lancaster and Chester Counties, PA, STB Docket No. AB-167 (Sub-No. 1095X) (STB served June 3, 2004). Therefore, the request for issuance of a NITU will be denied.

Employee protection. 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 the exemption, we will impose the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

Environmental review. BNSF has submitted environmental and historic reports with its petition and has notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed abandonment. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment.

SEA served an environmental assessment (EA) on October 9, 2009, and requested comments by November 9, 2009. As stated in the EA, according to the U.S. Department of Interior, Fish and Wildlife Service, Idaho Field Office (USFWS), portions of the line are adjacent to the Spokane River, and the Bull trout (*Salvelinus confluentus*), a federally listed threatened species, is present in the Spokane River, but the Spokane River has not been designated as critical habitat for the species. Therefore, SEA recommended a condition requiring BNSF, prior to commencement of any salvage activities, to consult with USFWS to assess potential impacts to the Bull trout (*Salvelinus confluentus*), to identify any appropriate

mitigation measures that may be warranted, and to report the results of the USFWS consultations to SEA in writing prior to the onset of salvage operations.

Also, the Idaho Department of Environmental Quality, Remediation Section (ID-DEQ), recommended that a reconnaissance assessment of the rail bed and adjacent right-of-way be performed and that both a narrative report of materials historically shipped on the line and a sampling and analyses report on materials that would be likely to have been spilled or sprayed along the right-of-way be submitted to ID-DEQ for review. SEA has not found any information indicating that either the rail bed or the right-of-way has been contaminated. Accordingly, SEA did not recommend that the Board require BNSF to conduct a full assessment of the line but instead recommended a condition requiring BNSF, prior to the commencement of any salvage activities, to consult with ID-DEQ to ensure that any concerns regarding potential contamination of the right-of-way are addressed, and to report the results of these consultations in writing to SEA prior to the onset of salvage operations.

SEA further states that the U.S. Department of Commerce, National Geodetic Survey (NGS) has indicated that 5 geodetic station markers may be disturbed by the proposed abandonment. Therefore, SEA recommended a condition requiring BNSF to notify NGS at least 90 days prior to beginning salvage activities in order to plan for the possible relocation of the station markers.

Finally, SEA states that BNSF served a copy of the historic report on the Idaho State Historical Society, Historic Preservation Office (SHPO). SEA states that it has not heard from the SHPO and, therefore, has not been able to consider the SHPO's opinion before determining whether the line may be eligible for listing in the National Register of Historic Places. Therefore, SEA recommended 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 (Area of Potential Effect) that are eligible for listing or listed in the National Register of Historic Places, until the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f, has been completed. The condition would also require BNSF to report to SEA regarding any consultations with the SHPO and the public, and would prohibit BNSF from filing its consummation notice or initiating any salvage activities (including removal of tracks and ties) until the section 106 process has been completed and the Board has removed the condition.

No comments to the EA were filed by the November 9, 2009 due date. Therefore, we will impose SEA's recommended conditions. Accordingly, based on SEA's recommendation, we conclude that the proposed abandonment, if implemented 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 motion for leave to file a reply to PFCA-RR's reply is granted.

2. Under 49 U.S.C. 10502, we exempt BNSF from the prior approval requirements of 49 U.S.C. 10903 for the abandonment of the above-described line, subject to the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), and the conditions that BNSF: (1) prior to the commencement of any salvage activities, consult with USFWS to assess potential impacts to the Bull trout (*Salvelinus confluentus*), a Federally listed threatened species, and identify any appropriate mitigation measures that may be warranted, and to report the results of the USFWS consultations to SEA in writing prior to the onset of salvage operations, (2) prior to the commencement of any salvage activities, consult with ID-DEQ to ensure that any concerns regarding potential contamination of the right-of-way are addressed, and report the results of these consultations in writing to SEA prior to the onset of salvage operations; (3) notify NGS at least 90 days prior to beginning salvage activities in order to plan for the possible relocation of 5 station markers; and (4) (a) 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 (Area of Potential Effect) that are eligible for listing or listed in the National Register of Historic Places until the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f, has been completed, (b) report to SEA regarding any consultations with the SHPO and the public, and (c) 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 the condition.

3. BNSF's request for exemption from the provisions of 49 U.S.C. 10904 is denied.

4. BNSF's request for exemption from the provisions of 49 U.S.C. 10905 is granted.

5. 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 December 7, 2009, 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 the filing fee, which currently is set at \$1,500. See 49 CFR 1002.2(f)(25).

6. 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."**

7. Provided no OFA has been received, this exemption will be effective on December 27, 2009. Petitions to stay must be filed by December 14, 2009, and petitions to reopen must be filed by December 22, 2009.

8. Pursuant to the provisions of 49 CFR 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 November 27, 2010, 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 Nottingham, and Commissioner Mulvey.