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23 Sept. 2003

Hon. Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: BG & CM Railroad --
Petition for Exemption, F.D. 34399

Dear Mr. Secretary:

This letter responds to some informational inquiries from the Office of Proceedings in connection with BG & CM Railroad--Petition, F.D. 34399.

1. The first inquiry concerned timing of commencement of operations. It was pointed out that BG & CM Railroad ("BG & CM") could immediately commence service, and that, so long as it contracted only for equipment and crews from Camas Prairie Railnet ("Camas Prairie"), only BG & CM -- not Camas Prairie-- would have common carrier obligations. Unfortunately, BG & CM Railroad is not in a financial position to incur either common carrier obligations or the uncertainties inherent in the abandonment pre-authorization process; in particular, BG & CM's lender is unprepared to provide necessary loans unless an exemption is granted from common carrier and abandonment regulation. BG & CM accordingly filed a petition for exemption in F.D. 34399 seeking exemption from common carrier obligations and abandonment pre-authorization requirements.

If BG & CM commenced operations prior to Board action on the pending petition for exemption, BG & CM may end up subject to common carrier and/or at least some abandonment requirements, should this Board not grant BG & CM's petition in full. (Given the inquiry from the Office of Proceedings, this is a very real concern to BG & CM.) BG & CM is not in a position financially to incur such a risk. Thus, BG & CM does not expect to go forward with providing rail service unless and until the pending petition in F.D. 34399 is granted. BG & CM Railroad remains concerned that it be able to provide contract rail service during this autumn's grain rush.

2. The second inquiry concerned BG & CM's position on the applicability of Caldwell County Economic Development Commission -- Exemption from 49 U.S.C. Subtitle IV, F.D. 32659, served

August 3, 1995. In that proceeding, a non-profit corporation evidently sought an exemption from "Subtitle IV" requirements for purposes of acquiring an operating branch line of railroad from Norfolk Southern, which line was to be operated by a shortline. The non-profit itself was not equipped to operate a railroad, but evidently intended its operator to engage in common carrier operations. The non-profit sought the exemption for itself. ICC indicated that absent acquisition by the non-profit corporation, the line "might otherwise be abandoned." The Commission granted the exemption, but stated that "to the extent ... our exemption could have the effect of authorizing abandonment or discontinuance of service over the line, Commission analysis of the potential environmental impacts of abandonment or discontinuance of service is required." ICC indicated that it could attempt to speculate on the environmental impacts now, but that since the non-profit corporation agreed to submit environmental information in the future, it would "reserve the right to conduct a full environmental review" in the event of abandonment or discontinuance in the future.

BG & CM Railroad's position is that Caldwell County either is not applicable, or may be applied only if the railroad in question consents (as evidently occurred in that case).

As to non-applicability, the line at issue in this proceeding has already been authorized for abandonment. Service has already been discontinued. The line has already gone through a thorough environmental review. There is no need to speculate on the impacts of abandonment because they have been analyzed. The Board after a laborious process imposed a host of environmental conditions. All the conditions have been met, except for those that are self-executing. See Camas Prairie Railnet, Inc. -- Abandonment in Lewis, Nez Perce and Idaho Counties, ID, AB-564, served Sept. 6, 2002. Undertaking another environmental analysis of the consequences of abandonment at this time would be totally redundant. It follows that postponing that which is redundant to a future time is also surplusage. In short, the regulatory posture of this line is simply not analogous to that in Caldwell County. Unlike Caldwell County, the environmental analysis of abandonment here has been completed.

BG & CM also is concerned that the Caldwell County decision is wrong if applied here. NEPA and related statutes only apply in the event of a discretionary federal action. See Goos v. ICC, 911 F.2d 1283 (8th Cir. 1990). In the case at bar, BG & CM Railroad basically seeks an exemption, prior to commencement of any operations, from any discretionary federal action in connection with further STB regulation of the rail line at issue. STB is authorized to grant such exemptions under 49 U.S.C. § 10502. If the line is exempted, there will be no discretionary federal actions if rail service is reinstated but then terminated. If there are no discretionary federal actions, then there is no trigger for NEPA review. Moreover, the kind of

rail service intended -- contract carriage on a line authorized for abandonment -- traditionally has been viewed as a kind of rail service over which the federal rail regulatory agency no longer has jurisdiction. See Consolidated Rail Corporation--Petition for Declaratory Order, 1 ICC 2d 284 (1984). Again, there is no discretionary federal action to trigger NEPA.

There is an apparent circularity in applying Caldwell County to the case at bar. If STB's action on BG & CM's petition for an exemption from discretionary federal action is itself viewed as a discretionary federal action, then STB by applying Caldwell County would be arguing that it must environmentally regulate in the future all things it would otherwise regulate, or analyze the environmental consequences now when they are "speculative" and when the events triggering an environmental consequence (e.g., termination of service) may never occur. This analysis unnecessarily eviscerates the use of 49 U.S.C. § 10502 as a means to preserve rail service on a contract basis. It overlooks the fact that BG & CM's petition is not seeking pre-approval of abandonment of common carrier service; it is seeking an exemption from having to provide common carrier service, and from any pre-approval requirements for termination of contract service should such service (over which STB would not have jurisdiction) commence. It also overlooks the fact that the environmental consequences of termination are not "speculative" but have been analyzed and appropriate mitigating conditions have already been formulated and largely implemented. In the course of authorizing abandonment of this line, this Board conducted a thorough environmental review and imposed many conditions, most of which have now been fulfilled and all the remainder of which are self-executing. See Camas Prairie Railnet, Inc. -- Abandonment in Lewis, Nez Perce and Idaho Counties, ID, AB-564, served Sept. 6, 2002.

There is nothing novel in this concept. Under this Board's "modified certificate" procedures, when a public agency owns an abandoned line, it may contract with a carrier to operate the line. The contract carrier is granted a "modified certificate," which may be terminated upon notice and without any abandonment pre-authorization or environmental review requirements. Compare 49 C.F.R. § 1150.21-.24 with 49 C.F.R. § 1105.6(c)(5). The theory behind the exemption is that there is no federal discretionary action involved when a contract carrier terminates service. Secondly, the lines to which the "modified certificate" program applies have all been authorized for abandonment, and have thus gone through environmental review and conditioning. As a general matter, there is no need for further environmental review of what happens in the event of reactivated rail termination because the issue has already been analyzed when the line was authorized for abandonment the first time.

BG & CM Railroad has already explained that in order to obtain the bank loans necessary to begin rail operations, BG &

CM Railroad must secure an exemption from common carrier and abandonment approval requirements. In the case of our predecessor in interest, Camas Prairie Railnet, compliance with environmental review and conditioning requirements took well over a year and was a costly process, involving multiple negotiations, including what we understand were commitments by Camas Prairie to make payments to other entities for various projects. In order to obtain financing, BG & CM needs relief from uncertain costs and delays which may be imposed by STB at the time of termination of contract rail service, assuming STB permits such service to commence. Relief from abandonment requirements without relief from the uncertainties and costs associated with environmental review and conditioning responsibilities which are triggered when a railroad seeks abandonment authority is not relief sufficient to render operation of this line feasible, even on a contract basis. A bank concerned about the liquidity of its security is at least as concerned about environmental constraints on that liquidity as about other constraints arising out of STB regulation of economic issues in connection with rail abandonment.

BG & CM Railroad realizes that the exemption process should not be used as a subterfuge to avoid legitimate environmental requirements associated with salvage, nor is BG & CM seeking the exemption in F.D. 34399 for that purpose. BG & CM Railroad understands that all the environmental conditions imposed on salvage operations in the Camas Prairie abandonment proceeding remain applicable should contract rail service terminate and the line be salvaged, just as such requirements would remain applicable should a modified certificate be terminated and a line covered by it be salvaged. In order to ensure compliance with those requirements, BG & CM is prepared to accept, as a condition to the granting of its Petition, the specific application of all the remaining environmental conditions imposed on Camas Prairie Railnet as restated and modified in Camas Prairie Railnet, Inc. -- Abandonment in Lewis, Nez Perce and Idaho Counties, ID, AB-564, served Sept. 6, 2002, if and when BG & CM Railroad should terminate any reinstituted contract rail service and engage in salvage operations. These remaining conditions are self-executing and are as follows:

condition (2): notification of National Geodetic Survey not less than 90 days prior to commencement of salvage operations, if such operations are expected to destroy or disrupt any of the 23 geodetic station markers listed in CSPR's Environmental Report.

condition (4): consult with City of Cottonwood's Highway Engineer prior to conducting salvage activities at or near grade crossings.

condition (5): consult with EPA and secure all necessary permits prior to initiation of salvage or disposal

activities.

condition (6(b)): obtain from ID-DEQ all required discharge permits and plans to prevent hill/slope mass wasting prior to initiation of salvage or disposal activities.

condition (8): abide by the terms of the negotiated agreement between CSPR and the Nez Perce Tribe governing stream restoration activities affecting Lapwai Creek and its tributaries.

Since these aforementioned conditions are all self-executing, salvage could commence without further action before the STB so long as the conditions are met.

In short, Caldwell County is not applicable, is redundant, and serves no purpose here.

3. The third inquiry turned on procedures for the Board to retain jurisdiction to act ministerially to re-impose a railbanking condition should BG & CM Railroad advise that it was terminating contract rail service. In Southern Pacific Transp. Co. -- Abandonment -- Tillamook Branch, AB 12 (Sub-no. 108), served August 28, 1986, the Commission authorized an abandonment, but also an exempt operation of a line by a local agency for two years. At the request of, among others, Rails to Trails Conservancy, the Commission imposed a condition retaining authority to authorize railbanking at a later time, notwithstanding continued exempt operation of the line. Similarly, the Commission and this Board have determined that the federal rail regulatory agency has authority to order railbanking upon request of the parties upon termination of contract operations under a "modified certificate." Wisconsin and Calumet Railroad Company -- NITU and Termination of Modified Cert., F.D. 30724 (Sub-no. 1), served Aug. 8, 1989; Sammamish Transp. Co. -- NITU and Termination of Modified Cert., F.D. 33398 (Sub-no. 1), served Feb. 26, 1998. For these reasons, this Board has jurisdiction to condition the granting of the petition for exemption to provide for retention of authority to authorize railbanking upon timely request and with the consent of BG & CM Railroad upon termination of contract rail operations. That retained authority is a ministerial action by the Board, not a discretionary action, and under this Board's rulings as confirmed on appeal, does not give rise to any environmental or related review requirement. See Goos v. ICC, 911 F.2d 1283 (8th Cir. 1990).

Very truly


Charles H. Montange
for BG & CM Railroad

cc. Service List

Service List

I hereby certify service of the foregoing petition upon the following representatives of parties to AB 564 by U.S. Mail, postage pre-paid, first class this 23rd day of Sept., 2003:

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Date: 23 Sept. 03

Message: Finance Dkt. 34399. Original and copies by express.
Response to inquiry.

Attached pages: 6

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