

34861
EB

SERVICE DATE - JULY 27, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-6 (Sub-No. 409X)

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY–
ABANDONMENT EXEMPTION–IN JEFFERSON, THAYER, AND
NUCKOLLS COUNTIES, NE, AND REPUBLIC COUNTY, KS

Decided: July 23, 2004

By petition filed on April 8, 2004, The Burlington Northern and Santa Fe 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 and discontinue service over its 39.95-mile line of railroad extending from milepost 167.78 near Superior, NE, to milepost 127.83 near Reynolds, NE, in Jefferson, Thayer, and Nuckolls Counties, NE, and Republic County, KS (the line). Notice of the filing was served and published in the Federal Register (69 FR 23250-51) on April 28, 2004. The exemption will be granted, subject to environmental and standard employee protective conditions.

BACKGROUND

The line has five stations: Hardy; Byron; Chester; Hubbell; and Reynolds. With the exception of Hardy, all of the stations on the line have been embargoed since June 2003 due to flooding and washouts. Aurora Cooperative, one of the two shippers on the line, has grain elevators and/or fertilizer facilities at Hardy, and at the embargoed Byron, Chester, and Hubbell stations. The other shipper, AGP, has a grain elevator at the embargoed Chester station.

BNSF states that traffic on the line has declined significantly in recent years by as much as 94.3% from 1980 to 2002. It provides the following breakdown of traffic on the line by station for the years 2000 through 2003:

STATION	<u>Cars Handled (Inbound and Outbound)</u>			
	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>
<u>HARDY</u>				
Aurora Cooperative	61	121	51	39
<u>BYRON</u>				
Aurora Cooperative	8	46	38	4
<u>CHESTER</u>				
AGP	0	0	50	23
<u>HUBBELL</u>				
Aurora Cooperative	0	88	26	0
<u>REYNOLDS</u>				
No Traffic	0	0	0	0
TOTAL	69	255	165	66

According to BNSF, the declining traffic and revenues on the line do not justify its continued operation. BNSF claims that the revenues currently generated by the line do not even cover the cost of maintenance and rehabilitation, which it estimates in the range of \$1 million to rehabilitate and restore the line to Federal Railroad Administration Class 1 track safety standards.

BNSF asserts that there would be little adverse effect on shippers from a grant of this exemption because both shippers have alternative truck transportation. Nebraska State Highway 8 parallels the line and provides truck access to the facilities located along the line, and U.S. Highway 81 bisects the line at Chester. The primary and secondary highway network in the area of the line is in excellent condition overall and has the capacity to handle additional truck traffic, according to BNSF. Finally, BNSF has submitted letters from both shippers stating that they do not object to the proposed abandonment.

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.

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 reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will also foster sound economic conditions and encourage efficient management by relieving BNSF of the costs of owning, rehabilitating, and maintaining the line, and by allowing BNSF to apply its assets more productively elsewhere on its system [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be adversely affected.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power because the two shippers on the line support the proposed abandonment and apparently have viable transportation alternatives. Nevertheless, to ensure that Aurora Cooperative and AGP are informed of our action, we will require BNSF to serve a copy of this decision on all shippers within 5 days of the service date and certify to the Board that it has done so. Given our market power finding, we need not determine whether the proposed abandonment is limited in scope.

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

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 action. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) reviewed and investigated the record in this proceeding, and served an environmental assessment (EA) on June 7, 2004. Comments to the EA were requested by July 7, 2004.

In the EA, SEA notes that the National Geodetic Survey (NGS) has identified 23 geodetic station markers that may be affected by the proposed abandonment. Therefore, SEA recommends that a condition be imposed requiring BNSF to provide NGS with at least 90 days' notice prior to initiation of any salvage operations that may disturb or destroy the markers so that plans can be made for their relocation. Also, SEA states that the Nebraska Office of the U.S. Fish and Wildlife Service (Nebraska FWS) has expressed concerns about salvage activities taking place during the nesting season of migratory birds. Therefore, SEA recommends that a condition be imposed requiring BNSF to consult with Nebraska FWS prior to beginning salvage activities regarding measures that should be taken to avoid impacts to migratory birds, pursuant to the Migratory Bird Treaty Act. Finally, SEA states that, although the Nebraska State Historical Society (Nebraska SHPO) has indicated that no historic properties listed in or eligible for inclusion in the National Register of Historic Places would be affected by the proposed abandonment, there is always a possibility that previously unsuspected archaeological remains may be uncovered during the process of project construction. Therefore, SEA recommends that

BNSF contact the Nebraska SHPO immediately if archaeological remains are uncovered during the project activities.

No comments to the EA were filed. Accordingly, the conditions recommended by SEA in the EA will be imposed. The proposed abandonment, as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

SEA has indicated in its EA that the right-of-way may be suitable for other public use following abandonment. Public use requests were due no later than 20 days after publication of the notice of the petition in the Federal Register, or by May 18, 2004. No one has sought a public use condition, and none will be imposed.

It is ordered:

1. Under 49 U.S.C. 10502, an exemption from the prior approval requirements of 49 U.S.C. 10903 for the abandonment by BNSF of the above-described line is granted, subject to the employee protective conditions set forth in Oregon Short Line R. Co. – Abandonment – Goshen, 360 I.C.C. 91 (1979), and subject to the conditions that BNSF shall: (1) provide NGS with at least 90 days' notice prior to initiation of any salvage operations that may disturb or destroy any geodetic station markers so that plans can be made for their relocation; (2) consult with Nebraska FWS prior to beginning salvage activities regarding measures that should be taken to avoid impacts to migratory birds, pursuant to the Migratory Bird Treaty Act; and (3) contact the Nebraska SHPO immediately if archaeological remains are uncovered during the project activities.

2. BNSF is directed to serve a copy of this decision on Aurora Cooperative and AGP within 5 days after the service date of this decision and to certify to the Board that it has done so.

3. An offer of financial assistance (OFA) under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by August 6, 2004, 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 is currently set at \$1,100. See 49 CFR 1002.2(f)(25).

4. 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.”**

5. Provided no OFA has been received, this exemption will be effective August 26, 2004. Petitions to stay must be filed by August 11, 2004, and petitions to reopen must be filed by August 23, 2004.

6. 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 July 27, 2005, 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 Nober, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A. Williams
Secretary