

SURFACE TRANSPORTATION BOARD<sup>1</sup>

DECISION

Docket No. AB-6 (Sub-No. 370X)

BURLINGTON NORTHERN RAILROAD COMPANY--ABANDONMENT EXEMPTION--  
BETWEEN MESA AND BASIN CITY, FRANKLIN COUNTY, WA

Decided: January 13, 1997

By decision served and published in the Federal Register on February 29, 1996 (61 FR 7850), we granted Burlington Northern Railroad Company (BN) an exemption under 49 U.S.C. 10505 from the prior approval requirements of 49 U.S.C. 10903-04, to abandon its 11.20-mile line of railroad between milepost 0.00, near Mesa, and milepost 11.20, near Basin City, in Franklin County, WA, subject to an endangered species condition, an environmental condition, and standard labor protective conditions. The exemption became effective on March 30, 1996.

Petitions to reopen were filed by Eppich Grain, Inc. (Eppich) on March 10, 1996, and by Mr. Ivan Taylor on March 25, 1996<sup>2</sup> (collectively, petitioners). BN replied on May 10, 1996.<sup>3</sup>

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<sup>1</sup> The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10903. Therefore, this decision applies the law in effect prior to the ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

<sup>2</sup> Mr. Taylor had filed a protest to the abandonment exemption but it was received by the Board on March 7, 1996, after the Board had issued its decision granting the exemption. We will consider the protest along with the petition to reopen.

<sup>3</sup> BN's reply was submitted on May 10, 1996, after the 20-day period provided by 49 CFR 1115.3(e) for the filing of replies had elapsed. Because the lateness of the pleading did not delay the processing of this proceeding, and no party has been prejudiced, we will accept it for filing.

Mr. Taylor submitted a response to BN's reply on May 17, 1996, and BN submitted a follow-up verified statement on June 4, 1996, to which Mr. Taylor submitted a response on July 29, 1996. Generally, a reply to a reply is not permitted under our rules, at 49 CFR 1104.13(c), and the May 17, 1996 submission and the subsequent pleadings would be rejected. In this exemption proceeding, which is less formal than an application proceeding, we will waive the rule against the filing of a reply to a reply

(continued...)

Congressman Richard Hastings and State Senator Eugene A. Prince submitted letters in support of the petitions to reopen.

POSITION OF THE PARTIES

Eppich operates a soybean meal business in Basin City. It receives soybean meal from the Midwest and unloads two or three cars at its site every month. Eppich contends that its business is growing and states that its inbound traffic volume has increased from nine cars in 1991 to 30 cars in 1995. According to Eppich, it had agreed with BN not to protest the abandonment of this line if BN would find it another suitable railcar unloading site, but, it states, BN has not found one. Eppich asks the Board to reopen this proceeding, alleging that Eppich will go out of business if it does not have rail service. Eppich also expresses concern that its expensive railsiding and unloading equipment will become useless if the line is abandoned.

Mr. Taylor is a sugar beet grower in Basin City. He is one of 35 member-growers of the Columbia River Sugar Company (CRSC) and purports to represent the beet growers in the Basin City area. Mr. Taylor expresses concern that the abandonment will adversely affect the newly-developed sugar beet industry in the area. He states that the beet growers in this area currently transport beets by truck 30 miles to Bruce, WA, where the beets are unloaded onto rail cars and transported to California. As a result, he asserts, a considerable amount of fuel is wasted by both the beet growers and BN. He states that CRSC has indicated that the sugar beets could be loaded directly onto rail cars at Basin City if BN would leave its track in place, thereby reducing truck miles by at least 50 round-trip miles. Mr. Taylor indicates that in 1994, 47,000 tons of sugar beets were shipped from the Basin City area, and in 1995, 45,000 tons were shipped, representing approximately \$540,000 in gross revenues. He also states that it is likely that sugar beets would be shipped out of Basin City for a long time because of the opening of a new sugar beet plant located 80 miles north of Basin City near Scalley, WA, in the Moses Lake area. Mr. Taylor argues that the additional traffic would make the line profitable.

Mr. Taylor also states that CRSC currently has contracts with Holly Sugar of California and Amalgamated Sugar of Idaho. He states that Holly Sugar will help to construct and operate the new facility near Moses Lake and that Amalgamated Sugar's contract extends beyond the opening date of the new facility and can be renewed. Mr. Taylor admits that the beet growers in this area have not used the line during the previous two seasons, but states that this is because sugar beets have not been grown in this area for nearly 20 years. CRSC is new and, according to Mr. Taylor, has recently realized how critical freight costs are. He also states that CRSC has not had the time to locate and/or construct piling and loading equipment to permit use of the line. Mr. Taylor urges us to require BN to file a full abandonment application to seek authority to abandon this line.

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<sup>3</sup>(...continued)

and accept the pleadings in the interest of deciding the merits on as complete a record as possible. Waiver of the rule in this instance will not prejudice any party to the proceeding.

In reply, BN states that, in 1969, it invested substantial sums in the branch line by laying continuous welded 115-pound rail in hopes that the Columbia Basin farmland irrigation project and related agricultural development would generate healthy traffic volumes for the line. The anticipated traffic never developed.<sup>4</sup> BN states that neither the beet industry nor the community will suffer from the proposed abandonment because they have never relied on this line as an important artery to get products to market.

In the verified statement attached to BN's reply, Mr. Richard A. Batie, Manager of BN's Asset Rationalization Department, states that, in 1995, approximately 10,000 acres of sugar beets were grown in the Columbia Basin. Sugar beets average about 37 tons per acre, which amounts to 370,000 tons produced in the Columbia Basin. Mr. Batie points out that the 45,000 tons Mr. Taylor stated that the growers shipped in 1995 amounts to only 12.2% of the total sugar beets grown in this area. CRSC shipped from two locations, Sieler and Bruce, WA, using the Washington Central Railroad (WCR), instead of the Mesa to Basin City line.<sup>5</sup> Mr. Batie states that all the sugar beet traffic from the Basin City area has moved by means other than BN's Mesa to Basin City line and that the minimal amount of traffic at Basin City does not justify retaining this line. Mr. Batie also points out that the members of CRSC are compensated to deliver their beets to Bruce, where they may be loaded onto unit trains.<sup>6</sup>

Mr. Batie indicates that generally sugar beets move between October and mid-December, which is an extremely short shipping season. When the new plant opens near Scalley in 1998, it is expected that 25,000 acres of sugar beets will be grown in the Basin City area. He argues that the opening of the new facility should have no bearing on the current low traffic volume on the line. To the contrary, he asserts that the new factory will draw sugar beets grown in the Basin City area to the new plant and eliminate the need for outbound rail service from Basin City.

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<sup>4</sup> In 1993, the line incurred a net loss from operations of \$46,118.

<sup>5</sup> In Burlington Northern Santa Fe Corporation, BNSF Acquisition Corp., and Burlington Northern Railroad Company--Control--Washington Central Railroad Company, STB Finance Docket No. 32974 (STB served Oct. 25, 1996), BN's parent, BNSF, was authorized to acquire control of WCR. In Columbia Basin Railroad Company, Inc.--Exemption to Lease and Operate--Burlington Northern Railroad Co. and BNSF Acquisition, Inc., STB Finance Docket No. 33140 (STB served Dec. 13, 1996), Columbia Basin Railroad Company, Inc. was authorized to lease and operate the WCR lines in the vicinity of Sieler and Bruce contemporaneously with consummation of the transaction in STB Finance Docket No. 32974 on or after December 4, 1996.

<sup>6</sup> Mr. Taylor states that the beet growers are compensated only \$0.09 per ton/mile to haul their beets to Bruce, which amounts to about \$0.54 per ton, while their actual cost to haul the beets to Bruce is \$5.00 per ton. He also states that there is ample rail siding to allow the loading of unit trains at Basin City, but BN does not publish unit train rates for beet shipments from Basin City, but only single car class rates, which he asserts are too high for the transportation of sugar beets.

Mr. Batie states that Mr. Lynn Eppich, owner of petitioner Eppich, has been notified of an alternative unloading site for its soybean meal shipments, indicating that BN representatives have been in contact with Mr. Eppich and have determined that the shipments could be unloaded at BN's icing track, a team track, located in Pasco, WA. According to Mr. Batie, Mr. Eppich indicated that, as soon as he can inspect the site, he will inform BN if he is able and willing to use the alternate unloading site.

#### DISCUSSION AND CONCLUSIONS

The rail exemption procedures in 49 CFR 1121.4(g) incorporate the standards in 49 CFR 1115 and 1152.25(e) for reopening an abandonment exemption. Under these standards, a petition to reopen an abandonment exemption must state in detail whether there is material error, new evidence or substantially changed circumstances to warrant reopening a proceeding.

To warrant revocation of the exemption, in whole or in part, petitioners must show that regulation is necessary to carry out the rail transportation policy of 49 U.S.C. 10101a. Thus, the statutory standard for revoking an exemption is whether regulation is needed to carry out that policy. Under this standard, we evaluate revocation petitions to correct demonstrated abuses. The party seeking to revoke the exemption has the burden of proof, and a petition to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and regulation of the transaction is necessary. CSX Transp., Inc.-Aban.-In Randolph County, WV, 9 I.C.C.2d 447, 449 (1992).

Petitioners do not allege that our February 29, 1996 decision contained material error; nor do they set forth new evidence or demonstrate that circumstances have changed so significantly since we issued our decision that reopening of this exemption proceeding is warranted. Rather, petitioners base their requests for reopening on projections of future traffic that is expected to move over BN's 11.20-mile line and an allegation that BN has not found alternative rail service for Eppich.

Petitioner Taylor's traffic projections relate to the potential movement of sugar beets after the completion of a new sugar plant at Scalley in 1998. Although the new plant is likely to be accompanied by an increase in sugar beet production in the Basin City area, petitioners' projection that this would result in an increase in rail traffic is speculative. According to BN, the new plant is likely to reduce the need to ship beets by rail out of the Basin City area. In any event, until the new plant opens, traffic on the line will remain minimal and the line will be unprofitable to operate. Mere speculation about future traffic is not a sound basis upon which to deny or revoke an abandonment exemption. CSX Transportation, Inc.--Abandonment Exemption--in Webster County, Docket No. AB-55 (Sub-No. 413X) (ICC served May 29, 1992). Absent more specific indications of a likely increase in traffic on the line, BN should not be required to incur further losses from the operation of this line.

With regard to petitioner Eppich's concern that BN find it an alternative unloading site, BN states that, since we issued our February 29, 1996 decision, it has found such a site and that

Eppich has agreed to use it, subject to an inspection to determine the site's suitability. Eppich has not shown that our previous decision was made in error or that there is sufficient traffic available so that BN would not incur a loss operating the line.

Petitioners have not met their burden of showing that the revocation standard of section 10505 has been met so that an application proceeding under section 10903-04 would be warranted. Many abandonments are conducted under the exemption provisions of 49 U.S.C. 10505 (now 49 U.S.C. 10502). Under this section, we are authorized to relieve railroads of regulatory burdens to the extent that regulation is not necessary. Given the minimal amount of traffic on the line in recent years, which has resulted in an operating loss, BN's election to use the exemption procedure was appropriate. We affirm our previous findings that detailed scrutiny of the transaction is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a, and that the transaction is limited in scope and will not result in an abuse of market power by the railroad.

We conclude that petitioners have not presented new evidence; have not shown a change in circumstances or alleged material error to justify reopening this proceeding and revoking the exemption; nor have petitioners met their burden of showing that the revocation standard of section 10505 has been met so that an application proceeding would be warranted. We will deny the petitions to reopen this proceeding and to revoke the exemption.

This action will not significantly affect the quality of the human environment or the conservation of energy resources.

It is ordered:

1. BN's reply submitted on May 10, 1996, is accepted for filing.
2. Petitioner Taylor's response to BN's reply submitted on May 17, 1996, BN's follow-up verified statement submitted on June 4, 1996, and petitioner Taylor's further response submitted on July 29, 1996, are accepted for filing.
3. The petitions to reopen the proceeding and revoke the exemption are denied.
4. This decision is effective on the date of service.

By the Board, Chairman Morgan, Vice Chairman Owen, and Commissioner Simmons. Commissioner Simmons did not participate.

Vernon A. Williams  
Secretary