

ENTERED
Office of Proceedings
October 26, 2018
Part of
Public Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35982

**JACKSON COUNTY, MISSOURI
-ACQUISITION AND OPERATION EXEMPTION-
UNION PACIFIC RAILROAD COMPANY
VERIFIED NOTICE OF EXEMPTION
PURSUANT TO 48 C.F.R. § 1150.31, *Et. Seq.***

NOTICE OF ADDITIONAL AUTHORITY

***DEBORAH S. GROH
DJJHS ENTERPRISES, LLC
JHB & MEB ENTERPRISES, LLC
DAVID W. WELLS
DAWN R. WELLS
CURRENT PROPERTIES INVESTMENTS, LLC
NEPHRITE FUND 1, LLC***

Stewart, Wald & McCulley, LLC
Elizabeth A. McCulley
Thomas S. Stewart
2100 Central St., Suite 22
Kansas City, MO 64108
Tel: (816) 303-1500
Fax: (816) 527-8068
mcculley@swm.legal
stewart@swm.legal

Counsel for Plaintiffs

Dated: October 26, 2018

Please find additional authority in support of *Groh, et al.*'s Petition for Revocation which was filed on October 23, 2018. In FD33389, attached hereto as Exhibit A, a revocation of exemption was granted because the Land Conservancy of Seattle ("TLC") never intended to provide service over the line and intended to sell it to King County for a recreational trail.

Stewart, Wald & McCulley, LLC

By: /s/ Elizabeth A. McCulley

Elizabeth A. McCulley

Thomas S. Stewart

2100 Central St., Suite 22

Kansas City, MO 64108

Tel: (816) 303-1500

Fax: (816) 527-8068

mcculley@swm.legal

stewart@swm.legal

COUNSEL FOR PETITIONERS/LANDOWNERS

Certificate of Service

I certify that I have this day served copies of document upon all parties of record in this proceeding, by U.S. Mail this 26th day of October, 2018.

Brown, Sandra L.
Thompson Hine LLP
1919 M Street, Suite 700
Washington, DC 20036

Marks, Justin J.
1666 K Street, Nw Ste 500
Washington, DC 20006

Sheys, Kevin M.
Nossaman Llp
1666 K Street, N.W., Suite 500
Washington, DC 20006

/s/ Elizabeth A. McCulley

28913
EB

SERVICE DATE - LATE RELEASE MAY 13, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33389¹

THE LAND CONSERVANCY OF SEATTLE AND KING COUNTY
--ACQUISITION AND OPERATION EXEMPTION--
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

STB Docket No. AB-508X

THE LAND CONSERVANCY OF SEATTLE AND KING COUNTY
--ABANDONMENT EXEMPTION--IN KING COUNTY, WA

STB Docket No. AB-6 (Sub-No. 380X)

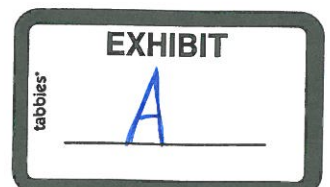
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
--ABANDONMENT EXEMPTION--IN KING COUNTY, WA

Decided: May 13, 1998

In this decision, we are denying petitions filed by The Land Conservancy of Seattle and King County (TLC) and The Burlington Northern and Santa Fe Railway Company (BNSF) for reconsideration of our decision served September 26, 1997, in the above-mentioned acquisition proceeding. There, we: (1) granted a petition by the United Transportation Union (UTU) for revocation of an exemption granted to TLC to acquire and operate a 12.45-mile rail line; and (2) ordered TLC immediately to reconvey the line to BNSF.² At the same time, we are granting a request to reinstate the abandonment exemption filed in The Land Conservancy of Seattle and King County — Abandonment Exemption — In King County, WA, STB Docket No. 508X, but substituting BNSF for TLC, in view of our determination in the acquisition proceeding that title was never appropriately passed to TLC. Because of the substitution, we will give the BNSF proceeding a new docket number, AB-6 (Sub-No. 380X). We will also grant the petition for abandonment exemption pursuant to 49 U.S.C. 10502, subject to standard employee protective conditions and an environmental condition, because it is clear from the record before us in these cases that regulation is not necessary to carry out the national transportation policy of 49 U.S.C. 10101. Moreover, the transaction is of limited scope and regulation is not necessary to protect shippers from the abuse of market power.

¹ These three proceedings are consolidated in this decision.

² As discussed below, the requirement for a reconveyance has been held in abeyance.



BACKGROUND

1. The Acquisition Exemption Proceeding.

On April 15, 1997, TLC, a noncarrier, filed a notice of exemption under 49 CFR 1150.31 to acquire and operate a rail line owned by BNSF in Finance Docket No. 33389. The line extends between milepost 7.30, near Redmond, and milepost 19.75, at Issaquah, in King County, WA. The exemption became effective on April 22, 1997, and the transaction was consummated on that date. Notice of the exemption was published on April 29, 1997 (62 FR 23291) and served on April 30, 1997.

As noted, in a decision served September 26, 1997, the Board granted UTU's petition for revocation of the exemption and ordered TLC immediately to reconvey the line to BNSF. The decision was effective on its service date. Thereafter, in a decision served October 22, 1997, the Chairman denied TLC's request to stay the September 26 decision because the decision had already gone into effect. However, to avoid disruption that could be caused by immediate enforcement of the Board's order to reconvey pending the consideration of administrative appeals, the Chairman ordered the reconveyance requirement held in abeyance pending resolution of the petitions to reconsider the September 26 decision.

TLC and BNSF filed their petitions for reconsideration on October 7 and 17, 1997, respectively.³ On October 27, 1997, The Redmond-Issaquah Railroad Preservation Association (RIRPA) filed a petition for leave to intervene and for leave to file a reply, accompanied by a reply to TLC's petition; on November 5, 1997, RIRPA filed a petition for leave to file a reply, accompanied by a reply to BNSF's petition. On October 28, 1997, The National Association of Reversionary Property Owners (NARPO) filed a reply to the petitions for reconsideration. On October 30, 1997, Cascade Bicycle Club (Cascade) filed a comment in support of the petitions for reconsideration. On November 5, 1997, UTU filed a reply in opposition to the petitions. On November 6, 1997, however, UTU filed a "Notice of Withdrawal of its Petitions to Revoke and Withdrawal of Opposition to Petitions to Reopen."

³ TLC's pleading is titled "Petition for Rehearing or, in the alternative, Petition for Exemption under §10502, Motion for Stay of Order to Reconvey Line, and Request for Clarification." (As noted, the Board already has disposed of the stay request.) BNSF's pleading is titled "Petition to Reopen." As the pleadings are appeals filed under 49 CFR 1115.3, they should and will be designated "Petitions for Reconsideration."

2. The Abandonment Exemption Proceeding.

In a decision served September 29, 1997, the Board dismissed TLC's abandonment exemption petition in Docket No. AB-508X. TLC subsequently filed a petition in that proceeding requesting the Board to rehear and reinstitute the proceeding and to hold the dismissal in abeyance pending action in the acquisition exemption proceeding. In the October 22 decision in the acquisition proceeding, the Chairman indicated that the Board would defer action on the request. Before Docket No. AB-508X was dismissed, the public was given notice and an opportunity to participate. No shippers or community interests opposed the abandonment request. Moreover, the Board's environmental staff conducted an appropriate environmental review. Thus, we have the information we need to reinstate and conclude the abandonment exemption proceeding at this point, although we will substitute BNSF for TLC, because, as discussed below, title was never appropriately passed to TLC, and we will give the BNSF proceeding a new docket number in light of the substitution.

PRELIMINARY MATTERS

UTU seeks to withdraw its petition to revoke, which is what had precipitated our examination of the acquisition transaction and our subsequent issuance of the decision revoking it. UTU also seeks to withdraw its reply in opposition to the petitions for reconsideration of the revocation decision. The union requests that we strike the latter pleading. In support of its requests, UTU indicates that BNSF now has agreed with the union to ensure protection of the two employees UTU believes are affected by the acquisition and abandonment exemption proceedings. The union indicates that this agreement has alleviated any concerns it has regarding labor protection and the transactions. UTU now supports reinstitution of the acquisition exemption and also supports favorable treatment of TLC's abandonment exemption petition.

UTU will be permitted to withdraw from the proceedings, and its reply to the petitions for reconsideration will be stricken. While UTU has changed its position regarding revocation of the acquisition exemption, its petition to revoke will remain in the record.

RIRPA requests leave to intervene and to file replies to the petitions for reconsideration. RIRPA states that it was formed for the purpose of acquiring the subject Redmond — Issaquah line for continued rail operations. RIRPA is a party to the abandonment exemption proceeding, in which it has filed a pleading in opposition to TLC's requested exemption from the provisions of 49 U.S.C. 10904 concerning offers of financial assistance (OFA). RIRPA wants to participate in the acquisition exemption proceeding to bring to the Board's attention its interest in acquiring the subject line for rail operations under section 10904, and to advance its position that the Board's September 1997 revocation decision in the acquisition case was in accordance with the statutory scheme.

RIRPA has demonstrated a legitimate interest in the acquisition proceeding. It therefore will be granted leave to intervene and to participate.

NARPO complains that, although it sent letters to the Board requesting to be placed on the service list and to be informed of decisions in the acquisition proceeding, TLC and BNSF have failed to serve it with copies of their pleadings seeking stay and reconsideration of the Board's revocation decision.⁴ NARPO contends that it was thus denied the opportunity to participate in the matter of the stay requests, and it seeks rescission of the October 22, 1997 acquisition decision.⁵

NARPO is confused regarding the difference between being a party of record and simply being included on a list for service of decisions. Being placed on the service list, as NARPO requested, did not make NARPO a party of record with a right to be served with pleadings and to participate in the proceeding. However, we note that the Board's Office of the Secretary and Office of Congressional and Public Services have now clarified the situation for NARPO, and NARPO has become a party of record in the acquisition proceeding.⁶

NARPO also alleges that BNSF, in its petition to reopen, deliberately falsified a document. Specifically, NARPO complains that, whereas BNSF submitted portions of its agreement for the transfer of the subject line to TLC, BNSF deleted the portion of a page that would have shown the amount that TLC agreed to pay for the line. NARPO has submitted the missing matter to which it refers and, in addition, material in the agreement concerning an Internal Revenue Service Form 8283 (Donee Acknowledgment Form). NARPO contends that BNSF might have withheld certain pages from its exhibit so as not to disclose a plan to gain a large charitable tax deduction by virtue of its sale of the line.

BNSF submitted portions of its transfer agreement intended to support its argument that the parties' agreement was drafted so as to require TLC to provide any rail service that might be

⁴ The Board subsequently provided NARPO with copies of decisions in the acquisition proceeding and the related abandonment exemption proceeding.

⁵ The request to rescind will be denied. Ordering the reconveyance requirement held in abeyance pending our decision here avoided disruption while we considered the petitions for reconsideration and replies.

⁶ All persons filing documents that they want to have treated as pleadings in a proceeding should comply with the Board's regulations at 49 CFR part 1104, including the provisions regarding identification, typographical requirements, copies, and service. NARPO, RIRPA, TLC, and BNSF have all submitted documents in this proceeding that appear to be letters for consideration by the Secretary rather than pleadings for consideration by the Board. They will be handled accordingly. The document submitted by Cascade contains a certificate of service and appears to have been intended as a pleading. It will be treated as such.

required on the line. BNSF was not required to divulge the sale price or the income tax consequences of the sale. Further, as NARPO has obtained and submitted the information that is of concern to it, no one has been prejudiced by the omission.

THE REVOCATION DECISION

In our September 26 decision in STB Finance Docket No. 33389, we considered evidence suggesting that TLC never intended to provide service over the line it had acquired on April 22, 1997. Specifically, we examined letters dated May 1 and May 5, 1997, and newspaper articles apparently published May 2, May 8, and June 25, 1997, that strongly suggested a pre-existing plan by TLC to “decommission” the line and sell it to King County, WA, for development of a hiking and biking trail. We further noted that, on June 11, 1997, less than 2 months after acquiring the line, TLC filed its petition for exemption to abandon it.⁷

Considering the record as a whole, we found that TLC never had any intention of providing rail service on the line. We found that, rather, TLC had put into effect a plan to convert the line to trail use as soon as possible following acquisition. We concluded, slip op. at 3, that TLC’s actions constituted “a misuse of our procedures, which envision that a party that acquires an active rail line does so to continue to provide rail service.” In the circumstances, in order to protect the integrity of our processes, we revoked the acquisition exemption and ordered TLC to reconvey the line to BNSF.

POSITIONS OF THE PARTIES IN THE ACQUISITION EXEMPTION CASE

In its petition for reconsideration, TLC argues that it fully complied with the formal requirements of the class exemption regulations. It asserts that section 1150.31 neither sets forth any particular intent or ability a party must have to provide rail service nor a minimum operating period. TLC adds that the regulations have no minimum capitalization or service requirements.

TLC claims that it was and is fully prepared and economically able to provide rail service. Petitioner indicates that, prior to acquiring the subject line, it contracted with an operator,⁸ on a stand-by basis, to operate over the line in the event there was a demand for rail service. Petitioner states that it has \$250,000 available to cover service requests and management functions on the

⁷ As discussed in the Preliminary Matters section, the petition embraced a request for exemption from the provisions of 49 U.S.C. 10904 concerning OFAs. The petition also embraced a request for the issuance of a notice of interim trail use or abandonment (NITU) under 16 U.S.C. 1247(d) and was accompanied by a “statement of willingness” filed by King County Department of Parks and Recreation under 49 CFR 1152.29. These latter facts, which certainly are not indicative of an intent to perform active rail service, were not discussed in our September 26 decision. We note them here.

⁸ The name of the prospective operator is Sammamish Transportation Company.

corridor. This amount assertedly is enough to enable TLC to provide rail service on an FRA-excepted track basis, which is the same status under which BNSF provided service prior to an embargo of the line.⁹ Petitioner indicates that, despite its readiness to provide service on demand, it has received only one tariff inquiry (from Lakeside Industries). According to TLC, although it promptly responded with a rate quote, including a quote from the connecting railroad (BNSF), the shipper never followed up. TLC adds that it hired a consulting firm to estimate the costs of rehabilitating the line, including sidings, in order to serve Lakeside.

TLC agrees that it must be prepared to provide rail service if it acquires a line under the Board's acquisition exemption regulations. However, it argues, if no service is currently requested, it is not inconsistent with TLC's common carrier obligation to endeavor to preserve the line for possible future rail reactivation under 16 U.S.C. 1247(d), the rail banking statute, and to use it as a trail in the meantime. Petitioner contends that this case is similar to the Board's decision in Roaring Fork Railroad Holding Authority--Acquisition and Operation Exemption--Southern Pacific Transportation Company, STB Finance Docket No. 33390 (STB served June 27, 1997) (Roaring Fork). In that case, a shipper sought stay and revocation of an acquisition exemption on the basis of allegations that the acquiring railroad (RFRHA) had neither the ability nor the intention to operate the line, and that the acquisition was, in essence, an unauthorized abandonment. The Board denied the requests, finding that the evidence was undisputed that RFRHA planned to preserve the line either through contract operation or, if there was no service demand, through rail banking. TLC claims that its intent here is the same as that of RFRHA, and that the Board should find, as it did in Roaring Fork, that the transaction falls squarely under the class exemption.

TLC argues further that, if the Board determines that the class exemption is not applicable, it should alternatively grant TLC an individual exemption under 49 U.S.C. 10502.¹⁰ In support, TLC addresses the statutory criteria and contends that the facts warrant a grant of such an individual exemption in that there is shipper support for the transaction, rail labor will not be harmed, and its purpose is to preserve the rail corridor.

TLC proposes a third option. To alleviate any concern that the transaction might have been part of a scheme to avoid the imposition of labor protective conditions, TLC proposes that BNSF

⁹ BNSF embargoed the line for safety reasons in August 1996 and no traffic moved over the line thereafter. As indicated in the September 26 decision, BNSF believed that the cost of restoring the line was substantial and unjustifiable. However, BNSF never sought abandonment or discontinuance authority with respect to the line.

¹⁰ Section 10502 requires the Board to exempt a transaction when we find that regulation is not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. 10101, and either (a) the transaction is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

retain trackage rights over the subject line. According to TLC, BNSF employees would be protected by the Board's imposition of conditions when BNSF discontinues those trackage rights.

In its petition, BNSF argues that, from the inception of the acquisition transaction, it took steps to assure that its purchaser would be in a position to resume rail service if necessary. BNSF indicates that TLC represented that it had the resources to discharge a common carrier obligation, and that it would put itself in a position to do so by contracting with an operator and repairing the line if service was requested. Petitioner points out that the parties' transfer agreement was drafted so as to expressly require TLC to provide any rail service that might be needed. BNSF adds that it had ascertained that the transfer was fully supported by King County, which represented that it would work with TLC. BNSF states that under these circumstances it was confident that, with the participation of the county, all legal requirements for continued service would be fulfilled.

BNSF avers that it was interested in transferring the line to a noncarrier in order to reduce the regulatory burdens of an unproductive asset and to rationalize its system. Petitioner states that it also was concerned that NARPO might seek to "obstruct" any abandonment/rail banking process respecting the line, so petitioner sought to transfer the line to a noncarrier that was willing and able not only to discharge a common carrier obligation but also to litigate with NARPO.¹¹ In BNSF's view, then, TLC's use of the class exemption was consistent with the RTP goal of reducing regulatory burdens. In this vein, BNSF avers that reconveyance would cost it some \$15.6 million in additional taxes, and it argues that public policy requires the Board to choose the course of action that minimizes the cost to carriers.

BNSF contends that there is another policy reason why the Board should allow the acquisition exemption to remain in effect. The railroad asserts that there are numerous cases where, as here, future demand for rail service on a particular line is in doubt. In such cases, petitioner argues, a sale to a party such as TLC, which is prepared to provide service to the extent required but is also prepared to go forward with rail banking if no demand materializes, is in the best interest of all parties. BNSF argues that the alternative compelled by the Board's revocation decision is abandonment by the selling railroad, which assures that service will not be continued in the near future regardless of potential shipper need.

BNSF supports the option of granting TLC an individual exemption. As does TLC, BNSF addresses the statutory criteria and concludes that such a grant is warranted. As another option,

¹¹ Prior litigation with NARPO in connection with BNSF's effort to discontinue service and rail bank its Terry Avenue Line in Seattle had gone all the way to the Supreme Court. Burlington Northern Railroad Company--Abandonment Exemption--In the Matter of Financial Assistance, (ICC Docket No. AB-6 (Sub-No. 357X), (decisions served Mar. 16, 1994, and Apr. 24, 1994), aff'd sub nom. Seattle Lake Shore & Eastern Railroad v. ICC, 55 F.3d 684 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 799 (1996).

BNSF suggests that the Board eliminate the reconveyance requirement and partially revoke the acquisition exemption for the purpose of imposing labor protective conditions to benefit those BNSF employees who may be affected by the transfer transaction or subsequent abandonment by TLC.¹² Petitioner asserts that, by imposing labor protective conditions as suggested, the Board can insure that the integrity of its processes is not undermined.

Cascade supports the petitions for reconsideration. It asserts that TLC was prepared to provide rail service on request and that, in the circumstances, it is not true that the class exemption was misused or that the transaction was a ruse. This commenter asserts that TLC appropriately moved to rail bank the corridor after the remaining shipper on the line confirmed no interest in service. Cascade believes that TLC and BNSF are attempting to preserve the rail corridor intact in accordance with governing law.¹³

RIRPA replies that representations regarding TLC's willingness to respond to service requests ring hollow. RIRPA asserts that TLC assured itself before the acquisition that shippers who were active on the line before the embargo would not request service. When there was an unexpected service request by Lakeside, RIRPA claims, TLC and BNSF quoted rates "so high as to assure" that no service ever would have to be provided. RIRPA contends that there never was any doubt that TLC's plan was to make the line available to King County for trail use.

RIRPA asserts that BNSF's stated intention to avoid litigation over an OFA clearly is no justification for BNSF's actions in this proceeding. RIRPA asserts that it has a statutory right to file an OFA under section 10904. RIRPA contends that BNSF is strongly motivated to avoid an OFA because a sale of the line for continued rail use would jeopardize the \$15.6 million in tax savings the railroad realized as a result of its donation of most of the alleged \$41.7 million market value of the line to TLC. Under OFA procedures, RIRPA notes, BNSF would have to justify its alleged market value of the line. RIRPA believes that BNSF lacks merchantable title to most of the involved real estate, and that the fair market value of BNSF's property is a very small fraction of what the railroad claims in tax savings.

RIRPA further argues that the Board's revocation decision is not unfair to BNSF, but merely makes BNSF comply with the settled statutory scheme. RIRPA contends that it is well settled that OFAs take precedence over rail banking/trail use, and that it is BNSF's circumvention of

¹² BNSF also consents to the imposition of labor conditions in the event of a grant of an individual exemption.

¹³ Cascade attaches letters from the State of Washington and King County supporting the efforts of BNSF and TLC.

abandonment and the OFA process in favor of conveyance for rail banking/trail use that contravenes the statutory scheme.¹⁴

RIRPA asserts that, in view of TLC's lack of intent to reinstitute rail service on the line, TLC's proposed petition for an acquisition exemption would be no less a misuse of Board procedures than TLC's use of the class exemption. RIRPA further asserts that TLC's suggestion that the Board partially revoke the exemption in order to impose labor protective conditions misses the point. RIRPA avers that the actions of BNSF and TLC are objectionable because they abused Board processes, not simply because they evaded the imposition of labor protective conditions.

NARPO maintains that it is clear that TLC never intended to conduct rail operations on the subject line, and asserts that the provisions of the transfer agreement do not negate the facts that have come to light since the April 1997 acquisition. NARPO points out that TLC did not hire a consultant to determine rehabilitation costs until July 1997, some three months after the acquisition. NARPO argues that a prudent railroad that really intended to operate would have obtained the figures before spending \$1.5 million for a railroad right-of-way.

NARPO next points out that BNSF quoted Lakeside a rate of \$1,361 per car of rock aggregate for the 80-mile trip from Chehalis to Redmond, WA, and that TLC quoted it a rate of \$1,400 for the last 12 miles from Redmond to Issaquah. NARPO considers the quotes "outrageous" and so high as to discourage the potential shipper.

NARPO argues that another indicium of TLC's intent never to operate the line is its request for exemption from the OFA procedures in the abandonment exemption proceeding. NARPO notes that this is a strong indication of TLC's intent to convert the line to a nonrail use.

NARPO asks why BNSF could not have filed for an abandonment exemption itself, with no more effort than that expended in selling the line to TLC. In NARPO's view, the answer is found in an examination of BNSF's "charitable tax donation scheme." BNSF allegedly has engaged in tax law machinations to realize substantial tax savings by virtue of the involved transaction. Finally, regarding petitioners' argument that they complied with the class exemption regulations, and their offer to accept labor protective conditions, NARPO asserts that they are missing the point: the concern here is that TLC never had any intention to operate a railroad.

DISCUSSION AND CONCLUSIONS

A. The Petitions for Reconsideration in the Acquisition Proceeding. We will deny the requests for reconsideration. In our September 26 decision revoking the acquisition exemption, we

¹⁴ In support of its argument, RIRPA cites Rail Abandonments--Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 608 (1986).

found that the facts supported the conclusion that TLC never had any intention of continuing rail service on the subject line. We stated that TLC had put into effect a plan to convert the line to trail use as soon as possible following its acquisition of the line and that where, as here, an acquiring noncarrier initiates abandonment proceedings within days after consummating the acquisition of a line and there are no extenuating circumstances, our processes are being abused. Petitioners have not demonstrated that our findings constituted material error warranting reconsideration of our prior decision.¹⁵

The fact that BNSF and UTU have arrived at a settlement that, as we understand it, provides labor protection for the employees working on the line as if BNSF had sought to abandon the line eliminates one of our objections to the procedure employed here. However, other objections remain, which are discussed below.

TLC would have us find that compliance with “the letter” of section 1150.31 is sufficient to qualify a noncarrier for the exemption. TLC correctly observes that our regulations do not contain any provisions regarding intent. But that does not mean that we should ignore the purpose of the class exemption regulations, as petitioner would have us do. As we stated in the September 26 decision, slip op. at 3, “[t]he policy underlying the governing acquisition exemption procedures is to support the continued operation of rail lines in lieu of abandoning them.” In the circumstances of this proceeding, TLC’s filing for abandonment less than 2 months after acquiring a line under the class exemption procedures contravenes that policy.

Roaring Fork does not support TLC’s position. There, the facts supported a finding that the railroad’s intent was to provide rail service, later if not sooner. Here, the facts indicate that TLC intended to build a trail as soon as possible following its acquisition of the line.

TLC’s protestations that it was and is prepared to provide rail service are unconvincing. A carrier that actually intended to provide service would not wait to hire a consultant to calculate rehabilitation costs until after the railroad had acquired the line and had filed for an abandonment exemption and a request for a NITU to permit interim trail use/rail banking under 16 U.S.C. 1247(d) had been made. TLC has offered no credible explanation as to why, if it was prepared to provide service, it took action to abandon the line almost immediately after acquiring it. TLC asserts that no demand for service developed. But TLC gave it no chance to develop. The petition for exemption from the OFA procedures, the request for issuance of a NITU, and King County’s “statement of willingness” in the abandonment exemption proceeding support the inescapable conclusion that the acquisition was merely intended as a step toward converting what had once been an active rail line into a trail. We will not allow our processes to be manipulated in this manner. See Conrail v. ICC, 29 F.3d 706 (D.C. Cir. 1984) (Conrail) (ICC can order abandonment against

¹⁵ Petitioners have made no attempt to show that our prior decision should be changed due to new evidence or changed circumstances.

wishes of the railroad should abandonment be an accomplished fact despite railroad's protestations of intent to provide rail service). The fact that interim trail use/rail banking would preserve this line for reactivation does not mean that we should allow our class exemption process to be used where TLC, from the beginning, sought to use the property as a trail and for rail banking, not for active rail service. See Conrail, 29 F.3d at 712-13.

BNSF's assertions that it believed TLC would comply with all legal requirements, and that the parties' transfer agreement was drafted so as to expressly require that TLC would provide any service that might be required on the line, do not refute our conclusions regarding TLC's intent. See, e.g., Conrail. And BNSF's arguments regarding policy goals seem at best self-serving. From all appearances, TLC and BNSF have attempted to manipulate our class exemption procedures for their own benefit. They cannot now be heard to complain that they will suffer some loss or inconvenience by virtue of our looking beyond the formal requirements of our class exemption regulations and considering the purpose of the regulations, which is to assure orderly and expeditious processing of notices by noncarriers to acquire and operate rail lines.

Finally, we reject petitioners' argument that we should consider individually exempting the acquisition transaction under section 10502. The request would have us ignore the basis for the revocation decision — the finding that TLC planned to convert the line to interim trail use/rail banking rather than to operate it and that TLC misused our procedures to further its plan. The use of an individual acquisition exemption procedure to accomplish petitioners' goal would be no less objectionable than the use of the class exemption procedures.

In sum, we conclude that petitioners have failed to establish any basis for reconsideration of our prior decision in the acquisition exemption proceeding. Accordingly, we will deny their petitions seeking such relief. As a result, title was never appropriately passed to TLC. However, given all the circumstances regarding this matter, we will not at this time order TLC to reconvey the subject line to BNSF. Rather, consistent with our view of the public interest as it relates to the future use of the subject line, we will attempt to give effect to the intent of the parties to the transaction (TLC and BNSF) under our procedures. As discussed in the next section, our perception of how best to accommodate the public interest in view of what has taken place, while at the same time protecting our processes, is to reinstate the abandonment exemption proceeding filed by TLC involving this line, substitute BNSF for TLC (because title was never properly passed to TLC), give the BNSF proceeding a new docket number in light of the substitution, and determine, based on the evidence already before us, whether the criteria for an abandonment exemption have been met.¹⁶

¹⁶ No one will be prejudiced by this approach. The public already has been given notice and an opportunity to participate in Docket No. AB-508X. No shippers or community interests opposed the abandonment exemption request. Moreover, inasmuch as abandonment authority is permissive, BNSF need not exercise the abandonment exemption we will grant if for some reason BNSF wants

(continued...)

B. The Abandonment Exemption Proceedings. Under 49 U.S.C. 10502, we must exempt a transaction when we find that regulation is not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. 10101 and either (a) the transaction is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power. As discussed below, these statutory criteria are met in this case. Detailed scrutiny of the abandonment of this 12.45-mile line is not necessary to carry out the national transportation policy. An exemption would minimize the unnecessary expenses associated with the filing of a formal abandonment application, expedite regulatory decisions, and reduce regulatory barriers to entry. 49 U.S.C. 10101(2) and (7). By abandoning the line, BNSF will be able to avoid the significant rehabilitation and maintenance costs necessary on the line, and to apply its assets more productively elsewhere.

There is ample evidence in these consolidated proceedings to show that BNSF intends permanently to cease operating over this line. As noted, BNSF embargoed the line for safety reasons in August 1996, and no traffic has moved over it since that time. BNSF believes that the cost of restoring the line is substantial and unjustifiable. A consultant's study appended to TLCs' petition for reconsideration of our acquisition exemption decision estimates that the cost to rehabilitate the line to Federal Railroad Administration (FRA) Class 1 track condition for 3 years with moderate maintenance would be approximately \$665,000. This shows that a substantial amount of restoration would be required to make the line operable.

Also, appended to TLC's petition for reconsideration is a letter from Darigold, the sole shipper on the line in recent years.¹⁷ Darigold not only does not oppose abandonment, it supports termination of service on the line. We also have been given no information to suggest that prospects for anything more than de minimis traffic on the line now or in the future exists-- certainly not enough to cover rehabilitation, maintenance, and operating costs. In addition, it is apparent that the community would not be adversely affected, as King County has supported TLC's efforts to abandon the subject line. In short, granting this exemption will foster sound economic conditions and encourage efficient management by permitting the rationalization of a redundant rail line. 49 U.S.C. 10101(3), (5), and (9).

The proposed transaction also is of limited scope, and regulation is not necessary to protect shippers from an abuse of market power. The line totals only some 12.45 miles. In the past 3 years there have been only two shippers on the line, and only one has averaged more than a handful of

¹⁶(...continued)

or intends to provide rail service on this line. BNSF also has indicated that it does not object to the imposition of labor protective conditions on the acquisition. We assume it will have no problems with the imposition of labor protection here. Finally, should BNSF decide to exercise the abandonment exemption and the OFA process does not result in the sale of the line, reconveyance of the line would not appear to be necessary.

¹⁷ Another entity received 7 carloads in 1994 and 1995 but none in 1996.

cars. Darigold, the major shipper, supports the termination of service, and the other shipper has indicated no opposition.

Labor protection. In granting an abandonment exemption, we must ensure that affected employees are protected. We have found that the conditions imposed in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979), satisfy the statutory requirements. Accordingly, we will impose the Oregon Short Line conditions here.

Environmental issues. The Board is required to consider the environmental and energy impacts of an abandonment. In Docket No. AB-508X, TLC submitted an environmental report and notified the appropriate Federal, state and local agencies of the opportunity to submit information concerning energy and environmental impacts of its proposed abandonment. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) examined the environmental report, verified the information in it, and analyzed the probable effects of the proposed action on the quality of the human environment. SEA served an environmental assessment (EA) on August 11, 1997, and requested comments. Following the receipt of comments, SEA recommended that the following condition be imposed on any grant of abandonment authority: The Land Conservancy and King County shall consult with the National Geodetic Survey and provide it with 90 days' notice prior to disturbing or destroying any geodetic marker. SEA concluded that, as conditioned, the proposed abandonment would not significantly affect the quality of the human environment.

We agree with SEA's analysis and will adopt SEA's conclusions in this proceeding and impose the environmental condition SEA recommended.

Other matters. Assuming that BNSF decides to exercise the abandonment exemption authority granted here, any person desiring rail service to be continued will have the opportunity to file an OFA under section 10904 and the Board's regulations at CFR 1152.27(c)(1).¹⁸ However, it should be noted that the facts that caused us to find in the acquisition exemption proceeding that TLC never had any intention of providing rail service on this line make it highly unlikely that any future acquisition proceeding involving this line, whether under 49 U.S.C. 10904 or 49 U.S.C. 10902, would survive review by us.

The offer of financial assistance process envisions that a party that acquires a rail line under 49 U.S.C. 10904 continue to provide rail service. Where that is not the case, we will not allow our jurisdiction to shield a railroad, or any other party seeking relief before us, from the legitimate processes of Federal, state, or local law. See Modern Handcraft, Inc.--Aban., 363 I.C.C. 969 (1981) (Modern Handcraft); Kansas City Pub. Ser. Frgt. Operation--Exempt--Aban., 7 I.C.C.2d 216, 224-

¹⁸ TLC's request that we grant an exemption from 49 U.S.C. 10904 is denied. We indicate below, however, the skepticism with which we will view any OFA that may be filed. The request for an exemption from 49 U.S.C. 10905 also is denied.

226 (1990); and Chelsea Property Owners--Aban.--The Consol. R. Corp., 8 I.C.C.2d 773, 778 (1992), aff'd sub nom. Conrail.

Given the circumstances surrounding this case, we advise the public and all the parties that have participated in these proceedings that we intend to carefully review the substance as well as the form of any OFA that should be filed involving this line. Specifically, because the information now before us shows that this line is not currently being used for rail service and that there is no apparent demand for rail service, any entity filing an OFA should be prepared to submit not only evidence of its financial responsibility, but also evidence of a public need for continued rail service. Similarly, anyone challenging an OFA should be prepared to address why the OFA is not bona fide. We will not tolerate abuse of the OFA procedures either by proponents or opponents of an OFA.

Finally, all interested persons should be aware that in the abandonment exemption proceeding which we have reinstated, SEA determined that following abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use. Any request for a public use condition under 49 CFR 1152.28 or for trail use/rail banking under 49 CFR 1152.29 will be due no later than **[20 days from service date]**. Each trail use request must be accompanied by a \$150 filing fee. See 49 CFR 1002.2(f)(27).

We find:

A. In STB Finance Docket No. 33389:

1. The petitions for reconsideration are denied.
2. The requirement that TLC reconvey the subject line to BNSF is held in abeyance.
3. This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

B. In STB Docket No. AB-508X and STB Docket No. AB-6 (Sub-No. 380X):

1. The abandonment exemption proceeding is reinstated.
2. BNSF is substituted for TLC, and the abandonment exemption is granted, subject to (a) the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979), and (b) the condition that BNSF shall consult with the National Geodetic Survey and provide it with 90 days' notice prior to disturbing or destroying any geodetic marker.
3. Abandonment of the line will not have a serious, adverse impact on shippers and/or rural and community development.

4. The right-of-way may be suitable for other public purposes.
5. As conditioned, this action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

A. In STB Finance Docket No. 33389:

1. UTU is granted leave to withdraw from this proceeding, and its reply to the petitions to reopen, filed November 5, 1997, is stricken.
2. RIRPA is granted leave to intervene and to participate in this proceeding.
3. The petitions for reconsideration are denied.
4. The requirement that TLC reconvey the subject line to BNSF is held in abeyance.

B. In STB Docket No. AB-508X and STB Docket No. AB-6 (Sub-No. 380X):

1. BNSF is granted an exemption to abandon the above-described 12.45-mile line subject to the conditions specified above.
2. The petitions for exemption from 49 U.S.C. 10904 and 10905 are denied.
3. By May 26, 1998, BNSF must notify the Board whether it is going to exercise its abandonment authority. Also, BNSF must, within 5 days of the service date of this decision, serve a copy of the decision on the parties to these proceedings and on all shippers who have used the line in the last 5 years, and certify to the Board that it has done so.
4. Requests for a public use condition under 49 U.S.C. 10905 (49 CFR 1152.28) or for a trails use condition under 16 U.S.C. 1247(d) (49 CFR 1152.29) must be filed by June 2, 1998.
5. BNSF must promptly provide interested persons the information they require in order to formulate an OFA to acquire or subsidize the subject line.
6. An OFA to allow rail service to continue must be received by BNSF and the Board by June 2, 1998, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(C). Each OFA must be accompanied by the \$1000 filing fee. See 49 CFR 1002.(f)(25). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1).

STB Finance Docket No. 33389, et al.

7. OFAs and related correspondence to the Board must refer to STB Docket No. AB-6 (Sub-No. 380X). The following notation must be typed in bold face on the lower left-hand corner of the envelope: **“Office of Proceedings, AB-OFA.”**

C. In all proceedings:

1. These proceedings are consolidated.
2. This decision will be effective 30 days after its service date.

By the Board, Chairman Morgan, Vice Chairman Owen.

Vernon A. Williams
Secretary