

SERVICE DATE – NOVEMBER 27, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35068

SOO LINE RAILROAD COMPANY D/B/A CANADIAN PACIFIC RAILWAY—
ACQUISITION AND OPERATION EXEMPTION—BNSF RAILWAY COMPANY

Digest:¹ This decision orders the parties to participate in Board-sponsored mediation.

Decided: November 26, 2019

On December 21, 2018, New Century Ag (NCA) filed a petition to reopen this proceeding or, in the alternative, to revoke under 49 U.S.C. § 10502 the exemption authorizing Soo Line Railroad Company d/b/a Canadian Pacific Railway (CP) to acquire and operate the property interests of BNSF Railway Company (BNSF) in 35.26 miles of rail lines jointly owned by CP and BNSF and a contiguous 9.96-mile rail line solely owned by BNSF. By decision served on March 19, 2019, a proceeding was instituted under 49 U.S.C. § 10502(d).

By decision served April 22, 2019, the Board, among other things, requested that the parties indicate whether they were interested in participating in Board-sponsored mediation. All three expressed willingness to engage in further conversation, but CP objected to including BNSF, while NCA objected to *excluding* BNSF. Since that time, the parties have submitted additional filings. On August 20, 2019, the Board held an oral argument, during which the parties discussed their respective arguments and evidence and responded to questions from the Board. In particular, NCA and CP disagree on many points, including the level of service NCA is entitled to receive, the impact of representations made by the parties, and the appropriateness of relief.²

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² In response to a question at oral argument regarding the relief NCA seeks, counsel for NCA stated that NCA is “not trying to undo [the transaction], unless it’s necessary;” rather, NCA would like the Board to “simply enforce the exemption as it was granted.” (Oral Arg. Tr. 17-19.) Counsel for CP, however, stated that the relief NCA is requesting is “very different” than the terms of the 2007 transaction, which contemplated CP providing haulage service for existing BNSF traffic on existing CP trains. (Id. at 62.)

After considering the record and the additional information provided at oral argument, the Board believes this proceeding raises important and complex issues, and that the parties, rather than the Board, are better suited to resolve the commercial issues underlying this case. The Board favors the resolution of disputes through mediation in lieu of formal Board proceedings whenever possible. 49 C.F.R. § 1109.1. The Board will order NCA, CP, and BNSF to engage in Board-sponsored mediation pursuant to 49 C.F.R. § 1109.2(a)(1). While the parties are encouraged to work out as many issues as possible, the scope of the mediation will not, under 49 C.F.R. § 1109.1, encompass any grant, denial, stay, or revocation of regulatory authority.

The Chairman will soon appoint one or more mediators pursuant to 49 C.F.R. § 1109.3(a). Once appointed, the mediator or mediators will contact the parties to discuss ground rules and the time and location of any meetings. At least one principal of each party, who has authority to commit that party, shall participate in the mediation and be present at any session at which the mediator or mediators request(s) that the principal be present. The mediation period shall be 30 days, beginning on the date of the first mediation session. 49 C.F.R. § 1109.3(b). The parties may request to extend mediation by mutual written requests of all parties to the mediation proceeding. Id. The mediator or mediators are instructed to inform the Board when mediation has ended, with or without a resolution.

It is ordered:

1. NCA, CP, and BNSF are directed to engage in mediation, as discussed above.
2. This decision is effective on its service date.

By the Board, Board Member Begeman, Fuchs, and Oberman.