

SERVICE DATE – FEBRUARY 2, 2022

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36560

BNSF RAILWAY COMPANY—LEASE EXEMPTION—
UNION PACIFIC RAILROAD COMPANY

Digest:¹ This decision permits BNSF Railway Company to lease from Union Pacific Railroad Company an approximately 25-mile rail line in Colorado.

Decided: January 25, 2022

On November 9, 2021, BNSF Railway Company (BNSF) filed a petition under 49 U.S.C. § 10502 seeking exemption from the prior approval requirements of 49 U.S.C. §§ 11323-25 for BNSF to lease from Union Pacific Railroad Company (UP) approximately 25 miles of rail line extending from Sterling, Colo., near UP milepost 56.71, to Union, Colo., near UP milepost 81.1, on UP's Julesburg Subdivision (the Line).²

The petition explains that BNSF and its predecessors have operated over the Line since 1900, and that, concurrently with the petition, BNSF filed a verified notice of exemption pursuant to 49 C.F.R. § 1180.2(d)(7) pertaining to a trackage rights agreement to supersede the agreement that had been in effect since 1951. (Pet. 2.)³ According to the petition, BNSF and UP have agreed to enter into a lease that would modify certain roles and responsibilities set forth in the new trackage rights agreement; in particular, the lease would “allow BNSF to occupy UP's property for the purposes of maintenance, construction, repair, and renewal of the track and

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 Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

² An executed, redacted version of the lease agreement was filed with the petition for exemption. An unredacted version was submitted to the Board under seal along with a motion for protective order, which was granted by decision served on November 24, 2021.

³ Notice of the trackage rights exemption was published in the Federal Register on November 24, 2021 (86 Fed. Reg. 67,111), and the exemption took effect on December 9, 2021. See BNSF Ry.—Trackage Rts. Exemption—Union Pac. R.R., FD 36561 (STB served Nov. 24, 2021).

appurtenant structures and facilities on the Line.” (Pet. 2.)⁴ BNSF states that by permitting maintenance responsibilities to shift to BNSF, the sole user of the Line, the lease will streamline maintenance activity and produce more efficient rail operations. (Pet. 2.) According to BNSF, the lease transaction will have no adverse impact on commercial or operational access to the Line. (*Id.* at 5; *see also id.* at 6-7 (stating that the lease “is simply intended to produce more efficient rail operations by streamlining the Line’s maintenance activities” and “will have no adverse impact on the national, regional, or local rail industry”).)⁵

BNSF asserts that the Board has previously exempted similar lease agreements from the prior approval requirements of §§ 11323-25 pursuant to § 10502, and that the Board should grant this petition and exempt the lease for the same reasons. (Pet. 3.)

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 11323(a)(2), prior Board approval is required for a rail carrier to lease the property of another rail carrier. Under 49 U.S.C. § 10502, however, the Board must exempt a transaction or service from regulation when it finds that: (1) 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 needed to protect shippers from the abuse of market power.

Detailed scrutiny of the proposed transaction through an application for review and approval under 49 U.S.C. §§ 11323-25 is not necessary here to carry out the rail transportation policy. The proposed transaction would simply permit maintenance responsibilities for the Line to shift to BNSF, the sole user of the Line. As described in the petition, the lease is intended to streamline maintenance activity and would produce more efficient rail operations over the Line with no adverse competitive impacts. Therefore, the proposed transaction would promote a safe and efficient rail transportation system, (49 U.S.C. § 10101(3)), foster sound economic conditions in transportation and ensure effective competition, (49 U.S.C. § 10101(5)), encourage honest and efficient management, (49 U.S.C. § 10101(9)), and promote energy conservation, (49 U.S.C. § 10101(14)). Further, an exemption from the application process would expedite regulatory action, (49 U.S.C. § 10101(2)), and reduce regulatory barriers to entry and exit, (49 U.S.C. § 10101(7)). Other aspects of the rail transportation policy would not be adversely affected.

⁴ BNSF’s reference to “construction” is in connection with the planned repair and maintenance of the existing Line. (*See* Pet. 2.) Therefore, the Board does not construe that reference as involving any new line of railroad for which construction authority would be needed pursuant to 49 U.S.C. § 10901, and this decision does not grant any such authority.

⁵ Pursuant to 49 C.F.R. § 1121.3(d), BNSF certifies that the lease does not contain a provision or agreement that may limit future interchange with a third-party connecting carrier. (Pet. 7-8.)

Regulation of the proposed transaction is also not necessary to protect shippers from the abuse of market power.⁶ Nothing in the record indicates that any shipper would lose an existing rail service option as a result of the proposed lease transaction. According to the petition, the transaction will have no adverse impact on commercial or operational access to the Line. (See Pet. 5 (noting that the lease agreement specifically states that nothing contained in the lease would “amend, change or supersede the commercial access . . . terms as provided for in the Trackage Rights Agreement”).) BNSF states that it will continue to provide common carrier service to shippers over the Line and that there will be no material change in the service provided to shippers, because the lease simply shifts the Line’s maintenance responsibilities to BNSF, the sole user of the Line. (*Id.* at 6.) Indeed, the lease transaction should benefit shippers by producing more efficient rail operations by streamlining the Line’s maintenance activities. Moreover, no shippers or other parties have filed any objections to the proposed transaction.

Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a carrier of its statutory obligation to protect the interests of employees. Accordingly, as a condition to granting this exemption, the Board will impose the standard employee protective conditions in Norfolk & Western Railway—Trackage Rights—Burlington Northern, Inc., 354 I.C.C. 605 (1978), as modified in Mendocino Coast Railway—Lease & Operate—California Western Railroad, 360 I.C.C. 653 (1980).

The proposed lease is exempt from both the environmental reporting requirements under 49 C.F.R. § 1105.6(c) and the historic reporting requirements under 49 C.F.R. § 1105.8(b).

It is ordered:

1. Under 49 U.S.C. § 10502, the Board exempts from the prior approval requirements of 49 U.S.C. §§ 11323-25 BNSF’s lease of the Line, subject to the employee protective conditions in Norfolk & Western Railway—Trackage Rights—Burlington Northern, Inc., 354 I.C.C. 605 (1978), as modified in Mendocino Coast Railway—Lease & Operate—California Western Railroad, 360 I.C.C. 653 (1980).
2. Notice of the exemption will be published in the Federal Register on February 2, 2022.
3. The exemption will become effective on March 4, 2022.
4. Petitions to stay must be filed by February 14, 2022.
5. Petitions for reconsideration and petitions to reopen must be filed by February 22, 2022.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.

⁶ Because the Board concludes that regulation is not needed to protect shippers from the abuse of market power, it is unnecessary to determine whether the transaction is limited in scope. See 49 U.S.C. § 10502(a).