

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 New Century Ag has filed a petition to reopen or, in the alternative, revoke an exemption that allowed Soo Line Railroad Company d/b/a Canadian Pacific Railway to acquire and operate rail lines on which New Century Ag is located. The Board will hold the proceeding in abeyance to allow the parties to consider alternative options for relief.

Decided: April 22, 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).²

As discussed below, the allegations in NCA's petition regarding downgraded service and loss of competitive options may be more appropriately addressed under the Board's competitive access regulations, 49 C.F.R. § 1144.2, or other statutory provisions addressing service issues. Accordingly, the Board will hold the proceeding in abeyance and direct NCA to indicate whether it wishes to instead pursue alternative relief in a separate docket. The Board also requests that the parties inform the Board if they are interested in participating in Board-sponsored mediation.

BACKGROUND

By decision served on September 7, 2007, the Board granted the petition of CP and BNSF to allow CP to acquire full ownership of 35.26 miles of rail lines (the Joint Line) consisting of: (1) a 32.54-mile rail line located between BNSF milepost 89.5 at Crosby, N.D., and BNSF milepost 56.96 at Lignite Junction, N.D.; (2) the 1.16-mile connecting track located

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 By decision served on the same day, NCA's motion for protective order was granted.

between CP milepost 549.64, at Rival, N.D., and CP milepost 550.8, at Lignite Junction; (3) the 1.07-mile connecting track located between BNSF milepost 64.5, at Kincaid, N.D., and CP milepost 558.28, at Columbus, N.D.; and (4) the 0.49-mile connecting track at Crosby extending from CP milepost 582.35 to the original CP main line extending west to Whitetail, Mont. Soo Line R.R.—Acquis. & Operation Exemption—BNSF Ry. (2007 Decision), FD 35068, slip op. at 3 (STB served Sept. 7, 2007). The 2007 Decision also authorized CP to acquire a 9.96-mile rail line located between milepost 56.96, at Lignite Junction, and milepost 47.0, near Lignite (the Joint Line and this 9.96-mile rail line are collectively referred to as the Conveyed Lines).

In granting the petition for exemption, the 2007 Decision stated that there would “be no loss of rail competition.” 2007 Decision, FD 35068, slip op. at 4. It stated that CP would continue to operate as it was at the time of the decision, and that BNSF, through a Haulage Service Agreement with CP (Haulage Agreement), would retain the right to serve all customers on the Conveyed Lines. Id. The decision also explained that a short-line carrier, Dakota, Missouri Valley and Western Railroad, Inc. (DMVW), would assume from BNSF maintenance responsibilities for the Conveyed Lines, which suffered frequent flooding, in order to make maintenance more efficient and economical. Id. The Board noted that there were four rail shippers located on the Conveyed Lines, one of which was NCA, a co-operative with facilities at Crosby and Noonan, N.D. The transaction was supported by NCA and other shippers with facilities located on the Conveyed Lines. Id. at 2.

NCA’s petition to reopen or revoke the exemption asserts that, since at least 2014, representations made by CP and BNSF that granting their 2007 petition would preserve competitive rail service have not been realized. (See Pet. 8.) NCA claims that rail service to NCA has been “seriously degraded by CP’s refusal to let BNSF provide badly needed rail service to NCA,” and that these service problems “threaten the viability of both the NCA and its farmer members.” (Id. at 3.) In particular, NCA asserts that, in 2014, CP began to impose “arbitrary limitations” on the number of cars it would accept from BNSF for delivery to NCA and, despite CP’s inability to provide a second unit train for NCA’s use, CP has refused to accept any BNSF unit trains in interchange. (Id. at 8-10, 15.) NCA alleges that the results in terms of market share are “striking,” as BNSF has “gone from having an equal or even a majority” share of NCA’s outbound grain traffic during the early part of the pre- and post-2007 exemption years to a “minor role,” and that this change is not due to any pricing or service advantage offered by CP. (Id. at 9.)

On February 4, 2019, CP filed a reply in opposition to NCA’s petition. CP argues that there is no basis for reopening a transaction 11 years after consummation and that doing so would be unprecedented. (CP Reply 1-3, 17-20.) CP asserts that NCA “enthusiastically supported” the transaction in 2007 and further notes that, prior to 2007, the Joint Line suffered from frequent embargoes and poor service, and that uneconomic and inefficient operations hamstrung competition. (Id. at 1-2.) CP states that the Haulage Agreement, which was part of the public record, provided that CP would handle BNSF traffic in manifest service, which was

the type of service NCA was receiving in 2007.³ (*Id.* at 2, 8, V.S. Hubbard at 6.) CP further states that, after the transaction, there was a surge in BNSF haulage traffic causing capacity-related operational issues. (*Id.* at 10-11, V.S. Hubbard at 7.) CP states that, because of the capacity that can be accommodated at the Minot Interchange, it requested that BNSF limit its haulage traffic to a weekly maximum of 50 cars in each direction (i.e., a total of 100 loaded and empty cars) and a daily volume of no more than 15 cars. (*Id.* at 12, V.S. Hubbard at 8 (citing Ex. E).) CP also disputes NCA's allegations concerning the availability of CP unit train service and describes its Dedicated Train Program,⁴ which CP states is available to all interested shippers on a first-come, first-served basis. (CP Reply, 15-16.) According to CP, NCA's goal is not "a return to the conditions that existed before the transaction," but rather to obtain "access to BNSF unit trains service." (*Id.* at 2.) CP argues that this benefit was "never promised" during the transaction. (*Id.*)

On February 4, 2019, BNSF filed a letter stating that it has not determined whether to support the remedies requested by NCA, but that it would not be opposed to Board-sponsored mediation in an effort to resolve the issues raised in NCA's petition. On February 21, 2019, NCA filed a petition to file a rebuttal and a proposed rebuttal to CP's reply. NCA asserts that CP mischaracterized certain information, including the understanding of the parties that the Haulage Agreement was for a ten-year term and the nature of rail service NCA's predecessor received. (NCA Rebuttal 1-2.) On March 7, 2019, CP filed its opposition to NCA's request to file rebuttal and proposed rebuttal.⁵

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10502(d), an exemption may be revoked, in whole or in part, if the Board finds that regulation of the transaction is necessary to carry out the rail transportation policy of 49 U.S.C. § 10101. When, as here, an exemption has become effective, a revocation request is treated as a petition to reopen and revoke and will be granted only if the petition presents new evidence, substantially changed circumstances, or material error in the decision being challenged. 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3(b).

³ The Haulage Agreement, which could have been terminated as early as January 1, 2017, under its terms, was extended through a supplemental agreement executed by CP and BNSF on May 11, 2018. (CP Reply 12.)

⁴ Under CP's Dedicated Train Service, customers can contract with CP to receive 100-car unit train service. (CP Reply 15.)

⁵ While the Board's regulations do not generally permit "replies to replies," see 49 C.F.R. § 1104.13(c), in the interest of having a more complete record, the Board will grant NCA's request to file a rebuttal.

NCA's petition to reopen or revoke raises serious concerns, in light of the current competitive landscape, about the rail service it receives and its ability to access markets. Although NCA has framed its request for relief as a petition to reopen (or, alternatively, to revoke), NCA appears to allege conduct by CP that may be more appropriately addressed under the Board's competitive access regulations, 49 C.F.R. § 1144.2.⁶ Alternatively, to the extent that NCA is concerned with its ability to obtain unit train service from CP, NCA's arguments may also raise common carrier or unreasonable practices issues under 49 U.S.C. §§ 11101, 10702. Therefore, the Board has reserved a docket number should NCA wish to file a competitive access complaint or seek relief under other statutory provisions. Within 30 days, NCA shall notify the Board whether it wishes to pursue alternative relief in this separate docket. To allow the parties to consider all options for relief, the Board will hold the revocation/reopening proceeding in abeyance until further order of the Board.

The Board also reminds the parties that it favors the resolution of disputes through alternative dispute resolution, such as mediation, in lieu of formal Board proceedings. Accordingly, the Board requests that the parties inform the Board within 30 days if they are interested in participating in Board-sponsored mediation.⁷

It is ordered:

1. NCA's request to file a rebuttal is granted.
2. The proceeding is held in abeyance.
3. NCA shall inform the Board whether it intends to file a competitive access complaint or seek other relief in a separate docket by May 22, 2019.
4. The parties shall inform the Board whether they are interested in Board-sponsored mediation by May 22, 2019.
5. This decision is effective on its service date.

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

⁶ These regulations govern competitive access remedies available under 49 U.S.C. §§ 10705 (prescription of through routes) and 11102 (use of terminal facilities and reciprocal switching agreements).

⁷ Under 49 C.F.R. § 1109.1, the scope of the mediation cannot encompass any grant, denial, stay, or revocation of a request for construction, abandonment, purchase, trackage rights, merger, pooling authority or exemption related to such matters.