40310 SERVICE DATE – LATE RELEASE JANUARY 22, 2010
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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-1041X

DAKOTA NORTHERN RAILROAD, INC.—DISCONTINUANCE OF SERVICE EXEMPTION—IN WALSH AND PEMBINA COUNTIES, ND

Decided: January 22, 2010

By petition filed on October 5, 2009, and amended on October 8, 2009, and January 15, 2010,[1] Dakota Northern Railroad, Inc. (DN), seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to discontinue service over a portion of BNSF Railway Company's (BNSF) Glasston Subdivision between milepost 42.08 at the north edge of Private Crossing DOT No. 082102T approximately 2.7 miles north of Grafton and milepost 60.2 at the end of active track approximately 0.6 miles north of Glasston, a distance of 18.12 miles, in Walsh and Pembina Counties, ND. Notice of the filing was served and published in the Federal Register on October 23, 2009 (74 FR 54874-75).[2] No comments were filed in response to the notice. We will grant the exemption, subject to the standard employee protective conditions.

BACKGROUND

The line at issue was originally part of a line of the Great Northern Railway (GNR) between Grand Forks, ND, and Gretna, Manitoba, Canada. BNSF, a successor of GNR, abandoned the line up to its current northern terminus at Glasston. In 2006, DN sought authority to lease and operate a portion of BNSF's Glasston Subdivision between the clearance point of the turnout located at milepost 38.79, near Grafton, and the end of the line at milepost 60.20, near Glasston, a distance of approximately 21.41 miles, and BNSF's entire Walhalla Subdivision

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[1] By letter filed on January 15, 2010, DN explained that, although in its petition DN requested authority to abandon the line, because the line is owned by BNSF, DN should have instead sought authority to discontinue its service over the line. DN's petition will be amended accordingly.

[2] The notice of the filing served and published in the Federal Register described the petition as a request for abandonment authority. As explained above, the petition will now be considered a request for discontinuance authority. Given that discontinuance is a lesser-included authority, see BNSF Railway Company—Abandonment Exemption—in Hamilton and Merrick Counties, NE, STB Docket No. AB-6 (Sub-No. 408X), slip op. at 2 (STB served Aug. 26, 2008), citing T&P Ry.—Aban.—Shawnee, Jefferson, & Atchison Count., KS, 2 S.T.B. 36, 40 (1997), the notice of the filing provided adequate information to the public.

between milepost 0.0, near Grafton, and milepost 48.38 at the end of the line near Walhalla, ND, a distance of approximately 48.38 miles.[3]

According to DN, the line was embargoed on March 18, 2009, because of an unsafe bridge at milepost 43.16. DN states that the embargo remains in effect. At the time of the embargo, there were 2 shippers on the line at St. Thomas, ND: ADM, which used the line to ship edible beans; and Agriliance, which used the line to receive fertilizer.

ND seeks to discontinue its service over the line because: (1) operation of the line is unprofitable; (2) there is no reasonable prospect for profitable operations; (3) the line requires substantial track and bridge rehabilitation; and (4) the shippers on the line have feasible transportation alternatives.

DN states that, despite efforts to increase rail traffic over the line, traffic has been low in the past several years. DN submits that the traffic on the line consisted of 55 carloads in 2006, 72 carloads in 2007, 44 carloads in 2008, and 3 carloads in 2009 (January 1, 2009 to March 18, 2009). DN states that its actual revenue from the 44 carloads in the base year of 2008 was $17,435, and, even in 2007, when rail shipments were their highest, DN's actual revenue was only $25,738. In the forecast year of 2009, DN projects traffic to amount to only 44 carloads.

DN contends that continued operation of the line would result in an operating loss of $108,757 in the forecast year at 2008 traffic levels ($108,720 in maintenance-of-way costs + $17,472 in operating costs - $17,435 in revenue), and $100,454 in the forecast year at the highest 2007 revenue level ($108,720 + 17,472 - $25,738). DN estimates that normalized maintenance-of-way (MOW) costs in the forecast year to maintain the track and bridges on the line would amount to approximately $108,720.[4] DN estimates that its operating costs would be approximately $17,472, based on 52 train trips to St. Thomas (where the 2 shippers are located) and 416 man-hours (2 employees per 4-hour trip) at $42 per hour. DN states that there are other costs which would add to DN's operating loss (such as freight car-hire costs, locomotive and fuel costs, and property taxes), but it has based its calculations on the costs for normalized MOW and the train crew alone.

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[3] See Dakota Northern Railroad, Inc.—Lease and Operation Exemption—Rail Lines of BNSF Railway Company, STB Finance Docket No. 34816 (STB served Jan. 27, 2006).

[4] DN uses an average normalized maintenance cost of $6,000 per mile which, according to DN, the Board has recognized as a reasonable estimate of such cost in other abandonment cases ($6,000 per mile x 18.12 miles = $108,720), citing Conrail—Aban.—Bet. Warsaw & Valp. Counties, IN, 9 I.C.C.2d 1299, 1303-04 (1993) (Conrail Aban.).

DN states that track and bridge repairs of approximately $1 million are required to rehabilitate the line to Federal Railroad Administration (FRA) Class 1 safety standards.[5] In addition, although DN has not quantified opportunity costs, DN alleges that it would incur a significant opportunity cost from a requirement of continued operation of the line.

According to DN, the shippers on the line have been using alternative transportation since the embargo. DN states that U.S. Highway 71, a two-lane hard surface road located within 100 to 1,200 feet of the line, parallels the line for its entire length, and that I-29 parallels the entire line only 12 to 14 miles to its east. In addition, DN notes that BNSF's Drayton Subdivision is 2 to 15 miles to the east and the Walhalla Subdivision is 2 to 12 miles to the west. The 2 shippers on the line have not opposed the proposed discontinuance of service.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, service may not be discontinued on a rail line without our prior approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued 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 necessary to protect shippers from the abuse of market power.

Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of discontinuing service on this line, an exemption will expedite regulatory decisions and reduce regulatory barriers to exit (49 U.S.C. 10101(2) and (7)). The revenue from the traffic on the line is marginal compared to the cost of operating the line. Continued operation of the line would result in a loss of at least $100,000 per year, and would require a substantial expenditure for track and bridge rehabilitation to meet FRA Class 1 safety standards. An exemption, therefore, will promote adequate revenues, foster sound economic conditions, and encourage efficient management by allowing DN to avoid losses associated with the cost of operating on and maintaining an unprofitable line (49 U.S.C. 10101(3), (5), and (9)). Other aspects of the rail transportation policy will not be affected adversely.

Regulation of the proposed transaction under 49 U.S.C. 10903 is not necessary to protect shippers from the abuse of market power. BNSF, the owner of the line, retains the common carrier obligation to provide future rail service over the line. Furthermore, the 2 shippers on the line have been using alternative transportation for their products since March 2009 due to the

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[5] DN provides that replacement of joint ties and clusters of failed ties (6,400 crossties installed at $55 per used tie) would cost $352,000, switch ties (450 at $125 each, installed) would cost $56,250, joint bars (900 at $150 per pair) would cost $135,000, and rail (2,970 linear feet at $550 per 33 feet) would cost $49,500. DN also contends that surfacing of 18.12 miles of track would cost $333,927, and replacement and redriving of 5 piles for a bridge at milepost 43.16 would cost $85,000.

embargo on the line and have not opposed the proposed discontinuance of service. Nevertheless, to ensure that ADM and Agriliance are informed of our action, we will require DN to serve a copy of this decision on ADM and Agriliance so that it is received by them within 5 days of the service date of this decision, and to certify contemporaneously to us that it has done so. Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting the exemption, we will impose the employee protective conditions set forth in Oregon Short Line R. Co.–Abandonment–Goshen, 360 I.C.C. 91 (1979).

Because this is a discontinuance proceeding and not an abandonment, the Board need not consider offers of financial assistance (OFAs) to acquire the line for continued rail service (49 U.S.C. 10904), trail use requests (16 U.S.C. 1247(d)), or requests to negotiate for public use of the line (49 U.S.C. 10905). The Board will consider any OFAs for a subsidy to provide continued rail service under 49 U.S.C. 10904. This proceeding is also exempt from environmental reporting requirements under 49 CFR 1105.6(c) and from historic reporting requirements under 49 CFR 1105.8(b).[6] Therefore, this decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903 the discontinuance of service by DN of its operations over the above-described line, subject to the employee protective conditions set forth in Oregon Short Line R. Co.–Abandonment–Goshen, 360 I.C.C. 91 (1979).

2. DN is directed to serve a copy of this decision on ADM and Agriliance so that it is received by them within 5 days after the service date of this decision and to certify contemporaneously to the Board that it has done so.

3. An OFA under 49 CFR 1152.27(b)(2) to subsidize continued rail service must be received by the railroad and the Board by February 1, 2010, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904

[6] The environmental and historic reports are not required where BNSF is required to continue to provide common carrier service over the line. On December 4, 2009, the Board's Section of Environmental Analysis served an environmental assessment (EA) in this proceeding, which was at the time considered to be a request for abandonment authority. Because this proceeding is now being considered a request for discontinuance authority, the analysis in the EA is moot.

and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by the filing fee, which currently is set at $1,500. See 49 CFR 1002.2(f)(25).

4. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **"Office of Proceedings, AB-OFA."**

5. Petitions to stay must be filed by February 8, 2010. Petitions to reopen must be filed by February 16, 2010.

6. Provided no OFA to subsidize continued rail service has been received, this exemption will be effective on February 21, 2010.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.